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**THE**  
**ENGLISH AND EMPIRE DIGEST**  
**WITH**  
**COMPLETE AND EXHAUSTIVE**  
**ANNOTATIONS.**

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**VOLUME XXX.**



# THE ENGLISH AND EMPIRE DIGEST

WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

## VOLUME XXX.

*INTOXICATING LIQUORS.  
JUDGMENTS AND ORDERS.  
JURIES.*

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LAND TAX.  
LANDLORD AND TENANT (Parts I.-VI.).*

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r. Rep.	Australian Jurist Reports	Aus.
T.	Australian Law Times	Aus.
	Ontario Appeals	Can.
	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
	Agra High Court	Ind.
F. B.	Agra High Court, Full Bench	Ind.
N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
leg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
	New Brunswick Reports (Allen)	Can.
L. R.	Alberta Law Reports	Can.
	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
Ot. Rep.	Appeal Court Reports	N.Z.
D.	South African Law Reports, Appellate Division	S. Af.
itects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
L. R.	Argus Law Reports	Aus.
y	Arkley's Justiciary Reports (Scotland), 1 vol., 1840—1848	Scot.
M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
& H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
	Ashburner's Principles of Equity, 1902	Eng.
M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
	Atkyns' Reports, Chancery, 3 vols., 1786—1784	Eng.
Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
Ad.	Barber's Gold Law	S. Af.
	Barnwall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
C.	Barnewall and Crosswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
C. R. (preceded by (e))	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
R.	British Columbia Reports	Can.
g.	Bose's Digest	Ind.
R.	Bengal Law Reports	Ind.
R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
R. P. C.	Bengal Law Reports, Privy Council	Ind.
R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Abr.	Bacon's Abridgment	Eng.
Ch. Cas.	Dall Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

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<b>Bom. Cr. Ca.</b> ... ..	<b>Bombay Reports, Crown Cases</b> ... ..	<b>Ind.</b>
<b>Bom. O. C.</b> ... ..	<b>Bombay Reports, Original Civil Jurisdiction</b> ... ..	<b>Ind.</b>
<b>Bos. &amp; P.</b> ... ..	<b>Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804</b> ... ..	<b>Eng.</b>
<b>Bos. &amp; P. N. R.</b> ... ..	<b>Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807</b> ... ..	<b>Eng.</b>
<b>Bott.</b> ... ..	<b>Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827</b> ... ..	<b>Eng.</b>
<b>Bourke</b> ... ..	<b>Bourke's Reports</b> ... ..	<b>Ind.</b>
<b>Br. &amp; Col. Pr. Cas.</b> ... ..	<b>British and Colonial Prize Cases, 3 vols., 1914—1919</b> ... ..	<b>Eng.</b>
<b>Bract.</b> ... ..	<b>Bracton De Legibus et Consuetudinibus Angliæ</b> ... ..	<b>Eng.</b>
<b>Bro. Abr.</b> ... ..	<b>Sir R. Brooke's Abridgement</b> ... ..	<b>Eng.</b>
<b>Bro. C. C.</b> ... ..	<b>W. Brown's Chancery Reports, 4 vols., 1778—1794</b> ... ..	<b>Eng.</b>
<b>Bro. Ecc. Rep.</b> ... ..	<b>W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872</b> ... ..	<b>Eng.</b>
<b>Bro. N. C.</b> ... ..	<b>Sir R. Brooke's New Cases, 1 vol., 1515—1558</b> ... ..	<b>Eng.</b>
<b>Bro. Parl. Cas.</b> ... ..	<b>J. Brown's Cases in Parliament, 8 vols., 1702—1800</b> ... ..	<b>Eng.</b>
<b>Bro. Supp. to Mor.</b> ... ..	<b>M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.</b> ... ..	<b>Scot.</b>
<b>Bro. Synop.</b> ... ..	<b>M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827</b> ... ..	<b>Scot.</b>
<b>Brod. &amp; Bing.</b> ... ..	<b>Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822</b> ... ..	<b>Eng.</b>
<b>Brod. &amp; F.</b> ... ..	<b>Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864</b> ... ..	<b>Eng.</b>
<b>Broun</b> ... ..	<b>Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845</b> ... ..	<b>Scot.</b>
<b>Brown. &amp; Lush.</b> ... ..	<b>Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866</b> ... ..	<b>Eng.</b>
<b>Brownl.</b> ... ..	<b>Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624</b> ... ..	<b>Eng.</b>
<b>Bruce</b> ... ..	<b>Bruce's Decisions, Court of Session (Scotland), 1714—1715</b> ... ..	<b>Scot.</b>

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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...	...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	...	...	...	S. Af.
...	...	Buchanan's Reports of Appeal Court (Cape)	...	...	...	S. Af.
...	...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	...	...	...	Scot.
...	...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	...	...	...	Eng.
...	...	Buller's Nisi Prius (published, London, 1772)	...	...	...	Eng.
...	...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1628	...	...	...	Eng.
...	...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	...	...	...	Eng.
...	...	Burrow's Reports, King's Bench, 5 vols., 1756—1772	...	...	...	Eng.
...	...	Burrow's Settlement Cases, King's Bench, 1 vol., 1783—1776	...	...	...	Eng.
...	...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	...	...	...	Eng.
...	...	Court of Appeal Reports, 3 vols., 1867—1877	...	...	...	N.Z.
...	...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	...	...	...	Eng.
...	...	Common Bench Reports, 18 vols., 1845—1856	...	...	...	Eng.
...	...	Common Bench Reports, New Series, 20 vols., 1856—1865	...	...	...	Eng.
...	...	Canadian Bankruptcy Reports Annotated, 1920—(current)	...	...	...	Can.
...	...	Central Criminal Court Cases (Sessions Papers), 1834—1913	...	...	...	Eng.
...	...	Common Law Chambers	...	...	...	Can.
...	...	Cape Law Journal	...	...	...	S. Af.
...	...	Canada Law Journal, New Series, 1865—(current)	...	...	...	Can.
...	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	...	...	Can.
...	...	Common Law Reports, 3 vols., 1853—1855	...	...	...	Eng.
...	...	Commonwealth Law Reports	...	...	...	Aus.
...	...	Calcutta Law Reporter	...	...	...	Ind.
...	...	Canadian Law Times	...	...	...	Can.
...	...	Canadian Law Times, Occasional Notes	...	...	...	Can.
...	...	Upper Canada Common Pleas	...	...	...	Can.
...	...	Law Reports, Common Pleas Division, 5 vols., 1875—1880	...	...	...	Eng.
...	...	Cape Provincial Division Reports	...	...	...	S. Af.
...	...	Canadian Reports, Appeal Cases	...	...	...	Can.
...	...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	...	...	...	S. Af.
...	...	Calcutta Weekly Notes	...	...	...	Ind.
...	...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	...	...	...	Eng.
...	...	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	...	...	...	Eng.
...	...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	...	...	...	Eng.
...	...	Cameron's Supreme Court Cases	...	...	...	Can.
...	...	Cameron's Supreme Court Practice	...	...	...	Can.
...	...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	...	...	...	Eng.
...	...	Commercial Law Reports of Canada	...	...	...	Can.
...	...	Canadian Criminal Cases, Annotated	...	...	...	Can.
...	...	Canadian Gazette	...	...	...	Can.
...	...	Canadian Railway Cases	...	...	...	Can.
...	...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	...	...	...	Eng.
...	...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	...	...	...	Eng.
...	...	Carrington's Treatise on Criminal Law	...	...	...	Can.
...	...	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	...	...	...	Eng.
...	...	New Brunswick Reports (Carleton)	...	...	...	Can.
...	...	Carpmael's Patent Cases, 2 vols., 1602—1842	...	...	...	Eng.
...	...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	...	...	...	Eng.
...	...	Cases on British North America Act (Cartwright)	...	...	...	Can.
...	...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	...	...	...	Eng.
...	...	Cary's Reports, Chancery, 1 vol.	...	...	...	Eng.
...	...	Cases in Chancery, fol., 3 parts, 1660—1697	...	...	...	Eng.
...	...	Cases of Practice, King's Bench, 1 vol., 1655—1775	...	...	...	Eng.
...	...	Cases of Settlements and Removals, 1 vol., 1685—1727	...	...	...	Eng.
...	...	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	...	...	...	Eng.
...	...	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733	...	...	...	Eng.
...	...	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	...	...	...	Eng.
...	...	Cassells' Digest	...	...	...	Can.
...	...	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	...	...	...	Eng.
...	...	Law Reports, Chancery Appeals, 10 vols., 1865—1875	...	...	...	Eng.
...	...	Choyce Cases in Chancery, 1557—1606	...	...	...	Eng.
...	...	Upper Canada Chancery Chambers Reports	...	...	...	Can.
...	...	Law Reports, Chancery Division, 45 vols., 1875—1890	...	...	...	Eng.
...	...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	...	...	...	Eng.
...	...	Charley's Chamber Cases, 2 vols., 1875—1876	...	...	...	Eng.
...	...	Charley's New Practice Reports, 3 vols., 1875—1876	...	...	...	Eng.
...	...	New Brunswick Reports (Chipman)	...	...	...	Can.

Chit.	...	...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822...	Eng.
Cl. & Fin.	...	...	Clark and Finnely's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas.	...	...	Clark and Scully's Drainage Cases	Can.
Clay.	...	...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick.	...	...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph.	...	...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A.	...	...	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent.	...	...	Coke's Entries	Eng.
Co. Inst.	...	...	Coke's Institutes	Eng.
Co. L. J.	...	...	Colonial Law Journal	N.Z.
Co. Litt.	...	...	Coke on Littleton (1 Inst.)	Eng.
Co. Rep.	...	...	Coke's Reports, 13 parts, 1572—1616	Eng.
Coch.	...	...	Nova Scotia Reports (Cochran)	Can.
Cockb. & Rowe	...	...	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll.	...	...	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid.	...	...	Collectanea Juridica, 2 vols.	Eng.
Colles	...	...	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Colt.	...	...	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	...	...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas.	...	...	Commercial Cases, 1895—(current)	Eng.
Com. Dig.	...	...	Comyns' Digest	Eng.
Comb.	...	...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law.	...	...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig.	...	...	Congdon's Digest	Can.
Const.	...	...	Const's edition of Bott's Poor Laws, 3 vols., 1807	Eng.
Cooke & Al.	...	...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas.	...	...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	...	...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G.	...	...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas.	...	...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. temp. Brough.	...	...	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. temp. Cott.	...	...	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor.	...	...	Coryton's Reports	Ind.
Corb. & D.	...	...	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud.	...	...	Correspondances Judiciaires	Can.
Couper	...	...	Couper's Justiciary Reports (Scotland), 5 vols., 1808—1885	Scot.
Cout.	...	...	Coutlees' Unreported Cases	Can.
Cout. Dig.	...	...	Coutlees' Digest	Can.
Cowp.	...	...	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk.	...	...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C.	...	...	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas.	...	...	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H.	...	...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	Eng.
Cr. & J.	...	...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M.	...	...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph.	...	...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	Eng.
Cr. App. Rep.	...	...	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R.	...	...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D.	...	...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C.	...	...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas.	...	...	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas.	...	...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car.	...	...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng.
Cro. Eliz.	...	...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac.	...	...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig.	...	...	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn.	...	...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt.	...	...	Curtels' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
D.	...	...	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A.	...	...	Dorion's Queen's Bench Reports	Can.
D. L. R.	...	...	Dominion Law Reports	Can.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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...	...	...	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	Eng.
.	...	...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	Scot.
.	...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	...	Eng.
.	& I.L.	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	...	Eng.
.	& Mer.	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	...	Eng.
.	Ir.	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	...	Ir.
.	Pat. Cas.	...	Davies' Patent Cases, 1 vol., 1785—1816	...	Eng.
.	...	...	Day's Election Cases, 1 vol., 1892—1893	...	Eng.
.	& Sw.	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	...	Eng.
.	...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	...	Eng.
.	& Ch.	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	...	Eng.
rs.	& B.	...	Dearnly and Bell's Crown Cases Reserved, 1 vol., 1856—1858	...	Eng.
rs.	C. C.	...	Dearnly's Crown Cases Reserved, 1 vol., 1852—1856	...	Eng.
s	& And.	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	...	Scot.
3.	...	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	...	Eng.
3.	& J.	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859	...	Eng.
3.	& Sm.	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852	...	Eng.
3.	F. & J.	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	...	Eng.
G. J. & Sm.	...	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	...	Eng.
G. M. & G.	...	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	...	Eng.
me	...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835	...	Eng.
.	...	...	Denison's Crown Cases Reserved, 3 vols., 1844—1852	...	Eng.
.	...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798	...	Eng.
.	...	...	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	...	Scot.
la.	...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822	...	Eng.
nelly	...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837	...	Eng.
ig. El. Cas.	...	...	Douglas' Election Cases, 4 vols., 1774—1776	...	Eng.
ig. K. B.	...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785	...	Eng.
v	...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818	...	Eng.
v & Cl.	...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	...	Eng.
v & L.	...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	...	Eng.
v. & Ry. K. B.	...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827	...	Eng.
v. & Ry. M. C.	...	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	...	Eng.
v. & Ry. N. P.	...	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	...	Eng.
vl.	...	...	Dowling's Practice Reports, 9 vols., 1830—1841	...	Eng.
vl. N. S.	...	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	...	Eng.
& Wal.	...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	...	Ir.
& War.	...	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843	...	Ir.
...	...	...	Draper's King's Bench Reports	...	Can.
w.	...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859	...	Eng.
w. & Sm.	...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	...	Eng.
nkwater	...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841	...	Eng.
ry temp. Nap.	...	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859	...	Ir.
ry temp. Sug.	...	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844	...	Ir.
gd. Orig.	...	...	Dugdale's Origines Juridicales	...	Eng.
nl. (Ct. of Sess.)	...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	...	Scot.
nning	...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754	...	Eng.
rie	...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	...	Scot.
er	...	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581	...	Eng.
& A.	...	...	Upper Canada Error and Appeal	...	Can.
& B.	...	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	...	Eng.
& E.	...	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	...	Eng.
B. & E.	...	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	...	Eng.
D. C.	...	...	Reports of the Eastern Districts Court (Cape) from 1880	...	S. Af.
D. L.	...	...	South African Law Reports, Eastern Districts Local Division	...	S. Af.
L. R.	...	...	Eastern Law Reporter	...	Can.
R. (or Eng. Rep.)	...	...	English Reports	...	Eng.
R.	...	...	Ontario Election Reports	...	Can.
g. & Y.	...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	...	Eng.







East, P. C. ...	East's Reports, King's Bench, 16 vols., 1800—1812 ...	Eng.
Ecc. & Ad. ...	East's Pleas of the Crown ...	Eng.
Eden ...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855 ...	Eng.
Edgar ...	Eden's Reports, Chancery, 2 vols., 1757—1766 ...	Eng.
Edw. ...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725 ...	Scot.
Elchies ...	Edwards' Reports, Admiralty, 1 vol., 1808—1812 ...	Eng.
Emden's B. C. ...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754 ...	Scot.
Eng. Pr. Cas. ...	Emden's Building Contracts, Building Leases and Building Statutes ...	Eng.
Eq. Cas. Abr. ...	Roscoe's English Prize Cases, 2 vols., 1745—1858 ...	Eng.
Eq. Rep. ...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744 ...	Eng.
Esp. ...	Equity Reports, 3 vols., 1853—1855 ...	Eng.
Ex. D. ...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810 ...	Eng.
Exch. ...	Law Reports, Exchequer Division, 5 vols., 1875—1880 ...	Eng.
Exch. C. R. ...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856 ...	Eng.
F. (Ct. of Sess.) ...	Exchequer Court Reports ...	Can.
F. ...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906 ...	Scot.
F. & F. ...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880 ...	S. Af.
F. N. D. ...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867 ...	Eng.
Fac. Coll. ...	Finnemore's Notes and Digest of Natal Cases, 1863—1867 ...	S. Af.
Falc ...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841 ...	Scot.
Falc. & Fitz. ...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751 ...	Scot.
Fenton ...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838 ...	Eng.
Ferg. ...	Fenton, Important Judgments ...	N.Z.
Fitz. Nat. Brev. ...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817 ...	Scot.
Fitz-G. ...	Fitzherbert's Natura Brevium ...	Eng.
Fl. & K. ...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731 ...	Eng.
Fonbl. ...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842 ...	Ir.
For. ...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852 ...	Eng.
Forb. ...	Forrest's Reports, Exchequer, 1 vol., 1800—1801 ...	Eng.
Fort. De Laud. ...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713 ...	Scot.
Fortes. Rep. ...	Fortesque, De Laudibus Legum Angliæ ...	Eng.
Fost. ...	Fortescue's Reports, fol., 1 vol., 1692—1736 ...	Eng.
Fount. ...	Foster's Crown Cases, 1 vol., 1708—1760 ...	Eng.
Fox & S. Ir. ...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712 ...	Scot.
Fox & S. Reg. ...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825 ...	Ir.
Fras. ...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895 ...	Eng.
Freem. Ch. ...	Fraser (Simon), Election Cases, 2 vols., 1793 ...	Eng.
Freem. K. B. ...	Freeman's Reports, Chancery, 1 vol., 1660—1706 ...	Eng.
G. ...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704 ...	Eng.
G. & R. ...	Gregorowski's Reports of the High Court of the Orange Free State from 1883 ...	S. Af.
G. I. Dig. ...	Nova Scotia Reports (Geldert & Russell) ...	Can.
G. W. D. ...	General Index Digest ...	Can.
G. W. L. ...	South African Law Reports, Griqualand West Local Division ...	S. Af.
Gale & Dav. ...	South African Law Reports, Griqualand West Local Division ...	S. Af.
Gale ...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843 ...	Eng.
Gaz. L. R. ...	Gale's Reports, Exchequer, 2 vols., 1835—1836 ...	Eng.
Geld. Dig. ...	New Zealand Gazette Law Reports ...	N.Z.
Gib. Cod. ...	Geldert's Digest ...	Can.
Giff. ...	Gibson's Codex Juris Ecclesiastici Anglicani ...	Eng.
Gilb. ...	Giffard's Reports, Chancery, 5 vols., 1857—1865 ...	Eng.
Gilb. C. P. ...	Gilbert's Cases in Law and Equity, 1 vol., 1718—1714 ...	Eng.
Gilb. Ch. ...	Gilbert's History and Practice of the Court of Common Pleas ...	Eng.
Gilm. & F. ...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726 ...	Eng.
Gl. & J. ...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686 ...	Scot.
Glanv. ...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1810—1829 ...	Eng.
Glanv. El. Cas. ...	Glanville, De Legibus et Consuetudinibus Regni Angliæ ...	Eng.
Glascocock ...	Glanville's Election Cases, 1 vol., 1623—1624 ...	Eng.
	Glascocock's Reports (Ireland), 1 vol., 1831—1832 ...	Ir.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Godb. ... ..	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb. ... ..	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow ... ..	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr. ... ..	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases	Griffin's Patent Cases, 1884—1887	Eng.
Gwill. ... ..	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H. ... ..	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C. ... ..	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N. ... ..	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw. ... ..	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W. ... ..	Hurlstone and Walsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date)	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (e.g., [1915] H. B. R.)	Eng.
H. C. ... ..	Reports of the High Court of Griqualand West	S. Af.
H. E. C. ... ..	Hodgin's Election Reports	Can.
H. L. Cas. ... ..	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm. ... ..	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con. ... ..	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc. ... ..	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L. ... ..	Hale's Common Law	Eng.
Hale, P. C. ... ..	Hale's Pleas of the Crown, 2 vols.	Eng.
Han. ... ..	New Brunswick Reports (Hannay)	Can.
Har. & Ruth. ... ..	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W. ... ..	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc. ... ..	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard. ... ..	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare ... ..	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C. ... ..	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay ... ..	Hay's Reports	Ind.
Hay & Marr. ... ..	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes ... ..	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo. ... ..	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M. ... ..	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het. ... ..	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob. ... ..	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg. ... ..	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog. ... ..	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm. ... ..	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq. ... ..	W. Holt's Equity Reports, 2 vols., 1845	Eng.
Holt, K. B. ... ..	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P. ... ..	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess.	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R.	Hong Kong Reports	Hong Kong
Hop. & Colt. ... ..	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph. ... ..	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H. ... ..	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp. ... ..	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C. ... ..	Howard's Chancery Practice	Ir.
How. C. S. ... ..	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E. ... ..	Howard's Equity Exchequer	Ir.
How. P. L. ... ..	Howard on the Popery Laws	Ir.
Hud. & B. ... ..	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C. ... ..	Hudson on Building Contracts, 2 vols.	Eng.
Hume ... ..	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut. ... ..	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl. ... ..	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde ... ..	Hyde's Reports	Ind.
I. C. L. R. ... ..	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R. ... ..	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R. ... ..	Irish Equity Reports, 13 vols., 1838—1851	Ir.

## XXIV REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. ...	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. (Vol.) All.	Indian Law Reports, Allahabad	Ind.
I. L. R. (Vol.) Bom.	Indian Law Reports, Bombay	Ind.
I. L. R. (Vol.) Calc.	Indian Law Reports, Calcutta	Ind.
I. L. R. (Vol.) Lah.	Indian Law Reports, Lahore	Ind.
I. L. R. (Vol.) Mad.	Indian Law Reports, Madras	Ind.
I. L. R. (Vol.) Pat.	Indian Law Reports, Patna	Ind.
I. L. R. (Vol.) Ran.	Indian Law Reports, Rangoon	Ind.
I. L. T. ...	Irish Law Times, 1867—(current)	Ir.
I. L. T. Jo. ...	Irish Law Times Journal, 1867—(current)	Ir.
I. R. (preceded by date)	Irish Reports, since 1893 (e.g., [1894] 1 I. R.)	Ir.
I. R. (Vol.) C. L.	Irish Reports, Common Law, 11 vols., 1866—1877	Ir.
I. R. Eq. ...	Irish Reports, Equity, 11 vols., 1866—1877	Ir.
I. R., R. & L. ...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	Ir.
Ind. Awards ...	Industrial Awards Recommendations	N.Z.
Ind. Jur. N. S. ...	Indian Jurist, New Series	Ind.
Ind. Jur. O. S. ...	Indian Jurist, Old Series	Ind.
Ir. Cir. Rep. ...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	Ir.
Ir. Jur. ...	Irish Jurist, 18 vols., 1849—1866	Ir.
Ir. L. Rec. 1st ser.	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	Ir.
Ir. L. Rec. N. S.	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	Ir.
Irv. ...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	Scot.
J. Bridg. ...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	Eng.
J. D. R. ...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	S. Af.
J. P. Jo. ...	Justice of the Peace, 1837—(current)	Eng.
J. R. ...	Justice of the Peace (Weekly Notes of Cases)	Eng.
J. R. ...	Jurist Reports	N.Z.
J. R. N. S.	Jurist Reports, New Series	N.Z.
J. Shaw, Just.	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	Scot.
Jac. ...	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W.	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	Eng.
James ...	Nova Scotia Reports (James)	Can.
Jebb & B.	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	Ir.
Jebb & S.	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	Ir.
Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	Ir.
Jebb, Cr. & Pr. Cas.	Jebb's Crown and Presentment Cases	Ir.
Jenk. ...	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Eng.
Jo. & Lat.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	Ir.
John. ...	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur. ...	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K. ...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862	Eng.
K. & J. ...	Keay and Johnson's Reports, Chancery, 4 vols., 1854—1858	Eng.
K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 (e.g., [1901] 2 K. B.)	Eng.
Kames, Dict. Dec.	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec.	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec.	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay ...	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Kebl. ...	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen ...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil. ...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	Eng.
Kel. ...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W. ...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	Eng.
Keny. ...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr ...	New Brunswick Reports (Kerr)	Can.

Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Scot.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Knox	...	Knox's Reports	Eng.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Aus.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	Eng.
L. & G. temp. Plunk.	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Eng.
L. & G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Ir.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	Eng.
L. C. J.	...	Lower Canada Jurist	Can.
L. C. L. J.	...	Lower Canada Law Journal	Can.
L. C. R.	...	Lower Canada Reports	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. O.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	...	Leader Law Reports	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	...	Legal News	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T.	...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	...	La Themis	Can.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1753	Eng.
Lee temp. Hard.	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.

# xxvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep.	...	Legal Reporter	...	Ir.
Legge	...	Legge's Reports	...	Aus.
Leon.	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1553—1615	...	Eng.
Lev.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	Eng.
Lew. C. C.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	Eng.
Ley	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	Eng.
Lib. Ass.	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	Eng.
Lilly	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	Eng.
Litt.	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	Eng.
Lloyd, L. R.	...	Lloyd's List Law Reports, 1919—(current)	...	Eng.
Lloyd, Pr. Cas.	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	Eng.
Lofft	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	Eng.
Long. & T.	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	Ir.
Lords Journals	...	Journals of the House of Lords	...	Eng.
Lud. E. C.	...	Luder's Election Cases, 3 vols., 1784—1787	...	Eng.
Lumley, P. L. C.	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	Eng.
Lush.	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	Eng.
Lut.	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	Eng.
Lut. Reg. Cas.	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	Eng.
Lynd.	...	Lyndwood, Provinciale, fol., 1 vol.	...	Eng.
M.	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
M. & S.	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	Eng.
M. & W.	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	Eng.
M. C. R.	...	Montreal Condensed Reports	...	Can.
M. H. C. R.	...	Madras High Court Reports	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	Montreal Law Reports, King's Bench or Queen's Bench	...	Can.
M. L. R. (Vol.) S. C.	...	Montreal Law Reports, Superior Court	...	Can.
M. M. Cas.	...	Martin's Reports of Mining Cases	...	Can.
Mac.	...	Macassey's New Zealand Reports	...	N.Z.
Mac. & G.	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	Eng.
Mac. & H.	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	Eng.
M'Cle.	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	Eng.
M'Cle. & Yo.	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	Eng.
Macfarlane	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	Scot.
Macl. & Rob.	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	Scot.
Macph. (Ct. of Sess.)	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	Scot.
Macq.	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	Scot.
Macr.	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	Eng.
Mad.	...	Madras High Court Reports	...	Ind.
Madd.	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	Eng.
Madd. & G.	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	Eng.
Madox	...	Madox's Formulæ Anglicanum	...	Eng.
Madox, Exch.	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	Eng.
Mag.	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	Eng.
Man. & G.	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	Eng.
Man. & Ry. K. B.	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	Eng.
Man. & Ry. M. C.	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	Eng.
Man. L. J.	...	Manitoba Law Journal	...	Can.
Man. L. R.	...	Manitoba Law Reports	...	Can.
Man. R. temp. Wood	...	Manitoba Reports temp. Wood	...	Can.
Mans.	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	Eng.
Mar. L. C.	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	Eng.
March	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	Eng.
Marr.	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	Eng.
Marsh.	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	Eng.
Marsh.	...	Marshall's Reports	...	Ind.
Mayn.	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1323	...	Eng.
Meg.	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	Eng.

Men. ... ..	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer. ... ..	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw. ... ..	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep. ... ..	Modern Reports, 12 vols., 1669—1755	Eng.
Mol. ... ..	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	Ir.
Mont. ... ..	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
Mont. & A. ... ..	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	Eng.
Mont. & B. ... ..	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ... ..	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ... ..	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G. ... ..	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P. ... ..	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ... ..	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App. ... ..	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C. ... ..	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S. ... ..	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ... ..	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R. ... ..	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C. ... ..	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ... ..	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B. ... ..	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict. ... ..	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ... ..	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ... ..	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ... ..	Municipal Reports	Can.
Murd. Epit. ... ..	Murdoch's Epitome	Can.
Murp. & H. ... ..	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ... ..	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ... ..	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K. ... ..	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. (preceded by date) ... ..	Northern Ireland Law Reports, 1925—(current) (e.g., [1925] N.)	Ir.
N. A. C. ... ..	Native Appeal Cases	S. Af.
N. & S. ... ..	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig. ... ..	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ... ..	New Brunswick Equity Reports	Can.
N. B. R. ... ..	New Brunswick Reports	Can.
N. B. R. (All.) ... ..	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.) ... ..	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.) ... ..	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.) ... ..	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.) ... ..	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr) ... ..	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.) ... ..	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.) ... ..	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.) ... ..	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.) ... ..	New Brunswick Reports (Trueman)	Can.
N. L. R. ... ..	Natal Law Reports	S. Af.
N. P. D. ... ..	South African Law Reports, Natal Provincial Division	S. Af.
N. S. R. ... ..	Nova Scotia Reports	Can.
N. S. R. (Coch.) ... ..	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & O.) ... ..	Nova Scotia Reports (Geldert and Oxley)	Can.
N. S. R. (G. & R.) ... ..	Nova Scotia Reports (Geldert and Russell)	Can.
N. S. R. (James) ... ..	Nova Scotia Reports (James)	Can.
N. S. R. (Old.) ... ..	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.) ... ..	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.) ... ..	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.) ... ..	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad. ... ..	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ... ..	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas. ... ..	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq. ... ..	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas. ... ..	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R. ... ..	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts. ... ..	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.) ... ..	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.) ... ..	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S. ... ..	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N. ... ..	New South Wales Weekly Notes	Aus.
N. W. ... ..	North-Western Provinces High Court Reports	Ind.
N. W. T. R. ... ..	North-West Territories Reports	Can.
N. Z. Jur. ... ..	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law ... ..	New Zealand Jurist Mining Law	N.Z.



# xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	New Zealand Jurist, New Series ... ..	N.Z.
N. Z. L. R. ...	New Zealand Law Reports, 1883—(current) ... ..	N.Z.
N. Z. L. R. C. A. ...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887 ... ..	N.Z.
Nels. ...	Nelson's Reports, Chancery, 1 vol., 1625—1693 ... ..	Eng.
Nev. & M. K. B. ...	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836 ... ..	Eng.
Nev. & M. M. C. ...	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836 ... ..	Eng.
Nev. & P. K. B. ...	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838 ... ..	Eng.
Nev. & P. M. C. ...	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837 ... ..	Eng.
New Mag. Cas. ...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850 ... ..	Eng.
New Pract. Cas. ...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848 ... ..	Eng.
New Rep. ...	New Reports, 6 vols., 1862—1865 ... ..	Eng.
New Sess. Cas. ...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851 ... ..	Eng.
Nfld. L. R. ...	Newfoundland Reports ... ..	Nfld.
Nolan ...	Nolan's Magistrates' Cases, 1 vol., 1791—1793 ... ..	Eng.
Notes of Cases ...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850 ... ..	Eng.
Noy ...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ... ..	Eng.
O. B. & F. ...	Ollivier Bell and Fitzgerald's Reports ... ..	N.Z.
O. B. S. P. ...	Old Bailey Session Papers ... ..	Eng.
O. Bridg. ...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666 ... ..	Eng.
O. F. S. ...	Reports of the High Court of the Orange Free State, 1879—1883 ... ..	S. Af.
O. L. R. ...	Ontario Law Reports ... ..	Can.
O'M. & H. ...	O'Malley and Hardcastle's Election Cases, 1869—(current) ... ..	Eng.
O. P. D. ...	South African Law Reports, Orange Free State Provincial Division ... ..	S. Af.
O. R. ...	Ontario Reports ... ..	Can.
O. R. ...	Official Reports of the South African Republic, 1894—1899 ... ..	S. Af.
O. R. C. ...	Reports of the High Court of the Orange River Colony ... ..	S. Af.
O. S. ...	Upper Canada Queen's Bench, Old Series ... ..	Can.
O. W. N. ...	Ontario Weekly Notes ... ..	Can.
O. W. R. ...	Ontario Weekly Reporter ... ..	Can.
Old. ...	Nova Scotia Reports (Oldrights) ... ..	Can.
Ont. Dig. ...	Digest of Ontario Case Law, 4 vols., 1823—1900 ... ..	Can.
Owen ...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614 ... ..	Eng.
P. (preceded by date) ...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.) ... ..	Eng.
P. & B. ...	New Brunswick Reports (Pugsley and Burbidge) ... ..	Can.
P. & T. ...	New Brunswick Law Reports (Pugsley and Trueman) ... ..	Can.
P. Cas. ...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922 ... ..	Eng. & Col.
P. D. ...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890 ... ..	Eng.
P. E. I. ...	Prince Edward Island Reports ... ..	Can.
P. R. ...	Ontario Practice ... ..	Can.
P. Wms. ...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735 ... ..	Eng.
Palm. ...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ... ..	Eng.
Park. ...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717 ... ..	Eng.
Pat. App. ...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822 ... ..	Scot.
Pater. App. ...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873 ... ..	Scot.
Peake ...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794 ... ..	Eng.
Peake, Add. Cas. ...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ... ..	Eng.
Peck. ...	Peckwell's Election Cases, 2 vols., 1803—1806 ... ..	Eng.
Pelham ...	Pelham (S. A.) Reports ... ..	Aus.
Per. & Dav. ...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841 ... ..	Eng.
Per. & Kn. ...	Perry and Knapp's Election Cases, 1 vol., 1833 ... ..	Eng.
Per. C. S. ...	Perrault's Conseil Supérieur ... ..	Can.
Per. P. ...	Perrault's Prévosté de Quebec, 1726—1756 ... ..	Can.
Ph. ...	Phillips' Reports, Chancery, 2 vols., 1841—1849 ... ..	Eng.
Phil. El. Cas. ...	Phillips' Election Cases, 1 vol., 1780 ... ..	Eng.
Phillim. ...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ... ..	Eng.
Phillim. Eccl. Jud. ...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875 ... ..	E.
Phip. ...	Phipson's Digest of Natal Reports, 1858—1859 ... ..	S.
Pig. & R. ...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ... ..	
Pitc. ...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ... ..	
Plowd. ...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I. ... ..	Eng.
Poll. ...	Polluxien's Reports, King's Bench, fol., 1 vol., 1670—1682 ... ..	Eng.
Poph. ...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ... ..	Eng.
Pow. R. & D. ...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856 ... ..	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Pratt ... ..	Pratt's Supplement to Bott's Poor Laws, 1833 ... ..	Eng.
Pre. Ch. ... ..	Precedents in Chancery, fol., 1 vol., 1689—1722 ... ..	Eng.
Price ... ..	Price's Reports, Exchequer, 13 vols., 1814—1824 ... ..	Eng.
Price ... ..	Price's Mining Commissioners' Cases ... ..	Can.
Pug. ... ..	New Brunswick Reports (Pugsley) ... ..	Can.
Py. R. ... ..	Pykes' Lower Canada Reports ... ..	Can.
Q. B. ... ..	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852 ... ..	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.) ... ..	Eng.
Q. B. D. ... ..	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ... ..	Eng.
Q. J. P. ... ..	Queensland Justice of Peace Reports ... ..	Aus.
Q. L. J. ... ..	Queensland Law Journal and Reports, 11 vols., 1879—1901 ... ..	Aus.
Q. L. R. ... ..	Quebec Law Reports ... ..	Can.
Q. L. R. (Beor) ... ..	Queensland Law Reports by Beor, 1876—1878 ... ..	Aus.
Q. P. R. ... ..	Quebec Practice Reports ... ..	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current) ... ..	Can.
Q. R. (Vol.) S. C. ... ..	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current) ... ..	Can.
Q. S. C. R. ... ..	Queensland Supreme Court Reports, 5 vols., 1860—1881 ... ..	Aus.
Q. S. R. ... ..	Queensland State Reports ... ..	Aus.
Q. W. N. ... ..	Weekly Notes, Queensland ... ..	Aus.
R. ... ..	The Reports, 15 vols., 1893—1895 ... ..	Eng.
R. ... ..	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878 ... ..	S. Af.
R. (Ct. of Sess.) ... ..	Rettle, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898 ... ..	Scot.
R. A. C. ... ..	Ramsay, Appeal Cases ... ..	Can.
R. & C. ... ..	Nova Scotia Reports (Russell & Chesley) ... ..	Can.
R. & G. ... ..	Nova Scotia Reports (Russell and Geldert) ... ..	Can.
R. C. ... ..	La Revue Critique de Législation et de Jurisprudence de Canada ... ..	Can.
R. de J. ... ..	Revue de Jurisprudence ... ..	Can.
R. de L. ... ..	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848 ... ..	Can.
R. E. D. ... ..	New South Wales, Reserved and Equity Decisions ... ..	Aus.
R. E. D. ... ..	Ritchie's Equity Decisions (Russell) ... ..	Can.
R. J. R. Q. ... ..	Quebec Revised Reports ... ..	Can.
R. L. N. S. ... ..	Revue Légale, New Series, 1895—(current) ... ..	Can.
R. L. O. S. ... ..	Revue Légale, Old Series, 21 vols., 1869—1892 ... ..	Can.
R. P. C. ... ..	Reports of Patent Cases, 1884—(current) ... ..	Eng.
R. R. ... ..	Revised Reports ... ..	Eng.
Rast. ... ..	Rastell's Entries ... ..	Eng.
Rayn. ... ..	Rayner's Tithe Cases, 3 vols., 1575—1782 ... ..	Eng.
Real Prop. Cas. ... ..	Real Property Cases, 2 vols., 1843—1847 ... ..	Eng.
Rep. Ch. ... ..	Reports in Chancery, fol., 3 vols., 1615—1710 ... ..	Eng.
Rep. in C. of A. ... ..	Reports in Courts of Appeal ... ..	N. Z.
Res. & Eq. Jud. ... ..	New South Wales Reserved and Equity Judgments ... ..	Aus.
Reserv. Cas. ... ..	Reserved Cases ... ..	Ir.
Rick. & M. ... ..	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889 ... ..	Eng.
Rick. & S. ... ..	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894 ... ..	Eng.
Ridg. L. & S. ... ..	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795 ... ..	Ir.
Ridg. Parl. Rep. ... ..	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796 ... ..	Ir.
Ridg. temp. H. ... ..	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746 ... ..	Eng.
Ritch. Eq. Rep. ... ..	Ritchie's Equity Reports ... ..	Can.
Rob. Eccl. ... ..	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ... ..	Eng.
Rob. L. & W. ... ..	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851 ... ..	Eng.
Robert. App. ... ..	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727 ... ..	Scot.
Robin. App. ... ..	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841 ... ..	Scot.
Roll. Abr. ... ..	Rolle's Abridgment of the Common Law, fol., 2 vols. ... ..	Eng.
Roll. Rep. ... ..	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ... ..	Eng.
Rom. ... ..	Romilly's Notes of Cases in Equity, 1 part, 1772—1787 ... ..	Eng.
Roscoe's B. C. ... ..	Roscoe, Digest of Building Cases ... ..	Eng.
Rose ... ..	Rose's Reports, Bankruptcy, 2 vols., 1810—1816 ... ..	Eng.
Ross, L. C. ... ..	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols. ... ..	Eng.
Rowe ... ..	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ... ..	Eng.
Rul. Cas. ... ..	Campbell's Ruling Cases, 25 vols. ... ..	Eng.
Russ. ... ..	Russell's Reports, Chancery, 5 vols., 1824—1829 ... ..	Eng.
Russ. & M. ... ..	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ... ..	Eng.



# XXX REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry. ...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Russ. E. R. ...	Russell's Election Reports ...	Can.
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854 ...	Eng.
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current) ...	Eng.
Ry. & M. ...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ...	Eng.
Ryde, Rat. App. ...	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	Eng.
S. ...	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J. ...	South African Law Journal ...	S. Af.
S. A. L. R. ...	South Australian Law Reports ...	Aus.
S. A. L. R. ...	South African Law Reports ...	S. Af.
S. A. R. ...	Reports of the High Court of the South African Republic, 1881—1892 ...	S. Af.
S. A. S. R. ...	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.) ...	Aus.
S. C. ...	Reports of the Supreme Court of the Cape of Good Hope from 1880 ...	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R. ...	Canada, Supreme Court Reports ...	Can.
S. L. T. ...	Scots Law Times, 1893 (current) ...	Scot.
S. Q. R. ...	Queensland State Reports ...	Aus.
S. R. ...	Reports of the High Court of Southern Rhodesia ...	S. Af.
S. R. C. ...	Stuart's Lower Canada Reports ...	Can.
S. R. N. S. W. ...	New South Wales, State Reports ...	Aus.
S. R. Q. ...	Queensland Reports, Supreme Court ...	Aus.
S. V. A. R. ...	Stuart's Vice-Admiralty Reports ...	Can.
S. W. A. ...	South-West Africa Law Reports ...	S.-W. Af.
Saint ...	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
Salk. ...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ...	Eng.
Sask. L. R. ...	Saskatchewan Law Reports ...	Can.
Sau. & Sc. ...	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ...	Ir.
Saund. ...	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A. ...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B. ...	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C. ...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M. ...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ...	Eng.
Sav. ...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say. ...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur. ...	Scottish Jurist, 46 vols., 1829—1873 ...	Scot.
Sc. L. R. ...	Scottish Law Reporter, 1865—1924 ...	Scot.
Sc. R. P. ...	Scots Revised Reports ...	Scot.
Sch. & Lcf. ...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ...	Ir.
Scott ...	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ...	Eng.
Scott, N. R. ...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm. ...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ...	Eng.
Sel. Cas. Ch. ...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ...	Eng.
Selwyn's N. P. ...	Selwyn's Abridgement of the Law of Nisi Prius ...	Eng.
Sess. Cas. K. B. ...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem. ...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742 ...	Eng.
Sh. (Ct. of Sess.) ...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ...	Scot.
Sh. & MacL. ...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ...	Scot.
Sh. Dig. ...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ...	Scot.
Sh. Just. ...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App. ...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct. ...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch. ...	Sheppard's Touchstone of Common Assurances ...	Eng.
Show. ...	Shower's Reports, King's Bench, 2 vols., 1678—1695 ...	Eng.
Show. Parl. Cas. ...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ...	Eng.
Slid. ...	Sliderrin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ...	Eng.

Sim. ...	...	Simons' Reports, Chancery, 17 vols., 1826—1852 ...	Eng.
Sim. & St. ...	...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S. ...	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skinn. ...	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat. ...	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ...	Ir.
Sm. & G. ...	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B. ...	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C. ...	...	Smith's Leading Cases, 2 vols. ...	Eng.
Smith, Reg. Cas. ...	...	C. L. Smith's Registration Cases, 1895—(current) ...	Eng.
Smythe ...	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ...	Ir.
Sol. Jo. ...	...	Solicitors' Journal, 1856—(current) ...	Eng.
Spence ...	...	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ...	...	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date) ...	...	Queensland State Reports, since 1902 (e.g., [1902] St. R. Qd.) ...	Aus.
Stair Rep. ...	...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ...	Scot.
Stark. ...	...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ...	Eng.
State Tr. ...	...	State Trials, 34 vols., 1163—1820 ...	Eng.
State Tr. N. S. ...	...	State Trials, New Series, 8 vols., 1820—1858 ...	Eng.
Stewart ...	...	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ...	...	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ...	...	Story's Commentaries on Equity Jurisprudence ...	Eng.
Str. ...	...	Strange's Reports, 2 vols., 1716—1747 ...	Eng.
Stu. M. & P. ...	...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ...	Scot.
Stuart ...	...	Sessions Cases (Stuart) ...	Scot.
Stuart, Adm. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1830—1856 ...	Can.
Stuart, Adm. N. S. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ...	Can.
Stuart, K. B. ...	...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ...	Can.
Sty. ...	...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ...	...	Swabey's Report, Admiralty, 1 vol., 1855—1859 ...	Eng.
Sw. & Tr. ...	...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	Eng.
Swan. ...	...	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	Eng.
Swin. ...	...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ...	...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ...	...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ...	Eng.
T. H. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ...	S. Af.
T. Jo. ...	...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ...	Eng.
T. L. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ...	S. Af.
T. L. R. ...	...	The Times Law Reports, 1884—(current) ...	Eng.
T. P. ...	...	Reports of the Supreme Court of the Transvaal, 1910—(current) ...	S. Af.
T. P. D. ...	...	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym. ...	...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1600—1689 ...	Eng.
T. S. ...	...	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml. ...	...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ...	Eng.
Tas. L. R. ...	...	Tasmanian Law Reports ...	Aus.
Taunt. ...	...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ...	...	Tax Cases, 1875—(current) ...	Eng.
Tay. ...	...	Taylor's King's Bench Reports ...	Can.
Temp. Wood ...	...	Manitoba Reports temp. Wood ...	Can.
Term Rep. ...	...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R. ...	...	Territories Law Reports ...	Can.
Thom. ...	...	Nova Scotia Reports (Thomson) ...	Can.
Toth. ...	...	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr. ...	...	Townsend, Modern State Trials ...	Eng.
Trem. P. C. ...	...	Tremaine Pleas of the Crown, 1 vol., 1667 ...	Eng.
Trist. ...	...	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Eng.
Tru. ...	...	New Brunswick Reports (Trueman) ...	Can.
Tudor, L. O. Merc. Law. ...	...	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop. ...	...	Tudor's Leading Cases on Real Property ...	Eng.
Turn. & R. ...	...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. ...	...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
Tyr. & Gr. ...	...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ...	Eng.
U. C. Jur. ...	...	Upper Canada Jurist ...	Can.
U. C. L. J. N. S. ...	...	Canada Law Journal, New Series, 1865—(current) ...	Can.

# xxxii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

U. C. L. J. O. S.	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	Can.
U. C. R.	...	Upper Canada Reports, Queen's Bench	...	Can.
Udal	...	Fiji Law Reports (Udal)	...	Fiji.
V. L. R.	...	Victorian Law Reports	...	Aus.
V. R.	...	Victorian Reports	...	Aus.
V. R. (Adm.)	...	Victorian Reports (Admiralty)	...	Aus.
V. R. (Eq.)	...	Victorian Reports (Equity)	...	Aus.
V. R. (Law)	...	Victorian Reports (Law)	...	Aus.
Vaugh.	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	Eng.
Vent.	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	Eng.
Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	West Australian Law Reports	...	Aus.
W. A'B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	Wyatt and Webb	...	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	Western Law Reporter	...	Can.
W. L. T.	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866—(current) (e.g., [1866] W. N.)	...	Eng.
W. N.	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A'B.	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	Western Weekly Reports	...	Can.
Wallis by Lyne	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	...	Eng.
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West temp. Hard.	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1740—1779	...	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	...	Can.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Y. & C. Ch. Cas.	...	Youngs and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & C. Ex.	...	Youngs and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J.	...	Youngs and Jervis' Reports, Exchequer, 8 vols., 1826—1830	Eng.
Y. B.	...	Year Books	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series)	Eng.
Y. B. (Sel. Soc.)	...	Year Books (Selden Society)	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	Eng.
You.	...	Youngs's Reports, Exchequer in Equity, 1 vol., 1830—1832	Eng.



# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, see pp. xvii.—xxxiii., *ante*.)

A.-G.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	„ Actiengesellschaft.
Admlty.	.	.	.	.	„ Admiralty.
Afd.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	.	.	.	.	„ Anonymous.
Apid.	.	.	.	.	„ Applied.
Appet.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	„ Application.
Appln.	.	.	.	.	„ Application to Register a Trade Mark.
Appit.	.	.	.	.	„ Appellant.
Apprvd.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	„ Article.
Ass. Tax Case	.	.	.	.	„ Assessed Tax Case.
Assce.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	„ Association.
B. C.	.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	„ Doubted.
Deft.	.	.	.	.	„ Defendant.

<b>Distd.</b>	.	.	.	.	for Distinguished.
<b>Div. Ct.</b>	.	.	.	.	" Divisional Court.
<b>Ecol. Comrs.</b>	.	.	.	.	" Ecclesiastical Commissioners.
<b>Ecol. Ct.</b>	.	.	.	.	" Ecclesiastical Court.
<b>Ex. Ch.</b>	.	.	.	.	" Exchequer Chamber.
<b>Ex p.</b>	.	.	.	.	" <i>Ex parte</i> .
<b>Exch.</b>	.	.	.	.	" Exchequer.
<b>Exor.</b>	.	.	.	.	" Executor.
<b>Exorship.</b>	.	.	.	.	" Executorship.
<b>Expid.</b>	.	.	.	.	" Explained.
<b>Extd.</b>	.	.	.	.	" Extended.
<b>Extrix.</b>	.	.	.	.	" Executrix.
<b>Fi. fa.</b>	.	.	.	.	" <i>Fieri facias</i> .
<b>Folld.</b>	.	.	.	.	" Followed.
<b>G. &amp; S. W. Ry. Co.</b>	.	.	.	.	" Glasgow & South Western Railway Co.
<b>G. C. Ry. Co.</b>	.	.	.	.	" Great Central Railway Co.
<b>G. E. Ry. Co.</b>	.	.	.	.	" Great Eastern Railway Co.
<b>G. N. of Scotland Ry. Co.</b>	.	.	.	.	" Great North of Scotland Railway Co.
<b>G. N. Picc. &amp; Brompton Ry. Co.</b>	.	.	.	.	" Great Northern, Piccadilly & Brompton Railway Co.
<b>G. N. Ry. Co.</b>	.	.	.	.	" Great Northern Railway Co.
<b>G. S. &amp; W. Ry. Co. of Ireland</b>	.	.	.	.	" Great Southern & Western Railway Co. of Ireland.
<b>G. W. Ry. Co.</b>	.	.	.	.	" Great Western Railway Co.
<b>Govt.</b>	.	.	.	.	" Government.
<b>Grds.</b>	.	.	.	.	" Guardians or Guardians of the Poor.
<b>H. C. of A.</b>	.	.	.	.	" High Court of Australia.
<b>H. L.</b>	.	.	.	.	" House of Lords.
<b>I. R. Comrs</b>	.	.	.	.	" Inland Revenue Commissioners.
<b>Insee.</b>	.	.	.	.	" Insurance.
<b>JJ.</b>	.	.	.	.	" Justices.
<b>Jud. Act</b>	.	.	.	.	" Judicature Act.
<b>K. B. Div.</b>	.	.	.	.	" King's Bench Division.
<b>L. &amp; B. Ry. Co.</b>	.	.	.	.	" London & Brighton Railway Co.
<b>L. &amp; N. E. Ry. Co.</b>	.	.	.	.	" London & North Eastern Railway Co.
<b>L. &amp; N. W. Ry. Co.</b>	.	.	.	.	" London & North Western Railway Co.
<b>L. &amp; S. W. Ry. Co.</b>	.	.	.	.	" London & South Western Railway Co.
<b>L. &amp; Y. Ry. Co.</b>	.	.	.	.	" Lancashire & Yorkshire Railway Co.
<b>L. B.</b>	.	.	.	.	" Local Board.
<b>L. B. &amp; S. C. Ry. Co.</b>	.	.	.	.	" London, Brighton & South Coast Railway Co.
<b>L. C.</b>	.	.	.	.	" Lord Chancellor.
<b>L. C. &amp; D. Ry. Co.</b>	.	.	.	.	" London, Chatham & Dover Railway Co.
<b>L. C. C.</b>	.	.	.	.	" London County Council.
<b>L. Elec. Ry. Co.</b>	.	.	.	.	" London Electric Railway Co.
<b>L. G. Board</b>	.	.	.	.	" Local Government Board.
<b>L. J.</b>	.	.	.	.	" Lord Justice.
<b>L. JJ.</b>	.	.	.	.	" Lords Justices.
<b>L. M. &amp; S. Ry. Co.</b>	.	.	.	.	" London, Midland & Scottish Railway Co.
<b>L. T. &amp; S. Ry. Co.</b>	.	.	.	.	" London, Tilbury & Southend Railway Co.
<b>M. S. Act</b>	.	.	.	.	" Merchant Shipping Act.
<b>M. S. &amp; L. Ry. Co.</b>	.	.	.	.	" Manchester, Sheffield & Lincolnshire Railway Co.
<b>Mags.</b>	.	.	.	.	" Magistrates.
<b>Mentd.</b>	.	.	.	.	" Mentioned.
<b>Met. Dist. Ry. Co.</b>	.	.	.	.	" Metropolitan District Railway Co.
<b>Met. Ry. Co.</b>	.	.	.	.	" Metropolitan Railway Co.
<b>Mid. G. W. Ry. Co.</b>	.	.	.	.	" Midland Great Western Railway Co.
<b>Mid. Ry. Co.</b>	.	.	.	.	" Midland Railway Co.
<b>Mtge.</b>	.	.	.	.	" Mortgage.
<b>Mtgee.</b>	.	.	.	.	" Mortgagee.
<b>Mtgor.</b>	.	.	.	.	" Mortgagor.
<b>N. B. Ry. Co.</b>	.	.	.	.	" North British Railway Co.
<b>N. E. Ry. Co.</b>	.	.	.	.	" North Eastern Railway Co.
<b>N. F.</b>	.	.	.	.	" Not Followed.
<b>N. P.</b>	.	.	.	.	" <i>Nisi Prius</i> .
<b>Ord.</b>	.	.	.	.	" Order.
<b>Overd.</b>	.	.	.	.	" Overruled.

# ABBREVIATIONS.

xxxvii

P. C.	.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	.	„ Quære.
R. C.	.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	.	„ Rural Sanitary Authority.
R. S. O.	.	.	.	.	.	„ Revised Statutes of Canada.
R. S. O.	.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	.	„ Reversed.
Revsq.	.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	.	„ South Eastern & Chatham Railway Co
S. E. Ry. Co.	.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	.	„ Schedule.
Sci. fa.	.	.	.	.	.	„ Scire facias.
Sect.	.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	.	Urban Council.
U. D. C.	.	.	.	.	.	Urban District Council.
U. S. A.	.	.	.	.	.	United States of America.
Union Assmt. Com.	.	.	.	.	.	Union Assessment Committee.
Urban S. A.	.	.	.	.	.	Urban Sanitary Authority.
V.-C.	.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	.	„ Workmen's Compensation Act.





## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.



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## Part I.—Definitions.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 110.

"Intoxicating liquor."—See Licensing Act, 1921 (c. 42), s. 11.

"Spirits."—See Spirits Act, 1880 (c. 24), s. 3.

1. — Sweet spirits of nitre.]—Sweet spirits of nitre are not "spirits" within 6 Geo. 4, c. 80.—A.-G. v. BAILEY (1847), 1 Exch. 281; 2 New Mag. Cas. 324; 17 L. J. Ex. 9; 10 L. T. O. S. 208; 11 J. P. Jo. 349, 858.

Annotation:—*Expld. & Apld.* Bailey v. Harris (1849), 12 Q. B. 905.

2. — — — — —.]—Sweet spirits of nitre are not "spirits" for the removal of which a permit is required by 6 Geo. 4, c. 80, s. 115, & 2 & 3 Will. 4, c. 16, ss. 10, 11.—BAILEY v. HARRIS (1849), 12 Q. B. 905; 18 L. J. Q. B. 115; 12 L. T. O. S. 553; 13 Jur. 341; 116 E. R. 1109.

3. — Proof spirit.]—Proof spirit means that which contains 50·76 of water as against 49·24 of pure alcohol (DAY, J.).—NEWBY v. SIMS, [1894] 1 Q. B. 478; 63 L. J. M. C. 228; 70 L. T. 105; 58 J. P. 263; 10 T. L. R. 206; 38 Sol. Jo. 202; 10 R. 596, D. C.

Annotations:—*Mentd.* Fortune v. Hanson, [1896] 1 Q. B. 202; Lee v. Bent (1901), 84 L. T. 722; Jenkins v. Naden (1919), 88 L. J. K. B. 1137.

4. "Excisable liquor."—Excisable liquors are liquors subject to the duty of excise; & therefore, beer, upon which an excise duty is no longer paid, is not an excisable liquor. A. was licensed under Gaming Act, 1845 (c. 109), to keep a house for billiard playing; & the license provided that A. should not knowingly allow the consumption of excisable liquors in the house by persons resorting thereto. He was also licensed under Beerhouse Act, 1840 (c. 61), & 32 & 33 Vict. c. 27, to sell beer, wine, etc., to be consumed in the house. A. had allowed the consumption of beer by persons resorting to the house for the purpose of playing billiards, & was convicted of an offence against the tenor of his billiard license:—*Held*: A. had not been guilty of selling excisable liquor, & was wrongly convicted.—JONES v. WHITTAKER (1870), L. R. 5 Q. B. 541; 39 L. J. M. C. 139; 22 L. T. 535; 34 J. P. 663; 18 W. R. 1197.

"Beer."—See Licensing Act, 1921 (c. 42), s. 11.

5. — Botanic beer.]—M. sold a liquor in bottles called Summer's Botanic Beer without having a retail license to sell beer. The liquor was made of sugar, herbs, & water, without hops, & had about 6 per cent. spirit, while ginger beer & table beer had about the same percentage of spirit. The justices dismissed the information, holding that it was not beer within Beerhouse Act, 1834 (c. 85), & other Acts:—*Held*: the justices were right.—LEAH v. MINNS (1883), 47 J. P. 198.

Annotations:—*Consd.* Howorth v. Minns (1886), 56 L. T. 316; Fairhurst v. Price, [1912] 1 K. B. 404.

6. — — — — —.]—Applt. sold a liquor called "botanic beer," without having a retail license

for the sale of beer. It contained sugar, herbs, & water, but no hops or malt, & had 6 per cent. of proof spirit:—*Held*: such a liquor was "beer" within Customs & Inland Revenue Act, 1885 (c. 51), s. 4, & applt. was rightly convicted.—HOWORTH v. MINNS (1886), 56 L. T. 316; 51 J. P. 7; 3 T. L. R. 256, D. C.

Annotation:—*Consd.* Fairhurst v. Price, [1912] 1 K. B. 404.

7. — — — — —.]—Applt. was summoned under Finance (1909-1910) Act, 1910 (c. 8), s. 50 (3), for having sold by retail certain beer for the retail sale of which he was required to take out a license under that Act without having taken out such license. The beer had the ordinary gravity of beer, & contained 2 per cent. of proof spirit. It was manufactured from liquid glucose & hops, & was exactly like ordinary beer in colour, taste, & appearance. The justices found that the "beer" so sold was beer within the meaning of the definition of beer in sect. 52 of the Act, & that it was necessary to take out an excise licence for the retail sale of the same, & they convicted applt.:—*Held*: the article so sold came within the earlier words in sect. 52, "any other description of beer," & was therefore beer for the retail sale of which applt. was required to take out an excise licence under the Act; & the proceeding was properly taken under the Finance (1909-10) Act, 1910 (c. 8).—FAIRHURST v. PRICE, [1912] 1 K. B. 404; 81 L. J. K. B. 320; 106 L. T. 97; 76 J. P. 110; 28 T. L. R. 132; 22 Cox, C. C. 661, D. C.

8. Wine—British wine—Liquor containing large proportion of alcohol.]—Upon an information before justices under 11 & 12 Vict. c. 49, for the sale of "British wine" within the prohibited hours, it was proved by a practical chemist that the liquor sold contained a large proportion of alcohol, & the justices found that it was "wine," within the meaning of the statute:—*Held*: their conclusion was warranted by the evidence.—HARRIS v. JENNS (1860), 9 C. B. N. S. 152; 30 L. J. M. C. 183; 3 L. T. 408; 24 J. P. 807; 9 W. R. 36; 142 E. R. 59.

Annotation:—*Mentd.* R. v. Senior (1864), 9 Cox, C. C. 469.

9. — "Foreign wine"—Sherry.]—A., who held a license for retailing "sweets & made wines," but had no license for the sale of foreign wines, on being asked for a bottle of best sherry, sold a bottle of liquor labelled "Best sherry, British." He was thereupon charged with selling foreign wine without a license:—*Held*: the justices, in dismissing the information against him on the ground that the liquor was not sold as being foreign wine, were wrong, & the case must be remitted to them. Sherry is the name of a foreign wine; therefore, under Refreshment Houses Act, 1860 (c. 27), s. 21, liquor labelled "Best sherry, British," must, as against the seller, be deemed to be foreign wine.—RICHARDS v. BANKS (1887), 58 L. T. 634; 52 J. P. 23; 4 T. L. R. 172, D. C.

## PART I.

a. "Intoxicating liquor."—LINBERG v. KEARNEY (1883), 6 Nfld. L. R. 484.—Nfld.

b. — — — — —.]—R. v. DOJACEK, [1919] 2 W. W. R. 687; 49 D. L. R. 66.—CAN.

c. — — — — —.]—R. v. MACLEAN, [1918] 2 W. W. R. 154; 40 D. L. R. 443; 29 Can. Crim. Cas. 270; 13 Alta.

L. R. 244.—CAN.

d. "Home-brew."—R. v. MARSHALL, [1925] 1 D. L. R. 1132; 43 Can. Crim. Cas. 253; [1924] 3 W. W. R. 865.—CAN.

e. — — — — —.]—Although the word "home-brew" is not sufficient of itself to establish the alcoholic content of liquor yet when that fact is proved independently, the ct. is bound to take judicial notice of the fact that the

word "home-brew" is the common appellation for spirituous liquor which has been illicitly manufactured or distilled.—R. (ANDERSON) v. PINNO, [1925] 1 W. W. R. 737.—CAN.

f. "Dwelling-house."—R. v. GULEX (1917), 39 O. L. R. 539.—CAN.

g. — — — — —.]—R. v. OBERNESSER (1917), 40 O. L. R. 264.—CAN.

h. — — — — —.]—R. v. PURDY (1918),



10. **Sweets—Foreign wine.**—**RICHARDS v. BANKS**, No. 9, ante.

—**See Finance** (1909-10) Act, 1910 (c. 8), s. 52.

11. **"Beerhouse"**—**What constitutes—Sale under off license.**—A covenant not to use a house as "a beerhouse" is not broken by the sale, under a license, of beer by retail to be consumed off the premises.—**LONDON & NORTH WESTERN RY. CO. v. GARNETT** (1869), L. R. 9 Eq. 26; 39 L. J. Ch. 25; 21 L. T. 352; 18 W. R. 246.

**Annotations.**—**Consd.** **Formby v. Barker** (1903), 89 L. T. 249. **Reid.** **Holt v. Collyer** (1881), 44 L. T. 214.

12. ————**]**—A person who had entered into a covenant not to use a house as a public-house, tavern, or beer-house, opened a grocer's shop there, at which he carried on the sale of beer to be drunk off the premises as an ancillary business to his grocer's business:—**Held:** this was no infringement of the covenant.—**HOLT & CO. v. COLLYER** (1881), 16 Ch. D. 718; 50 L. J. Ch. 311; 44 L. T. 214; 45 J. P. 456; 29 W. R. 502.

**Annotations.**—**Consd.** **Formby v. Barker** (1903), 89 L. T. 249. **Reid.** **Lovell & Christmas v. Wall** (1910), 103 L. T. 588.

—**See Finance** (1909-1910) Act, 1910 (c. 8), s. 52.

13. **"Beer shop"**—**What constitutes.**—F. was subject to a covenant not to erect on a piece of land forming part of an estate laid out for building "any public-house, tavern, or beer-shop," nor to use any house erected on the piece of land as such. A shop had been built on the piece of land, & F., who was the occupier of the shop, had obtained a license authorising him to sell beer there, not to be drunk on the premises, & he was selling beer there accordingly. An action was brought to restrain F. from using his shop as a public-house, tavern, or beer-shop:—**Held:** the word "beer-shop" had no technical meaning distinct from its ordinary sense, & it must be taken to mean a shop where beer was sold, even if it was consumed off the premises. The act of F. was therefore a breach of the covenant.—**LONDON & SUBURBAN LAND & BUILDING CO. v. FIELD** (1881), 16 Ch. D. 645; 50 L. J. Ch. 549; 44 L. T. 444, C. A.

**Annotations.**—**Consd.** **Holt v. Collyer** (1881), 16 Ch. D. 718. **Reid.** **Thornwell v. Johnson** (1881), 50 L. J. Ch. 641; **Formby v. Barker** (1903), 89 L. T. 249.

14. ————**]**—The vendors of an estate sold part of it in 1863 to C., as a site for a public-house & entered into a covenant with him that they would not sell any other portion of it without requiring the purchaser to enter into a covenant with them "not to erect thereon, or use, or permit to be used, any building erected thereon as a tavern, public-house, or beer-shop." C. erected a public-house on his part which he demised to N. In 1869 other portions of the estate were sold to a co. who afterwards sold to P., his conveyance containing a covenant with his vendors in the above terms. P. erected a house on one plot & leased it to F., who obtained a retail license for the sale of beer off the premises:—**Held:** from the date of the sale to C., the rest of the property was

subject to the restrictive covenant, F. must be taken to have had constructive notice of it, a beer-shop was a shop where beer was sold independently of any other circumstance, F. had broken the covenant, & N. was entitled to sue in respect of such breach.—**NICOLL v. FENNING** (1881), 19 Ch. D. 258; 51 L. J. Ch. 166; 45 L. T. 738; 30 W. R. 95.

**Annotation.**—**Consd.** **Formby v. Barker** (1903), 89 L. T. 249.

"Premises."—**See Spirits Act**, 1880 (c. 24), s. 3.

15. **"Licensed premises"**—**Premises having occasional license—Spirits (Prices & Description) Order, 1919.**—The expression "licensed premises" in above Order includes premises having an "occasional license."—**R. v. LEWIS, Ex p. DANIELL** (1919), 122 L. T. 345; 84 J. P. 12; 36 T. L. R. 69, D. C.

—**See Licensing Act**, 1921 (c. 42), s. 18.

16. **"Fully licensed premises"**—**Seven days' license.**—A contract for the sale of a "fully licensed" public-house is a contract for the sale of a public-house with a seven days' license, if in fact the license does not include Sundays & the purchaser was not aware that it was only a six days' license the ct. will not give specific performance of the contract at the suit of the vendor.—**FRASER v. PUGSLEY** (1920), 37 T. L. R. 87.

—**See Finance** (1909-1910) Act, 1910 (c. 8), s. 52.

**License.**—**See Spirits Act**, 1880 (c. 24), s. 3.

**Justices' license.**—**See Licensing (Consolidation) Act**, 1910 (c. 24), s. 110.

**Justices on license.**—**See Licensing (Consolidation) Act**, 1910 (c. 24), s. 110.

**Justices' off license.**—**See Licensing (Consolidation) Act**, 1910 (c. 24), s. 110.

**Publican's license.**—**See Finance** (1909-1910) Act, 1910 (c. 8), s. 52.

**Beerhouse license.**—**See Finance** (1909-1910) Act, 1910 (c. 8), s. 52.

17. **"Sale by retail"**—**What amounts to.**—A grantee in fee of a piece of building land covenanted by a separate deed with the grantor that the piece of land should not for the space of twenty years be used "as a site for any hotel, tavern, public-house, or beer-house," nor should "the trade or calling of an hotel or tavern keeper, publican, or beer-shop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors," be "used, exercised, or carried on, at or upon" the same:—**Held:** the sale of wine & spirits in bottle by a grocer in the course of his trade was not such a breach of the above covenant as the Ct. of Ch. would interfere with.—**JONES v. BONE** (1870), L. R. 9 Eq. 674; 39 L. J. Ch. 405; 23 L. T. 304; 34 J. P. 468; 18 W. R. 489.

**Annotations.**—**Expld. & Distd.** **Buckle v. Fredericks** (1890), 44 Ch. D. 244. **Consd.** **Shoolbred v. St. Pancras JJ.** (1890), 21 Q. B. D. 346. **Reid.** **Holt v. Collyer** (1881), 16 Ch. D. 718; **Formby v. Barker** (1903), 89 L. T. 249.

18. ————**]**—The lessee of a theatre bought an adjoining piece of ground, which was subject to a covenant, of which he had notice,

41 O. L. R. 49; 13 O. W. N. 205.—**CAN.**

**K.** ————**]**—**R. (McDOUGALL) v. PECHET**, [1925] 3 W. W. R. 94; 43 Can. Crim. Cas. 344.—**CAN.**

1. **"Guest room."**—**R. v. ZAWISH** [1924] 3 W. W. R. 569; 44 Can. Crim. Cas. 304; 21 Alta. L. R. 22.—**CAN.**

**m.** **"Previously licensed premises."**—**R. v. LICENSING COURT, Ex p. DONNELLY**, [1925] S. A. S. R. 37.—**AUS.**

**n.** **"Licensee."**—**R. v. BOILEAU** (1917), 38 O. L. R. 607; 36 D. L. R. 781.—**CAN.**

**o.** **"Warehouse."**—**R. v. HALLIDAY** (1893), 21 A. R. 42.—**CAN.**

**p.** **"Liquors drunk in a tavern."**—**Re MCGOLDRICK v. RYALL** (1895), 26 O. R. 435.—**CAN.**

**q.** **"Person."**—**Re MUNICIPAL CLAUSES ACT, Re WAH YUN & CO.** (1904), 11 B. C. R. 154.—**CAN.**

**r.** **"Hotel-keeper."**—**BARTHELS SHE-**

**WAN & CO. v. PETERSON** (1914), 27 W. L. R. 734; 17 D. L. R. 301; 24 Man. L. R. 794.—**CAN.**

**t.** **"Sale of drink."**—A sale of drink consists in the order for the drink & the delivery of the drink in pursuance of the order.—**BEIRNE v. DUFFY**, [1914] 2 I. R. 68.—**IR.**

**a.** **"Fair."**—The word "fair" in Licensing Act, 1881, sect. 36, does not include a market where cattle & sheep are regularly sold by an auc-

that "the trade of an innkeeper, victualler, or retailer of wine, spirits or beer," should not be carried on there. He erected on this piece of ground a building, the object of which was to furnish convenient egress from the theatre; but on each floor he set up a counter for selling wine, spirits & beer, which could not be approached directly from the outside, but at which any person who paid for admittance to the theatre when open for theatrical performances could purchase refreshments:—*Held*: the lessee was carrying on the trade of a retailer of wine, spirits & beer, & must be restrained from doing so.—*BUCKLE v. FREDERICKS* (1890), 44 Ch. D. 244; 62 L. T. 884; 55 J. P. 164; 38 W. R. 742; 6 T. L. R. 264, C. A. *Annotation*:—*Mentl. Fitz v. Iles*, [1893] 1 Ch. 77.

*See, now*, Licensing (Consolidation) Act, 1910 (c. 24), s. 110.

—*Sale to member of club.*—*See CLUBS*, Vol. VII., p. 522, Nos. 109–111.

19. "Vintner."—The term "vintner" means

one who sells wine generally, & is not restricted to one who sells wine to be consumed on the premises.—*WELLS v. ATTENBOROUGH* (1871), 24 L. T. 312; 19 W. R. 465.

20. "Consume"—How construed.—*Licensing Act, 1921* (c. 42), s. 4.—Above sect. provides *inter alia* that no person shall, except during the permitted hours, "consume" in licensed premises any intoxicating liquor:—*Held*: the word "consume" must be read in its natural & ordinary sense, & therefore the sect. prohibits, except during the permitted hours, & subject to the specific exceptions provided for by the Act, the consumption on licensed premises of any intoxicating liquor, even though that liquor may not have been sold or supplied on those premises, but has been brought into the premises by the person consuming it there.—*CALDWELL v. JONES*, [1923] 2 K. B. 309; 92 L. J. K. B. 760; 129 L. T. 631; 87 J. P. 130; 39 T. L. R. 471; 67 Sol. Jo. 596; 21 L. G. R. 520; 27 Cox, C. C. 498, D. C.

## Part II.—Licenses.

### SECT. 1.—IN GENERAL.

#### SUB-SECT. 1.—NECESSITY FOR.

*See* Licensing (Consolidation) Act, 1910 (c. 24), ss. 1, 111.

21. At common law.—*R. v. FAWKNER* (1609), 2 Keb. 506; 84 E. R. 318

#### SUB-SECT. 2.—PURPOSE OF.

22. Superintendence & control by justices.—The policy of requiring a person who sold wine by retail to take out a license for the sale of ale & beer was obvious: it was for the purpose of placing the retailer of wine under the superintendence & control of the magistrates (*ABBOTT, C.J.*).—*SPALL v. MASSEY* (1819), 2 Stark. 559, N. P.

#### SUB-SECT. 3.—EXEMPTIONS.

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 111.

23. Power of sovereign to grant—Effect of demise of Crown.—*YOUNG v. WRIGHT* (1660), 1 Sid. 6; 82 E. R. 937.

*Annotation*:—*Consd. Thomas v. Sorrell* (1673), 3 Keb. 184, 223.

24. ———.—The King may grant a dispensation to sell wine without a license, *non obstante* 7 Edw. 6, c. 5; & the dispensation is not determined by the King's death. Such a dispensation is valid as well when granted to a corp. aggregate as to particular persons:—*Held*: such a grant to the Company of Vintners was saved by the proviso in 12 Car. 2, c. 25.—*THOMAS v. SORRELL* (1673), *Freem. K. B.* 85, 137; 2 Keb. 790; 3 Keb. 184, 223, 233, 264; *Vaugh.* 330; 1 Lev. 217; 89 E. R. 63, 100, *Ex. Ch.*

*Annotations*:—*Mentl. Jeverson v. Moor* (1699), 12 Mod. Rep. 262; *R. v. Papinian* (1725), *Sess. Cas. K. B.* 135; *Ex p. Armitage* (1756), *Amb.* 294; *Muskett v. Hill* (1839), 5 Bing. N. C. 694; *Wood v. Leadbitter* (1845), 13 M. & W.

838; *Washbourne v. Burrows* (1847), 16 L. J. Ex. 266; *Taplin v. Florence* (1851), 10 C. B. 744; *Congreve v. Evette* (1854), 10 Exch. 298; *Hailey v. Stephens* (1862), 12 C. B. N. S. 91; *Nuttall v. Braecwell* (1866), 36 L. J. Ex. 1; *L. C. C. v. Dundas*, [1904] P. 1; *Warr v. L. C. C.*, [1904] 1 K. B. 713; *Smith v. Colbourne*, [1914] 2 Ch. 533; *British Actors Film Co. v. Glover*, [1918] 1 K. B. 209.

25. ———.—*THOMAS v. WATERS* (1667), *Hard.* 442; 145 E. R. 538.

*Annotation*:—*Mentl. Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856.

26. Exempted bodies—Vintners Company.—*THOMAS v. SORRELL*, No. 24, *ante*.

27. ———.—Mayor & burgesses of St. Albans.—*A.-G. v. MARKS* (1801), cited in *Halsbury's Laws of England*, Vol. XVIII., p. 9; *Clutterbuck's History & Antiquities of the County of Hertford*, Vol. 1, p. 49.

28. ———.—University of Cambridge.—On a motion for a *quo warranto* information, calling on the Vice-Chancellor of the University of Cambridge to show by what authority he granted alehouse licenses within the borough of Cambridge, it appeared that the first exercise & origin of the franchise were too remote to be traced; that it had been exercised both within the borough of Cambridge & without it to the extent of the University Liberties, but not in pursuance of statutory authority, or according to the statutable form of granting licenses; that the franchise was recognised in 9 Ann. c. 23, s. 50, & later statutes, though not in 5 & 6 Edw. 6, c. 25; that, till very recently, no serious dispute had arisen on the subject between the borough & the University, nor had any licenses been granted by the charter justices of the borough, or those of the county at large; that in early times the assize of bread & ale was in the borough, not the University; that the Vice-Chancellor, in licensing, had always acted with another head of a house, both being styled justices of peace, but the license being under the single seal & signature of the Vice-Chancellor; & that his course of proceeding had not been in all respects uniform.—*Held*: sufficient doubt not being thrown on the legality of the franchise by

tioner on his own premises.—*BROOKING v. SMITH* (1883), 1 N. Z. L. R. 386 (S. C.)—N. Z.

b. "State of intoxication."—*LAF-*

*FRY v. MAGORIAN* (1903), 22 N. Z. L. R. 677.—N. Z.

### PART II. SECT. 1 SUB-SECT. 1.

e. Under 32 Vict. c. 32.—A license

to sell spirituous liquors whether by wholesale or retail, is necessary under the above Act, either in the case of a tavern or a shop.—*R. v. STRACHAN* (1869), 20 C. P. 182.—CAN.

*Sect. 1.—In general: Sub-sect. 3. Sect. 2: Sub-sects. 1, 2, 3 & 4. Sect. 3.]*

these circumstances, the ct. would not assist in questioning it by granting an information.—*R. v. ARCHDALL* (1838), 8 Ad. & El. 281; 3 Nev. & P. K. B. 696; 1 Will. Woll. & H. 440; 2 J. P. 486; 2 Jur. 1083; 112 E. R. 843.

*Annotations:—Mentd. Re Oxford University, Chancellor & Taylor* (1841), 1 Q. B. 952; *R. v. Canterbury* (Archbp.) (1848), 11 Q. B. 483; *Kemp v. Neville* (1861), 10 C. B. N. S. 523.

*See, now, Cambridge Award Act, 1856 (c. xvii), s. 8.*

**29. — University of Oxford—"Sweets or made wines."**—By a charter in the reign of Charles I. the Chancellor of the University of Oxford was given the exclusive right of granting licenses to sell drink, ale, or other victuals in Oxford; & by Universities (Wine Licenses) Act, 1743 (c. 40), s. 11, persons were prohibited from selling wine by retail in Oxford unless authorised so to do by the Chancellor of the University. By Customs & Inland Revenue Act, 1875 (c. 23), s. 9, a license to a retailer of foreign wine shall be granted so as to extend to the sale of any kind of sweets or made wines, or mead, or metheglin, without the payment of any further duty. The right to issue the University wine license has by statute been transferred to the corp. of Oxford:—*Held*: since the Act of 1875 the Oxford University wine license, now granted by the corp., entitled the holder thereof to sell "sweets or made wines" without payment of further duty, & without taking out any excise license for the sale of sweets or made wines.—*ROBERTS v. TWINING* (1909), 101 L. T. 41; 73 J. P. 317; 25 T. L. R. 525, D. C.

*See Universities (Wine Licenses) Act, 1743 (c. 40), s. 11; Oxford Corporation Act, 1890 (c. cxxiii), s. 119.*

**30. Houses of Parliament—Whether exempt.]—***WILLIAMSON v. NORRIS*, No. 625, *post*.

## SECT. 2.—EXCISE LICENSES.

### SUB-SECT. 1.—MANUFACTURER'S LICENSE.

*See Finance* (1909–1910) Act, 1910 (c. 8), sched. I, A.

**31. By whom required—Distiller of spirits—Ulterior use immaterial.]—**A person who distills spirit for the purpose of making, by the addition of nitric acid, sweet spirits of nitre for sale, is a distiller of spirits within 6 Geo. 4, c. 80, ss. 6, 7, requiring an excise license, & liable to the penalties imposed by s. 39 of that Act on persons having any private or concealed still, etc., for making or distilling low wines or spirits.—*A.-G. v. BAILEY* (1846), 16 M. & W. 74; 16 L. J. Ex. 63; 153 E. R. 1104; *subsequent proceedings* (1847), 1 Exch. 281. *Annotation:—Consol. Bailey v. Harris* (1849), 12 Q. B. 905.

### SUB-SECT. 2.—WHOLESALE DEALER'S LICENSE.

*See Finance* (1909–1910) Act, 1910 (c. 8), s. 51 (2), sched. 1, B.

**32. By whom required—Manufacturer selling**

#### PART II. SECT. 2, SUB-SECT. 1.

**31.1. By whom required—Distiller of spirits—Ulterior use immaterial.]—***R. v. VARGO*, [1921] 3 W. W. R. 228.—CAN. d. *Brewers' license frees not duties of excise.]—PETERSWALD v. BANTLEY* (1904), 1 C. L. R. 497.—AUS.

#### PART II. SECT. 2, SUB-SECT. 2.

**e. By whom required—Brewers.]—**

**BREWERS & MALSTERS' ASSOCN. OF ONTARIO v. A.-G. FOR ONTARIO**, [1897] A. C. 231.—CAN.

**f. — — — — —.]—***R. v. COUNTY CORK JJ.*, [1906] 2 I. R. 415; 40 I. L. T. 143.—IR.

**g. Quantity prescribed to be sold.]—**Four & a half gallons of beer is the minimum quantity which may be sold

**stock after sale of distillery.]—**If a person, being regularly licensed as a distiller of corn-spirits, etc., in Scotland, under 26 Geo. 3, c. 64, for one year, discontinue business as a distiller, & sell his stills to another before the expiration of such license, but keep on hand, for future sale, a considerable stock of spirits which were lawfully distilled under such license, he is to be considered as keeping & selling such spirits as a dealer, & is accordingly compellable to take out an excise license as a seller of, or dealer, by wholesale, in *aquavita*, under 33 Geo. 3, c. 69, s. 9.—*ADVOCATE-GENERAL v. MENZIES* (1799), 8 Bro. Parl. Cas. 168; 3 E. R. 513, H. L.

**33. — Ship's stores merchant—Selling spirits out of bond.]—**A ship's stores merchant, who sells spirits out of bond to foreign-going vessels as ship's stores, is a "dealer in spirits" within Excise Licence Act, 1825 (c. 81), s. 2, & must, therefore, for that purpose take out the excise license required by that statute.—*TINWELL v. MAYHOOK*, [1904] 2 K. B. 790; 73 L. J. K. B. 699; 91 L. T. 145; 68 J. P. 350; 53 W. R. 14; 20 T. L. R. 488; 48 Sol. Jo. 477, D. C.

**Quantity prescribed to be sold.]—***See Finance* (1909–1910) Act, 1910 (c. 8), sched. I, B.

**34. — Size of bottles—Whether material.]—**Applt. held an excise license under Excise Licenses Act, 1825 (c. 81), s. 2, for the sale of beer in casks containing not less than four & a half gallons or in not less than two dozen reputed quart bottles at one time; he did not hold a license under Revenue Act, 1803 (c. 33), s. 1, which enables the holder of such an excise license to take out an additional license for the sale of beer "in any less quantity & in any other manner than as aforesaid." He sold beer in pint & half-pint bottles, but the quantity thus sold at one time was not less than the amount which a cask of four & a half gallons or two dozen reputed quart bottles would contain.

Applt. having been convicted upon a summons under Licensing Act, 1872 (c. 94), s. 3, of having sold beer by retail without a licence:—*Held*: the test of a sale of beer by retail was the quantity sold at any one time, & the conviction was wrong.—*FAIRCLOUGH v. ROBERTS* (1890), 24 Q. B. D. 350; 59 L. J. M. C. 54; 62 L. T. 700; 54 J. P. 421; 38 W. R. 330; 6 T. L. R. 180; 17 Cox, C. C. 101, D. C.

**Justices' License—Necessity for.]—***See* No. 560, *post*, & generally, *Finance* (1909–1910) Act, 1910 (c. 8), sched. I, B.; Licensing (Consolidation) Act, 1910 (c. 24), s. 111 (2) i.

### SUB-SECT. 3.—RETAILER'S LICENSE.

*See Licensing* (Consolidation) Act, 1910 (c. 24), ss. 1, 111.

**On licenses.]—***See Finance* (1909–1910) Act, 1910 (c. 8), sched. 1, C.

**35. — Necessity for justices' licenses—Licensing (Consolidation) Act, 1910 (c. 24), s. 1.]—***R. v. CUSTOMS & EXCISE COMRS.*, No. 128, *post*.

**Off licenses.]—***See Finance* (1909–1910) Act, 1910 (c. 8), sched. I, C.

to one person at one time under a wholesale dealer's license, & the maximum under a retailer's license.—*WOOD v. MACKENZIE*, [1925] S. C. (J.) 13.—SCOT.

#### PART II. SECT. 2, SUB-SECT. 3.

**h. Statutory requirements must be observed.]—**A retail liquor license which

**36. — Wine—Necessity for justices' certificate.]**—A shopkeeper, holding a wine dealer's excise license, granted under Excise Licenses Act, 1825 (c. 81), s. 2, & for which the annual duty of £10 10s. is payable, is entitled, without any certificate from justices, to sell by retail wine to be consumed off his premises.—*PALMER v. THATCHER* (1878), 3 Q. B. D. 340; 37 L. T. 784; 26 W. R. 314; *sub nom.* *R. v. BRISTOL JJ.*, *PALMER v. THATCHER*, 47 L. J. M. C. 54; 42 J. P. 213, D. C.

**37. — — — — —.]**—*Semble*: a person who has a spirit dealer's retail license to sell spirits in bottles, & who has a wholesale beer dealer's license authorising sale of casks of ale of 4½ gallons, sufficiently fulfils the description of "a person who keeps a shop for the sale of goods & commodities other than foreign wine, & therefore, is entitled to a certificate of justices authorising the sale of wine by retail pursuant to Refreshment Houses Act, 1860 (c. 27), s. 3.—*R. v. BISHOP* (1886), 50 J. P. 167, D. C.

#### SUB-SECT. 4.—REFRESHMENT HOUSE LICENSES.

*See* Refreshment Houses Act, 1860 (c. 27), s. 6. *Hours of closing.*—*See* No. 506, *post*.

**38. Dancing saloon — Refreshments supplied from outside.]**—The occupier of a house kept in it a public dancing room, where each person who entered was charged 3d. No liquor was kept there, but if any visitor to the dancing room required beer the money for the quantity required was previously paid to the servant, who then sent for it to a neighbouring public-house. The occupier of such dancing-room had no license, upon an information against him for keeping open his house for public refreshment, resort & entertainment without a license under the Refreshment Houses Act, 1860 (c. 27), the magistrate dismissed the information on the ground that the evidence did not bring the house within the definition given by the Act, as a house kept open for public refreshment, resort, & entertainment:—*Held*: the magistrate's decision was correct.—*TAYLOR v. ORAM* (1862), 1 H. & C. 370; 31 L. J. M. C. 252; 7 L. T. 68; 27 J. P. 8; 8 Jur. N. S. 748; 10 W. R. 800; 158 E. R. 928.

*Annotation*:—*Reid*. *Howes v. Inland Revenue Board* (1876), 1 Ex. D. 385.

**39. Sale of cigars, coffee, & ginger beer.]**—By Refreshment Houses Act, 1860 (c. 27), s. 6, "all houses, rooms, shops, or buildings, kept open for public refreshment, resort, & entertainment," during certain hours of the night, are to be deemed refreshment houses & require a license. Deft.'s house was called *The Café*; it was found open

during the night, & seventeen females & twenty gentlemen were there, & were supplied with cigars, coffee, & ginger beer, which they consumed. Upon these facts justices convicted deft. upon a charge of keeping a refreshment house without a license:—*Held*: the house was kept open for public refreshment, resort, & entertainment, & the conviction was right.—*MUIR v. KEAY* (1875), L. R. 10 Q. B. 594; 44 L. J. M. C. 143; 40 J. P. 120; 23 W. R. 700.

*Annotations*:—*Folld*. *Howes v. Inland Revenue Board* (1876), 1 Ex. D. 385. *Mentd.* *Duck v. Bates* (1884), 13 Q. B. D. 843.

#### **40. Shop for sale of non-intoxicating liquors.]**

—By Refreshment Houses Act, 1860 (c. 27), s. 6, "all houses, rooms, shops, or buildings kept open for public refreshment, resort, & entertainment," during certain hours of the night are to be deemed refreshment houses, & require a license. By sect. 9 a penalty is imposed upon keeping unlicensed refreshment houses. During the prohibited hours applt. kept open without a license a shop for the sale of ginger beer & lemonade: it consisted of one room only, open in front, without seats. Applt. was convicted of keeping an unlicensed refreshment house:—*Held*: applt.'s shop was kept open for public refreshment, resort, & entertainment within the meaning of the foregoing enactment, & the conviction was right.—*Howes v. INLAND REVENUE BOARD* (1876), 1 Ex. D. 385; 46 L. J. M. C. 15; 41 J. P. 423; 24 W. R. 897, C. A.

*Annotation*:—*Mentd.* *Duck v. Bates* (1884), 13 Q. B. D. 843.

#### **41. Sale of food on plates - No other facilities.]**

—*COOPER v. DICKENSON* (1877), *Times*, Jan. 23.

**42. Temperance inn - Open to travellers.]**—Two revenue officers disguised as travellers went at 10.40 p.m. to a house kept by K., & requested to be supplied with chops, coffee, & a non-intoxicating ale, & were entertained accordingly, & paid the waiter. The house was a temperance hotel of a large size. No license for a refreshment house was held by M. pursuant to Refreshment Houses Act, 1860 (c. 27), s. 6:—*Held*: the justices were wrong in holding that, though this was an inn, yet it was not a refreshment house within the meaning of the statute, & so requiring a license.—*KELLEWAY v. MACDOUGAL* (1880), 45 J. P. 207, D. C.

### SECT. 3.—JUSTICES' LICENSES.

*See* Licensing (Consolidation) Act, 1910 (c. 24), ss. 1, 42 (3), 65 (1).

**Grant of justices' license.]**—*See* Part IV., Sect. 2, *post*.

is obtained clandestinely & without observing the preliminary statutory requirements will be cancelled.—*Re*

*CLOSE & BERRY* (1892), 2 B. C. R. 131.

—*CAN.*

k. *Petition for license must be*

*accompanied by electors' certificate.*—*Re HUNTER'S LICENSE* (1894), 24 O. R. 522. — *CAN.*





**50. From when time computed—Day of actual hearing.]**—(1) By 9 Geo. 4, c. 61, s. 1, justices in every county, etc., are to hold a general annual licensing meeting between Aug. 20 & Sept. 14; & by sect. 3, they are required to continue such meeting by adjournment to such days during Aug. & Sept. & places as they may deem most convenient for enabling persons to apply for a license. By 32 & 33 Vict. c. 27, s. 4, no license is to be granted without a certificate of justices. By sect. 5 certificates are to be granted by the justices at the general annual licensing meeting held in pursuance of 9 Geo. 4, c. 61, or at some adjournment of such meeting. By sect. 7 every person intending to apply for a certificate shall, twenty-one days before he applies, give notice in writing of his intention, as in the sect. prescribed :—*Held* : the notice might be given twenty-one days before, & the application made at an adjourned meeting.

(2) At a general annual licensing meeting B. applied for a certificate for a certain house. It was proved that he had been convicted of misconduct in another house. The justices refused the certificate. At an adjourned meeting D. applied for a certificate for the first house :—*Held* : the fact of the certificate having been refused to B. was no bar under sect. 8 to the application by D.—*R. v. WEST RIDING JJ., DRAKE'S CASE* (1869), L. R. 5 Q. B. 33; 39 L. J. M. C. 17; 21 L. T. 490; 34 J. P. 4; 18 W. R. 259.

*Annotations* :—As to (1) *Apld.* *R. v. Pownall*, [1893] 2 Q. B. 158. *Reld.* *R. v. Groom, Ex p. Cobbold*, [1901] 2 K. B. 157. As to (2) *Folld.* *Ex p. Maughan* (1875), 1 Q. B. D. 49. *Reld.* *Ex p. Rushworth* (1869), 34 J. P. 676; *R. v. Anglessea JJ.* (1895), 65 L. J. M. C. 12. *Generally, Mentd.* *Murray v. Freer* (1893), 9 T. L. R. 193.

**51. ———.]**—*R. v. POWNALL*, No. 366, *post*. Compare Sub-sect. 2, A. (b) iii., *post*.

### iii. Service of Notice.

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 26 (4), 108.

**52. On police superintendent—Service at police station—Not being business office or residence.]**—S. applied for a new wine license to the general annual meeting, & objection was made that he had not given notice to T., the superintendent of police of the division, in time. The notice was not sent to the residence of T., who did not reside or have an office in the division but lived outside. The notice was merely left for T. at one of several police stations in the division :—*Held* : the justices were right in holding that the service was invalid, & in refusing to hear the application.—*R. v. RILEY* (1889), 53 J. P. 452, D. C.

**53. Borough included in sessional division—Separate police superintendents for borough & division—Service on borough superintendent.]**—A petty sessional division included a borough, & the borough had a chief constable or superintendent of police of its own, while there was another person superintendent of police for the rest of the division. S., having a shop within the borough & applying for an off wine & off spirit license, served the notice on the chief constable of the borough, but the justices held the notice bad, & refused the license :—*Held* : the notice was sufficiently served, & rule for *mandamus* made absolute accordingly.—*R. v.*

*BIRLEY, ETC., KIRKHAM DIVISION OF LANCASHIRE JJ.* (1891), 55 J. P. 88, D. C.

### iv. Posting of Notice.

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 15 (1) b, 33 (3).

**54. Place of posting—Door of premises—Inner door.]**—*R. v. CAULFIELD, ETC. JJ.* (1882), 46 J. P. Jo. 756, D. C.

**55. ——— Uncompleted building without door—Notice affixed to floor.]**—*R. v. SHARPE, ETC. JJ., Ex p. ELLIS* (1898), 42 Sol. Jo. 572, D. C.

**56. Evidence of posting—Evidence unsatisfactory to justices—Interference by High Court.]**—*R. v. HAYHURST, Ex p. MACHIN* (1897), 61 J. P. Jo. 88, D. C.

### v. Contents of Notice.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 15 (2).

**57. Whether strict accuracy necessary.]**—A notice before applying to the licensing justices for a certificate for an outdoor license to sell beer by retail described the thing asked for as a "certificate for the sale of beer by retail to be consumed off the premises," instead of a "certificate to authorise the excise to grant a license to sell beer by retail, etc.," & the justices held the notice bad, & refused on that ground alone to grant the certificate :—*Held* : the notice was sufficient, & the justices being wrong in holding it insufficient a *mandamus* must issue to command another hearing.—*R. v. OVER DARWEN JJ., Ex p. SLATER* (1878), 39 L. T. 444; *sub nom.* *R. v. BLACKBURN HUNDRED JJ.*, 42 J. P. 775.

*Annotation* :—*Folld.* *R. v. Blackburn JJ.* (1878), 43 J. P. 111.

**58. ——— Clerical error.]**—*Ex p. CLAYTON*, No. 63, *post*.

**59. Description of premises—Sufficiency of identification—Discretion of justices.]**—By 32 & 33 Vict. c. 27, s. 7, an appct. for a justices' certificate to sell by retail wine, etc., to be consumed off the premises, shall in his notice set forth a description of the situation of his house or shop :—*Held* : the sect. merely requires that the situation should be described in the notice in such a way that the house or shop can be identified; & it is in the discretion of the justices to permit, in the case of a house or shop situate in a small country town, a modification of description appropriate to large cities.—*R. v. PENKRIDGE JJ.* (1892), 61 L. J. M. C. 132; 66 L. T. 371; 56 J. P. 87; 8 T. L. R. 226, D. C.

**60. Description of signatory.]**—Appct. to licensing justices for a certificate under 32 & 33 Vict. c. 27, authorising the grant to him of a license to sell by retail beer to be consumed off his premises, under Beerhouse Act, 1840 (c. 61), was already the holder of a certificate & additional license for the same purpose under Revenue Act, 1862 (c. 33). In the notice required by sect. 7 of the first-mentioned Act, he had set forth his name & address, & the situation of his shop, but merely stated his intention to apply for a certificate to sell by retail beer to be consumed off the premises. The justices refused a certificate, on the ground that the notice was insufficient. Upon a rule for *mandamus* :—*Held* : appct. under the circumstances was entitled to the certificate he applied

*MITTEK* (1893), 12 N. Z. L. R. 721.—N.Z.

### PART III. SECT. 2, SUB-SECT. 1.—A. (a) ii.

**50 i. From when time computed—Day of actual hearing.]**—An interval of twenty-one days must elapse between the publication in a newspaper of an

intention to apply for a license, & the day on which the application is to be made.—*McLEOD v. HAY* (1887), 5 N. Z. L. R. 481 (S. C.).—N.Z.

**50 ii. ———.]**—*PARAMENA ONE v. HAYLOCK LICENSING COM-*

### PART III. SECT. 2, SUB-SECT. 1.—A. (a) v.

**57 i. Whether strict accuracy necessary.]**—*Re WAIPAWA LICENSING DISTRICT* (1889), 7 N. Z. L. R. 735.—N.Z.

*Sect. 2.—Justices' licenses: Sub-sect. 1, A. (c) v. (d), R. & C.; sub-sect. 2, A. (a) & (b) i. & ii.]*

for.—*R. v. OVER DARWEN JJ., Ex p. GIBSON (1878), 39 L. T. 444, 445; sub nom. R. v. BLACKBURN HUNDRED JJ., 43 J. P. 111.*

61. —.]—Notice of application for a shop-keeper's retail wine license signed by appt. as secretary for a limited co. is not bad because appt. does not so describe himself in the body of the notice.—*R. v. LYON, Ex p. SKINNER (1898), 62 J. P. 357; 14 T. L. R. 357, C. A.*

62. Discrepancy in notices.—*R. v. HAYHURST, Ex p. MACHIN (1897), 61 J. P. Jo. 88, D. C.*

63. —.]—Party served not misled.]—Where there is a clerical error in a notice of intended application for a new license, the licensing justices may overlook it. Accordingly, where an application was intended to be made, & was in fact made, for an off beer & cider licence, & all the notices save the notice served on the superintendent of police, spoke of an off beer & cider licence, while the notice served on the superintendent of police spoke of an on beer & cider licence, & it appeared that the superintendent of police was not misled, the justices had, notwithstanding the discrepancy, jurisdiction to entertain the application, & in their discretion to grant an off license.—*Ex p. CLAYTON (1899), 63 J. P. 788, D. C.*

#### (d) Deposit of Plans.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 15 (1) (d).

#### B. At Adjourned Meeting.

64. Application made in same circumstances—*Res judicata.*—Although a beerhouse keeper may apply for a renewal of his certificate in the first instance to the justices at their adjourned meeting, he cannot, upon being refused a certificate at the original meeting, renew his application at the adjourned meeting.

*R.*, who was a beerhouse keeper, applied at the original licensing meeting for a certificate, when he was unexpectedly met with an opposition, on the ground that his house was frequented by prostitutes, whereupon the justices refused his certificate. He thereupon gave fresh notices, & again applied for a certificate at the adjournment day, with evidence to rebut the charge, when the justices refused to hear his application, on the ground that they had heard & adjudicated at the former meeting.—*Held*: they were justified in their refusal.—*Ex p. RUSHWORTH (1869), 23 L. T. 120; 34 J. P. 676.*

*Annotations*:—*Expld. R. v. West Riding of Yorkshire JJ., Ex p. Drake (1869), 10 B. & S. 840. Refd. R. v. Kirkdale Division of Lancaster JJ. (1876), 45 L. J. M. C. 36.*

65. Application made in different circumstances—*Different applicant.*—*R. v. WEST RIDING JJ., DRAKE'S CASE, No. 50, ante.*

66. —.]—Defective qualification rectified.]—Appt., a grocer, applied at the general annual licensing meeting in Aug. for a certificate to sell spirits under 35 & 36 Vict. c. 94, s. 68, by retail off his premises. The application was refused, on the ground that he did not hold a wholesale dealer's excise licence. He took out this licence, gave fresh notices, & applied again for a certificate at the adjourned sessions in Sept. The magistrates refused the application on the ground that it had already been disposed of & could not be re-heard.—*Held*: on the authority of *R. v. West Riding Justices, Drake's Case, No. 50, ante*, the second application ought to be heard, as it was not

concluded by the previous decision.—*Ex p. MAUGHAN (1875), 1 Q. B. D. 49; 33 L. T. 603; sub nom. R. v. KIRKDALE DIVISION OF COUNTY OF LANCASTER JJ., 45 L. J. M. C. 36; 40 J. P. 39; 24 W. R. 205.*

67. —.]—Different license applied for.]—*R. v. ARMSTRONG, ETC. JJ., Ex p. DUFFY, No. 93, post.*

68. Original notice defective—Application after fresh notice.]—*R. v. CAULFIELD, ETC. JJ. (1882), 46 J. P. Jo. 756, D. C.*

Personal attendance of applicant.]—*See Nos. 99, 199, post.*

Notice to attend.]—*See Sub-sect. 2, A. (c), post.*

#### C. At Transfer Sessions.

See, now, Licensing (Consolidation) Act, 1910 (c. 24), ss. 11, 22 (1), 25 (3), 27.

69. Sufficiency of notice—New licensee.]—When a license is applied for by a new tenant under 9 Geo. 4, c. 61, s. 14, on the ground that the occupier has removed therefrom & yielded up possession, s. 40 (2) of the Licensing Act, 1872 (c. 94), does not apply, & it is not necessary to give fourteen days' notice of the application; & there is nothing in the Acts to warrant the justices in requiring fourteen days' notice as a sufficient notice.—*R. v. HUGHES, [1893] 2 Q. B. 530; 58 J. P. 151; 42 W. R. 94; 37 Sol. Jo. 684; sub nom. R. v. HUGHES, ETC. LIVERPOOL JJ., Ex p. DONELAN, 62 L. J. M. C. 150; 5 R. 518; sub nom. Re LIVERPOOL BEERHOUSE LICENCE APPLICATION, 11 T. L. R. 618, D. C.*

*Annotation*:—*Refd. R. v. Bath Licensing JJ., Ex p. Splers & Pond (1908), 72 J. P. 356.*

70. —.]—*A.*, the holder of a publican's country license, got notice to quit on Sept. 29, but before that date he got his license renewed, & refused to quit. The landlord expelled *A.* by force on Oct. 8, & *J.* entered into possession. At a special transfer sessions on Oct. 27, though *J.* had given no notices, the justices granted to *J.* a license under 9 Geo. 4, c. 61, s. 14. On *certiorari* to quash the license:—*Held*: (1) a *certiorari* being matter of discretion, it would not be granted, as *A.*'s object seemed to be to blackmail his landlord; (2) as *A.* did not apply for the transfer, no notice was required by *J.* when he applied under 9 Geo. 4, c. 61, s. 14; *Semble*: as no sale of liquor had taken place under *A.*'s renewal license, *J.* was in strictness bound by the proviso in 9 Geo. 4, c. 61, s. 14, to give the same notices as for a new license.—*R. v. GROVE, ETC. WILTSHIRE JJ. (1893), 57 J. P. 454; 9 T. L. R. 185, D. C.*

*Annotation*:—*As to (2) Consd. R. v. Bath JJ., Ex p. Splers & Pond (1908), 99 L. T. 54.*

71. —.]—The licensee of certain licensed premises, having had a renewal of such license refused before the expiration of such license on Apr. 5, 1907, removed from & yielded up possession of such premises to the owners. On Feb. 21, 1908, the premises being then closed, an application was made for the grant of a license under 9 Geo. 4, c. 61, s. 14. No notice of the intended application had been given in accordance with the proviso to that sect., but notice pursuant to Licensing Act, 1872 (c. 94), s. 40 (2), had been duly given:—*Held*: that notice was sufficient, & no notices were necessary under 9 Geo. 4, c. 61, s. 14.—*R. v. BATH JJ., Ex p. SPIERS & POND, LTD. (1908), 99 L. T. 54; 72 J. P. 356, D. C.*

72. —.]—New premises.]—*R. v. NICHOLSON, No. 531, post.*

See, now, Licensing (Consolidation) Act, 1910 (c. 24), s. 25 (3).

## SUB-SECT. 2.—OBJECTION TO APPLICATION.

## A. At Annual or Adjourned Meeting.

## (a) Who may Object.

73. Member of public.]—BOULTER v. KENT JJ., No. 548, *post*.

— Before confirming authority.]—See No. 368, *post*.

74. Licensing justices.]—R. v. FARQUHAR, No. 117, *post*.

75. —.]—R. v. MERTHYR TYDVIL JJ., No. 112, *post*.

76. —.]—R. v. ANGLESEA JJ., No. 92, *post*.

77. —.]—BAXTER v. LECHE, No. 122, *post*.

78. —.]—R. v. KINGSTON JJ., *Ex p.* DAVEY, No. 103, *post*.

79. —.]—R. v. HOWARD, ETC., FARNHAM LICENSING JJ., No. 355, *post*.

— Disqualification as objector from hearing cause.]—See Part IV., Sect. 2, sub-sect. 3, *post*.

— Whether notice of objection necessary.]—See No. 545, *post*.

— Adjournment of hearing in default of notice.]—See Sect. 2, sub-sect. 2, A. (f), *post*.

## (b) Notice of Objection.

## i. Necessity for Notice.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 16 (3).

80. General rule.]—The jurisdiction of justices as regards the refusal of renewal of off beer licenses under the Licensing Acts, 1872 (c. 94), s. 42, & 1874 (c. 49), s. 26, & 45 & 46 Vict. c. 34, can only be exercised provided appct. for renewal has been served with notice of objection, & other requirements in the first two enactments above stated have been complied with.—R. v. GEPP, ETC. ESSEX JJ. (1882), 46 J. P. 761, D. C.

81. —.]—GASCOYNE v. RISLEY, No. 351, *post*.

82. Objection by justices—Adjournment in default of notice.]—RUDDICK v. LIVERPOOL JJ., No. 545, *post*.

83. Before objection entertainable.]—Justices having refused the renewal of a license without hearing any sworn evidence, & having listened to an opposition of which seven days' notice had not been given under Licensing Act, 1872 (c. 95), s. 42, & without adjourning the ct.:—*Held*: the whole proceedings were irregular, & allowed the appeal & renewed the license.—DENT v. CHRISTCHURCH JJ. (1881), 45 J. P. 816.

84. Before reference to compensation authority.]—(1) At an adjournment of the general annual licensing meeting the renewal of an existing on license was objected to on the ground that the licensed house was not required for the needs of the neighbourhood. An inspector of police gave evidence on oath as to the number of licensed houses within a short distance of the house in question, the amount of population, & the character of the neighbourhood. The license holder had been served with notice to attend, & was present, but called no evidence. The justices had been supplied with plans of all the licensed houses in the district, & were acquainted

with the locality & accommodation of the house in question & of the other licensed houses in the neighbourhood, & acting upon the evidence & upon their own knowledge, they referred the question of the renewal of the license to quarter sessions, with their report thereon:—*Held*: there was evidence upon which the justices could form the opinion that the question of the renewal of the license required consideration, & refer the matter to quarter sessions under Licensing Act, 1904 (c. 23), s. 1 (2).

(2) Licensing justices cannot refer to quarter sessions, under Licensing Act, 1904 (c. 23), s. 1 (2), the question of the renewal of an existing on license if no notice of objection has been given to the license holder, & he has not been given the opportunity of attending at the hearing of his case before the justices & of tendering evidence.

(3) Where the ground of objection to the renewal of a license is that the licensed house is not required for the needs of the neighbourhood, the justices must have some evidence on oath that it is not so required before they can form the opinion that the question of the renewal requires consideration on that ground. It is not necessary, however, in all cases, that they should have before them detailed evidence differentiating the house in question from the other licensed houses in the neighbourhood; nor are they bound in forming their opinion to exclude their own knowledge of the locality upon such questions as the character of the neighbourhood, the amount of population, & the habits of the inhabitants.—R. v. TOLHURST, *Ex p.* FARRELL, R. v. COX, *Ex p.* WEST, [1905] 2 K. B. 478; 74 L. J. K. B. 652; 93 L. T. 70; 69 J. P. 308; 53 W. R. 619; 21 T. L. R. 533; 49 Sol. Jo. 515, D. C.

*Annotations:—As to (1) Consd.* Dartford Brewery Co. v. County of London Quarter Sessions, [1906] 1 K. B. 695; R. v. Cheshire Licensing JJ., *Ex p.* Kay's Atlas Brewery, [1906] 1 K. B. 362. *Reid.* Howe v. Newington Licensing JJ., [1907] 2 K. B. 340. *As to (2) Reid.* Dartford Brewery Co. v. County of London Quarter Sessions, [1906] 1 K. B. 695; Morgan v. Aylesford Licensing JJ., [1906] 1 K. B. 437. *As to (3) Consd.* Dartford Brewery Co. v. County of London Quarter Sessions, [1906] 1 K. B. 695. *Reid.* R. v. Drinkwater, etc., Coventry JJ., *Ex p.* Conway (1905), 70 J. P. 1; R. v. Johnson, etc., Leicester JJ., *Ex p.* Whitmore (1906), 71 J. P. 59; Colchester Brewing Co. v. Tendring Licensing JJ., [1915] 3 K. B. 48. *Generally, Menid.* R. v. Chester Licensing JJ. & Compensation Authority, *Ex p.* Bennion (1914), 111 L. T. 575.

## ii. Persons entitled to Notice.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 16 (3), 88.

Licenseses.]—See generally, Sub-sect. 2, A. (b) i., *ante*.

85. — Temporary licensee.]—Justices refused to grant transfer & renewal of license, on the ground that appct. was not a *bond fide* resident occupier. Verdict of jury in favour of prosecutor on *mandamus* set aside.

It was said that by virtue of several Acts of Parliament he [appct.] had a vested right to a transfer & renewal of the license, but that did not make him a licensed person. Therefore it was not necessary that notice of opposition to the renewal

## PART III. SECT. 2, SUB-SECT. 2.—A. (a).

731. Member of public.]—LANGERMAN v. JOHANNESBURG & KRUGERSDORP LIQUOR COMMISSION MEMBERS (1897), 4 O. R. 137.—S. AF.

8. Licensing inspector.]—R. v. BLACKALL LICENSING COURT, *Ex p.* CHICAM (1919), 13 Q. S. R. 4.—AUS.

9. Nearest householders.]—CROTHERS v. MONTEITH (1896), 11 Man.

L. R. 373.—CAN.

p. Law-agent acting under a *mandate*.]—GOODALL v. BILSLAND, [1909] 8 C. 1152; 46 So. L. R. 555; 1 S. L. T. 376.—SCOT.

9. Person peculiarly interested.]—Re MAIL, TROTTER & Co. (1903), 24 N. L. R. 433.—S. AF.

r. — Landlord.]—GOOD v. LADYSMITH LICENSING BOARD (1905), 26 N. L. R. 551.—S. AF.

t. — Trade competitor.]—The interest of a competitor in the liquor trade is not such a pecuniary interest as would entitle him, as an objector, to appeal from the decision of a licensing board, in respect of an application for a license made by another person.—Re DURBAN PUBLIC HOUSE TRUST (1905), 26 N. L. R. 175.—S. AF.

s. — —.]—RAW & Co. v. PIETERMARITZBURG LICENSING BOARD (1905), 26 N. L. R. 662.—S. AF.



*Sect. 2.—Justices' licenses: Sub-sect. 2, A. (b) ii., iii., iv. & v., & (c).]*

should be given (LORD ESHER, M.R.).—*R. v. PIREHILL NORTH LICENSING JJ.* (1886), 2 T. L. R. 387, C. A.; *affg.* (1885), 49 J. P. 453, D. C.

86. ————]—A person holding an interim authority under Licensing Act 1842 (c. 44), s. 1, to carry on business is not a "licensed person" applying for a renewal of "his" licence, within Licensing Act, 1872 (c. 94), s. 42, & is therefore not entitled to the notice therein mentioned.

Where a case is stated under Summary Jurisdiction Act, 1879 (c. 40), s. 33, as to refusal of a license, the superintendent of police who had opposed the license, & to whom notice of appeal had been given:—*Held*: to be rightly constituted resp.

The term "renewal" used in the judgment in *R. v. Liverpool JJ.*, No. 319, *post*, with reference to this sect. appears to me not an inapt term to use in speaking of an application for the continuance to the occupier of premises of the license held by a former occupier, though no doubt the term "grant" would have been the strictly correct legal term, & is the term used in the sect. I do not think, however, that it would be right to call such a grant a renewal of "his," i.e. appct.'s license (LORD ESHER, M.R.).—*PRICE v. JAMES*, [1892] 2 Q. B. 428; 61 L. J. M. C. 203; 67 L. T. 543; 57 J. P. 148; 41 W. R. 57; 8 T. L. R. 682; 36 Sol. Jo. 624, C. A.

*Annotations*:—*Consd.* *R. v. Bristol Licensing JJ.*, *R. v. Gloucestershire JJ.* (1893), 68 L. T. 225. *Expld.* *Symons v. Wedmore*, [1894] 1 Q. B. 401. *Refd.* *R. v. London JJ.*, (1895) 1 Q. B. 616; *R. v. Kent JJ.* (1896), 65 L. J. M. C. 171; *Jones v. Hatherton* (1916), 115 L. T. 932. *Mentd.* *R. v. West Riding, Yorkshire JJ.*, *Ex p. Hill* (1895), 59 J. P. 308.

87. ———— Full transfer before application.]

—Licensing justices at their general annual licensing meeting took objection in ct. to the renewal of a license, & they adjourned the hearing of the application to the adjourned meeting. Notice of objection was duly served on the license holder, stating the grounds of objection, & requiring him to attend at the adjourned meeting. The license holder afterwards quitted the house, & a temporary authority to sell upon the premises was granted to L., who continued to sell under that authority. On the morning of the adjourned meeting the license was duly transferred to L., under 9 Geo. 4, c. 61, ss. 4, 14, & after such transfer had been granted, L. then & there applied for the renewal of the license. No notice of objection had been served on L., but upon the hearing of his application for renewal the justices heard evidence in support of the objection served on the previous holder of the license, & refused the renewal:—*Held*: as L. had got a transfer of the license or the grant of a new license before his application for renewal, he was, within the meaning of Licensing Act, 1872 (c. 94), s. 42, a "licensed person" applying for the renewal of his license, & therefore, the objection served on the previous license holder could not be used against him.—*BLENCOWE & Co., LTD. v. HATHERTON (LORD), ETC. JJ.* (1907), 96 L. T. 817; 71 J. P. 210, D. C.

*Annotations*:—*Refd.* *R. v. Chester Licensing JJ.*, *Ex p. Bennion*, [1914] 3 K. B. 349; *Jones v. Hatherton*, [1917] 2 K. B. 412.

88. ————]—The Licensing (Consolidation) Act, 1910 (c. 24), s. 16 (3), provides that, "subject to the provisions of this section, the

licensing justices shall not, where the holder of a justices' license applies for the renewal of his license, entertain any objection to . . . the renewal thereof unless written notice of an intention to oppose the renewal of the license, stating in general terms the grounds on which the renewal is opposed, has been served on the holder thereof not less than seven days before the commencement of the general annual licensing meeting." More than seven days before the general annual licensing meeting notice of intention to oppose the renewal of the justices' license in respect of licensed premises was served on J. who was carrying on the business on the premises under a protection order. Before the general annual licensing meeting the license was duly transferred to J., & at that meeting he applied for the renewal of his license:—*Held*: service of the notice upon J., who was the holder of the license when the application for renewal was made but not when the notice of opposition was served was not service on "the holder thereof" within the meaning of Licensing (Consolidation) Act, 1910 (c. 24), s. 16 (3).

The case of *R. v. Salford Hundred Justices*, No. 500, *post*, shows that the indemnity against costs to which the licensing justices are entitled under Licensing (Consolidation) Act, 1910 (c. 24), s. 32, extends to & includes costs ordered to be paid by licensing justices to other parties, & that, whether the costs relate to *certiorari* or *mandamus* or are the costs of a special case, they are to be regarded as costs in the appeal. Under these circumstances we are of opinion that in the present case the practice should be followed, & that the licensing justices should be ordered to pay costs here & below, they being entitled to obtain repayment by virtue of Licensing (Consolidation) Act, 1910 (c. 24), s. 32 (SWINFEN EADY, L.J.).—*JONES v. HATHERTON*, [1917] 2 K. B. 412; 86 L. J. K. B. 1206; 116 L. T. 657; 81 J. P. 101; 61 Sol. Jo. 383, C. A.

iii. Time for Notice.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 16 (3).

89. Before adjourned meeting—Rehearing after mandamus.]—A licensed person applied at the general annual licensing sessions for a renewal of his license. No notice of intention to oppose the renewal was given, but the licensing justices refused the application. A *mandamus* issued commanding the justices to hold an adjournment of the general annual licensing meeting, & to hear & determine the merits of the application or show cause to the contrary. The justices held such adjourned meeting, before which notice of the objection was duly given to appct. The justices, at the adjourned meeting, gave effect to the objection, & refused the renewal. The justices returned that they had heard & determined the matter of the application:—*Held*: on the argument of a point of law raised on the reply to the return, the justices were not bound to grant the renewal at the adjourned meeting, but had jurisdiction to entertain the objection & refuse the application, & therefore the return was sufficient.—*R. v. HOWARD* (1889), 23 Q. B. D. 502; 60 L. T. 900; 53 J. P. 454; 37 W. R. 617; 5 T. L. R. 505.

*Annotations*:—*Consd.* *R. v. Anglessea JJ.* (1895), 65 L. J. M. C. 12; *R. v. Kingston JJ.*, *Ex p. Davey* (1902), 86 L. T. 589. *Refd.* *Daykin v. Fasker*, [1894] 2 Q. B. 373.

PART III. SECT. 2, SUB-SECT. 2.—A. (b) III.

b. Sufficient time for preparation of defence.]—*STRANGE v. STRANGE*, [1908] V. L. R. 187.—AUS.

c. ————]—*FABER v. FRASER* (1866), 4 N. Z. L. R. 324 (S. C.).—N.Z.

**90. Before annual general meeting—Adjourned meetings included therein.]**—By Licensing Act, 1872 (c. 94), s. 42 (2), no objection to the renewal of a license shall be entertained unless written notice of an intention to oppose the renewal has been served on the holder "not less than seven days before the commencement of the general annual licensing meeting."

On Aug. 17, 1891, a licensed victualler was served with a written notice of opposition to the renewal of his license. The general annual licensing meeting for the petty sessional division was fixed for Aug. 24; but the adjourned licensing meeting for that part of the division in which his house was situate, & at which he would in the ordinary course apply for the renewal of his license, was fixed for Sept. 18:—*Held*: the notice was served in time, since the adjourned licensing meeting on Sept. 18 was "the general annual licensing meeting" for that part of the division in which the house was situate.—*R. v. ANGLESEY JJ.*, [1892] 1 Q. B. 850; 56 J. P. 440; *sub nom. R. v. ANGLESEY JJ.*, *Ex p. WILLIAMS*, 61 L. J. M. C. 140, D. C.

**91. ———.]**—*R. v. ALTRINCHAM, CHESHIRE JJ.* (1894), 11 T. L. R. 3, D. C.

**92. ——— Unless license granted in meantime.]**—(1) Upon an application for the renewal of a license the justices, no objection to the renewal having been made, adjourned the consideration of the renewal. Before the determination of the general annual meeting, that is, between the commencement of it & the adjournment, notice of objection was served on appct. With the notice of objection the grounds of objection were stated, & appct. was required to attend on the day when the matter was to be heard. She did so attend with her solr. The justices heard the application & refused the renewal. Upon an application for a *mandamus* to the justices to hear and determine the application for the renewal:—*Held*: the *mandamus* must be refused, as the justices had heard & determined the matter. They had a right if they thought fit to adjourn the consideration of the renewal, & the general annual licensing meeting continued for all purposes of granting or refusing licenses from the moment of its commencement until the last moment of the adjourned meeting or meetings as if they formed one single day, & an objection to a license might be made at any time during them, unless in the meantime the license had been granted.

(2) There is no objection to licensing justices meeting in their private room, not to receive objections made to them by others, but to discuss among themselves the expediency of adjourning for future consideration particular licenses as to which they feel that discussion is necessary; but the instant a complaint is formally made appct. ought to have notice of it & a full opportunity to meet it.

(3) *Semble*: under the proviso to the Licensing Act, 1872 (c. 94), s. 42, the justices cannot themselves be objectors, but if they may be objectors within the meaning of the proviso they must make their objection in open ct.—*R. v. ANGLESEA JJ.* (1895), 65 L. J. M. C. 12; 12 T. L. R. 4; 40 Sol. Jo. 35; 15 R. 614; *sub nom. R. v. ANGLESEA JJ.*, *Ex p. WILLIAMS*, 59 J. P. 743.

*Annotations*.—As to (1) *Fold.* *R. v. Armstrong, etc., JJ.*, *Ex p. Duffy* (1896), 65 L. J. M. C. 35. As to (2) *Beld.* *R. v. Howard*, [1902] 2 K. B. 363. As to (3) *Consid.* *R. v. Howard*, [1902] 2 K. B. 363.

**93. ———.]**—An appct. for a new license to sell wine & beer to be consumed on or off the premises gave notice of his application for a general annual licensing meeting to be held on Aug. 26. He did not apply on that day, but appeared at the adjourned general annual licensing meeting held on Sept. 30, & made his application. The justices refused the license, on the ground that they had no jurisdiction to grant it, & that appct. must be taken to have abandoned his notice by not applying on Aug. 26:—*Held*: the justices had jurisdiction to entertain the application, & the notice for the first day of the general annual licensing meeting held good for all adjournments. The meeting continued for all purposes from the moment of its commencement to the last moment of the adjourned meeting or meetings as if they formed a single day.—*R. v. ARMSTRONG, ETC. JJ.*, *Ex p. DUFFY* (1896), 65 L. J. M. C. 35; 12 T. L. R. 159; 40 Sol. Jo. 220, D. C.

**94. ——— Adjournment not for purpose of hearing objections.]**—Upon an application for a provisional license, the licensing justices announced that they were inclined to grant the license if certain alterations were made in the plans of the proposed building, & that they wished to take time to consider the question of monopoly value; they accordingly adjourned the general annual licensing meeting for a month. At the adjourned meeting certain persons appeared for the first time & asked to be heard in opposition to the grant of the licence. The justices refused to hear them:—*Held*: the justices were right.—*Ex p. FEARN & BOUCHER* (1905), 69 J. P. 177, C. A.

#### iv. Service of Notice.

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 108 (1).

**95. Personal service unnecessary.]**—Licensing Act, 1872 (c. 94), s. 42, provides that the justices shall not entertain any objection to the renewal of a license, unless written notice of an intention to oppose such renewal has been "served on" the holder not less than seven days before the commencement of the general annual licensing meeting.

A notice under the sect. need not be served personally on the holder of the license; therefore, where such a notice was left with a servant on the licensed premises & came to the hands of the holder of the license in due time:—*Held*: there had been sufficient service of such notice.—*Ex p. PORTINGELL*, [1892] 1 Q. B. 15; 61 L. J. M. C. 1; 65 L. T. 603; 56 J. P. 276; 40 W. R. 102; 8 T. L. R. 40; 36 Sol. Jo. 41, C. A.

#### v. On Adjournment in Default of Notice.

*See* Sub-sect. 2, A. (f), *post*.

#### (c) Sufficiency of Objection.

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 16 (3), (4).

**96. Grounds of objection—Whether must be stated—Objection in open court.]**—An objection to the renewal of a license made in open ct. on the general annual licensing meeting in a good "objection made" within proviso to Licensing Act, 1872 (c. 94), s. 42. Although neither the grounds nor the nature of the objection are stated by the objector & upon such an objection being

renewal of a license is objected to on the ground that "the bedrooms are insufficiently furnished" is a sufficient

**SECT. 2.—Justices' licenses: Sub-sect. 2, A. (f) ii. & iii., & B. Part IV. Sect. 1: Sub-sects. 1, 2 & 3.]**

Q. B. 224. *As to* (2) *Consd.* Ruddick v. Liverpool JJ. (1876), 42 J. P. 406. *Distd.* R. v. Eales, Eales v. Philpotts, etc., Devon JJ. (1880), 42 L. T. 735. *Consd.* R. v. Merthyr Tydvil JJ. (1885), 14 Q. B. D. 584. *Dbtd.* R. v. Angelsea JJ. (1895), 65 L. J. M. C. 12. *Consd.* Baxter v. Leche (1898), 79 L. T. 138; R. v. Kingston JJ., *Ex p.* Davey (1902), 86 L. T. 589. *Held.* R. v. Howard, [1902] 2 K. B. 363.

118. To be given by direction of justices—*Waiver of irregularity by applicant.*—WHIFFEN v. MALLING (OR MAIDSTONE) JJ., No. 478, *post*.

119. —Through clerk to justices.]—WHIFFEN v. MALLING (OR MAIDSTONE) JJ., No. 478, *post*.

120. —[—HARP v. STOKE-ON-TRENT LICENSING JJ., No. 116, *ante*.

121. —Through police superintendent.]—WHIFFEN v. MALLING (OR MAIDSTONE) JJ., No. 478, *post*.

122. —[—Appct. for renewal of a licence attended on the day fixed for the general annual licensing meeting & applied for the renewal. No notice to attend or notice of objection had been served upon appct. prior to that day, but at the meeting an objection was taken by the justices themselves, who thereupon adjourned the case, & more than seven days before the date of the adjourned meeting a written notice to attend by the authority & on behalf of the justices, was served upon appct., & a written notice of objection was served by objectors stating the grounds of objection, which included the objection taken by the justices, but this notice of objection did not purport to be served by the authority of the justices. The licensing justices heard the objections & refused to renew the license:—*Held*: (1) it was competent for the licensing justices under Licensing Act, 1872 (c. 94), s. 42 (2), to raise an objection themselves at the licensing meeting & then adjourn the case; (2) the notices served were sufficient under the sect., & the justices had jurisdiction at the adjourned meeting to refuse the renewal. Supposing that there was no written notice at all before the day of hearing, appct. could have done more than ask for an adjournment if objection were then made. There it would be the duty of the justices to do one of

two things, namely, either adjourn the case or refuse to hear the objection if it was brought too late, & go on with the hearing of the case without looking at the objection (KENNEDY, J.).—BAXTER v. LECHE (1898), 79 L. T. 138; 62 J. P. 630; 14 T. L. R. 352; 42 Sol. Jo. 430.

*Annotation*:—*As to* (1) *Held.* R. v. Howard, [1902] 2 K. B. 363.

“Cause personal to applicant.”—*See* No. 99, *ante*; No. 199, *post*.

**iii. Notice of Objection.**

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 16 (2), (4).

*Necessity for*—Where objection by justices.]—*See* No. 545, *post*.

123. Must set out grounds.]—R. v. EALES, EALES v. PHILPOTTS, ETC., DEVON JJ., No. 261, *post*.

124. Effect of want of—Further adjournment.]—DAKIN v. PARKER, No. 96, *ante*.

125. —[—BAXTER v. LECHE, No. 122, *ante*.

126. Need not be by direction of justices.]—BAXTER v. LECHE, No. 122, *ante*.

**B. At Special Sessions.**

*See* Licensing (Consolidation) Act, 1920 (c. 24), s. 87.

127. Person entitled to notice—Application by owner for temporary authority.]—(1) Where the occupier of a beerhouse has forfeited his license by being guilty of an offence under Licensing Act, 1874 (c. 40), s. 15, the grant by the petty sessions of an authority to the owner to carry on the business until the next special sessions for licensing purposes is in the discretion of the justices, under 4 Geo. 4, c. 16, ss. 1, 4, 14.

(2) The person applying for such authority is not entitled to notice under Licensing Act, 1872 (c. 94), s. 42, of the objections intended to be urged against his application.—R. v. MOORE (1881), 7 Q. B. D. 542; *sub nom.* R. v. HERTFORDSHIRE JJ., *Re* WROUGHTON, 50 L. J. M. C. 121; 45 J. P. 768, D. C. *Annotations*:—*Generally.* *Held.* *Ex p.* Filinn, [1899] 2 Q. B. 607. *Mentd.* R. v. London JJ., *Ex p.* Kerfoot (1896), 45 W. R. 58.

## Part IV.—Grant of Licenses.

**SECT. 1.—EXCISE LICENSES.**

**SUB-SECT. 1.—BY WHOM GRANTED.**

*See* Excise Licenses Act, 1825 (c. 81), s. 6; Refreshment Houses Act, 1860 (c. 27), s. 10; Finance (1909–1910) Act, 1910 (c. 8), s. 49; & generally, REVENUE.

**SUB-SECT. 2.—TO WHOM GRANTED.**

*See* Excise Licenses Act, 1825 (c. 81), ss. 22, 26, 27; Beerhouse Act, 1830 (c. 64), s. 2; Beerhouse Act, 1840 (c. 61), s. 7; Refreshment Houses Act, 1860 (c. 27), ss. 8, 22; Finance (1909–1910) Act, 1910 (c. 8), Sched. VI.; Licensing (Consolidation) Act, 1910 (c. 24), s. 23; Finance Act, 1910 (c. 35), s. 2.

**128. Person holding justices' license—Granted in accordance with statutory provision.]**

—(1) Licensing justices granted a new justices' on license without first estimating at a definite capital sum the monopoly value as defined by Licensing (Consolidation) Act, 1910 (c. 24), s. 14 (1) (a), but they attached to the grant certain conditions providing that the sum to be paid as monopoly value should be an annual sum representing a percentage of each year's gross takings from the sale of intoxicants:—*Held*: monopoly value as defined by Licensing (Consolidation) Act, 1910 (c. 24), s. 14 (1) (a), is a definite lump sum to be ascertained once for all; the justices had no jurisdiction to omit this preliminary step & to attach the above conditions to the grant of the license; & the license was not granted in accordance with the Act.

**PART IV. SECT. 1, SUB-SECT. 2.**

128 l. Person holding justices' license

—Granted in accordance with statutory provision.]—ARTHUR v. LORD ADVOCATE (1895), 22 R. (Ct. of Sess.) 382;

32 Sc. L. R. 289; 2 S. L. T. 498.—SCOT.

h. Wholesale license.]—*Held*: 11

(2) The comrs. of customs & excise having refused to grant a retail excise license to the holder of a justices' license granted as above stated:—*Held*: in the circumstances & having regard to the statutory duty imposed on the comrs. by Licensing (Consolidation) Act, 1910 (c. 24), s. 1, which provides that an excise license "shall not be granted except to a person who holds a justices' license granted in accordance with this Act," the comrs. were justified in their refusal.—*R. v. CUSTOMS & EXCISE COMRS.*, [1914] 2 K. B. 390; *sub nom. R. v. SUNDERLAND CUSTOMS & EXCISE COMRS.*, 83 L. J. K. B. 555; 12 L. G. R. 580; *sub nom. R. v. SUNDERLAND CUSTOMS & EXCISE COMRS.*, *Ex p. JENKINS*, 110 L. T. 527; *sub nom. R. v. CUSTOMS & EXCISE COMRS.*, *Ex p. JENKINS*, 78 J. P. 185; 30 T. L. R. 298, C. A.; *affg.*, [1913] 3 K. B. 483, D. C.

*Annotations*.—*As to* (1) *Consol. R. v. Taylor*, *R. v. Amendt*, [1915] 2 K. B. 593. *Refd.* Customs & Excise Comrs. v. Curtis (1913), 83 L. J. K. B. 931.

#### SUB-SECT. 3.—IN RESPECT OF WHAT PREMISES GRANTED.

See Beerhouse Act, 1840 (c. 61), ss. 1, 4, 18; Licensing Act, 1872 (c. 94), s. 46.

**129. What amounts to requisite value—Dwelling house communicating with shop.**—Appl. occupied a house & shop, which were together rated in the sum of £15; the house & shop were attached to & communicated with each other, & the shop was used for the sale of groceries & beer:—*Held*: the shop was part of the premises occupied with the house within Beerhouse Act, 1840 (c. 61), s. 1, & that in ascertaining the ratable rate of the house the value of the shop might be taken into account.—*GARETTY v. POTTS* (1870), L. R. 6 Q. B. 86; *sub nom. GARATTY v. POTTS*, 40 L. J. M. C. 1; 23 L. T. 554; 35 J. P. 168; 19 W. R. 127.

**130. How area ascertained—Parish containing several townships—Larger area considered.**—Under Beerhouse Act, 1840 (c. 61), s. 15, beer-houses in the metropolis may be kept open until twelve o'clock at night; in places containing two thousand five hundred inhabitants they may be kept open until eleven; but in places with a less population must be closed at ten o'clock.

A. obtained a license to sell beer in respect of a house situate in Holmfirth, which comprised parts of three townships, W., C., & U., the two former being in the parish of K. & the latter in the parish of A. Each township maintained its own poor. Holmfirth contained upwards of two thousand five hundred inhabitants, but was not a township, & had no local rights to itself, being an aggregate of houses & inhabitants which had received a separate name. The license stated that the house was to be closed at ten o'clock, but A. having kept it open until eleven an information was laid against him for keeping it open later than the statute allowed him. The justices having doubts on the construction of the statute refused to adjudicate. A rule having been obtained calling on them to adjudicate:—*Held*: Holmfirth was a place containing more than two thousand five hundred inhabitants within the meaning of the word "place," & therefore A. was entitled to keep his house open until eleven o'clock. The fact of the license stating that the house was to be closed at ten o'clock

was of no avail to support the information, the information against deft. being for keeping open his house after ten o'clock "contrary to the statute," & not for infringing the license.—*R. v. CHARLESWORTH, ETC.*, WEST RIDING J.J. (1851), 2 L. M. & P. 117; 20 L. J. M. C. 181; 15 J. P. 163; 15 Jur. 178; 4 New Sess. Cas. 554; *sub nom. Re HEARNshaw*, *R. v. CHARLESWORTH*, 16 L. T. O. S. 395.

*Annotations*.—*Consol.* Scott v. Washington (1865), 13 W. R. 939; Washington v. Scott (1865), 6 B. & S. 617; Smith v. Redding (1866), L. R. 1 Q. B. 489. *Fold.* Rice v. Sloc (1872), L. R. 7 C. P. 378. *Mentd.* R. v. Wilson (1851), 17 L. T. O. S. 147; R. v. Ingham (1853), 17 Q. B. 884; R. v. Dayman (1857), 29 L. T. O. S. 125; R. v. Paynter (1857), 7 E. & B. 328; *Ex p. Westminster District Board of Works* (1857), 21 J. P. 133.

**131.** ————]—A house was situate in & rated, at less than £15 annual value, to the poor rate of a township, which separately maintained its own poor, & had a population under ten thousand, but the township formed part of a very extensive parish which had a population exceeding that number:—*Held*: the population of the larger district & not that of the rating area governed the amount of rating, & that the house being situate in a parish of which the population exceeded ten thousand, rating under £15 was insufficient.—*PRESTON v. BUCKLEY* (1870), L. R. 5 Q. B. 391; 39 L. J. M. C. 105; 22 L. T. 653; 35 J. P. 38; 18 W. R. 1104.

*Annotation*.—*Refd.* Rice v. Sloc (1872), L. R. 7 C. P. 378.

**132.** ————] **Collection of houses part of parish containing more than two thousand five hundred inhabitants.**—A "place" to be within Beerhouse Act, 1840 (c. 61), s. 15, must be a place of the same kind as those mentioned before it in the sect., "parish, etc.," & a mere aggregation of houses, though separate from other houses, & known by a distinct name, is not such a place. *R. v. Charlesworth, etc. West Riding J.J.*, No. 130, ante, overrd.—*WASHINGTON v. SCOTT* (1865), 6 B. & S. 617; 29 J. P. 598; 122 E. R. 1323; *sub nom. SCOTT v. WASHINGTON*, 13 W. R. 939.

*Annotation*.—*Consol.* Smith v. Redding (1866), L. R. 1 Q. B. 489.

**133.** ————]—Appl.'s house was within a hamlet having less than two thousand five hundred inhabitants, but the parish to which the hamlet belonged had more than that number:—*Held*: applt. had the privilege of keeping his house open till eleven; for though the hamlet might be a "place" within the statute, the house was still within "a parish" with a population of more than two thousand five hundred.—*SMITH v. REDDING* (1866), L. R. 1 Q. B. 489; 6 B. & S. 621; 35 L. J. M. C. 202; 14 L. T. 358; 30 J. P. 518; 12 Jur. N. S. 618; 122 E. R. 1324.

*Annotations*.—*Appl.* Windsor v. Jeffery (1866), 6 B. & S. 628. *Extd.* Preston v. Buckler (1870), 39 L. J. M. C. 105. *Refd.* R. v. L. G. Board (1873), L. R. 8 Q. B. 227.

**134.** ————] **Parish partly situate within borough.**—W. had an alehouse duly licensed in a parish which had a population above two thousand five hundred. Part of the parish was situated within a borough, & W.'s house was in the part of the parish situated without the borough, & not having a population of two thousand five hundred:—*Held*: W.'s house, being in a parish having two thousand five hundred population, he was entitled to keep open till 11 p.m.—*WINDSOR v. JEFFERY* (1866), 6 B. & S. 628; 30 J. P. 552; 122 E. R. 1327.

**135.** ————] **"Place" consisting of two parishes.**—T. is divided into two parishes, viz. East T. &

applied with, & applicant certified as a fit & proper person, & no reason against

granting the license is suggested, the comrs. are bound to grant it, as there is no limitation as to the number of

wholesale licenses.—*Re CAROBELLA* (1906), 6 W. L. R. 765.—*CAN.*

**SECT. 1.—Excise licenses: Sub-sect. 3. Sect. 2**  
**sects. 1, 2 & 3.]**

West T. The former contains less than two thousand five hundred inhabitants but the two together contain more than that number:—**Held:** T. was a "place" in which a beershop might lawfully be kept open until 11 p.m. under the provisions of Beerhouse Act, 1840 (c. 61) s. 15, & therefore appt., whose house was situated in East T., was not liable to be convicted under that section for keeping it open after 10 p.m.—**RICE v. SLEE** (1872), L. R. 7 O. P. 378; 36 J. P. 454.

**SECT. 2.—JUSTICES' LICENSES.**

**SUB-SECT. 1.—THE LICENSING DISTRICT.**

See Licensing (Consolidation) Act, 1910 (c. 24) s. 2.

**136. What justices have jurisdiction—Island in Channel—Justices of any division of nearest county.]—H.** had a house in an island in the Bristol Channel, & had for thirty eight years without having a justices' or excise license, sold intoxicating liquors to all visitors there, no other house being in the island. He was summoned for selling without a license:—**Held:** the island was part of the county to which it was nearest, & the licensing justices of any division of the county had jurisdiction to grant the ordinary licenses to sell intoxicating liquors there.—**WRIGHT v. HARRIS** (1885), 49 J. P. 628, D. C.

**137. Transfer of district to another county—Under County Police Act, 1840 (c. 88), s. 2—Whether affecting licensing jurisdiction.]—The transfer of an outlying district of a county to another county under above sect. does not effect a transfer of the licensing jurisdiction in that district to the justices of the other county.—R. v. WORCESTERSHIRE JJ., R. v. WARWICKSHIRE JJ., [1899] 1 Q. B. 59; 68 L. J. Q. B. 109; 79 L. T. 393; 62 J. P. 830; 47 W. R. 134; 15 T. L. R. 45; 48 Sol. Jo. 60; 19 Cox, C. C. 198, C. A.**

**SUB-SECT. 2.—MEETINGS FOR GRANTING LICENSES.**

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 9, 10, 22.

**138. Notice of meeting—Publication.]—R. v. JAMES** (1848), 11 L. T. O. S. 69; 12 J. P. Jo. 262.

**139. Hearing of adjourned application—To date beyond statutory period—Mandamus.]—At the general licensing meeting in 1884, the justices refused to renew M.'s licence for an inn. The house was shut up, then sold in Jan. to J., who in July, 1885, obtained a mandamus to hear the**

application. The justices, in obedience to the rule, reheard the case in Jan. 1886, & granted the renewal for the year ending Oct. 1885, but refused to renew the license for the then current year ending Oct. 1886, as no application had been made at the general meeting in Sept. 1885:—**Held:** though the justices had no power to renew the license for 1886, yet the ct. would give them power by making absolute a second rule for a mandamus to hear the application.—**R. v. MISKIN** **HIGHER LICENSING JJ.** (1886), 50 J. P. 247, D. C.

**140. ———.]—R. v. DENBIGH JJ., Ex p. FISHER** (1895), 40 Sol. Jo. 12; 59 J. P. Jo. 708, D. C.

**Annotations:—Distd. Webber v. Birkenhead JJ.** (1897), 61 J. P. 664. **Expld. R. v. Groom, Ex p. Cobbold,** [1901] 2 K. B. 157.

**141. ——— Pending appeal by applicant against conviction.]—The licensing justices have no power to adjourn the hearing & determination of an application for the renewal of a license over Sept. 30, to await the determination of an appeal pending to the next quarter sessions against a conviction of the licensed person making the application for renewal, where due notice of objection on the ground of such conviction has been given to the appt. before the adjournment of the general licensing meeting at which the application for renewal is made & the objection taken.—WEBBER v. BIRKENHEAD JJ.** (1897), 61 J. P. 664.

**Annotation:—Reid. R. v. Groom, Ex p. Cobbold,** [1901] 2 K. B. 157.

**142. ——— To enable applicant to give fresh notices.]—Where a full license to sell intoxicating liquors, under 9 Geo. 4, c. 61, is applied for at an adjourned general annual licensing meeting held in Sept., the justices have no power to adjourn that meeting to a date after the end of Sept. in order to allow appt., who has not given sufficient notice of his application, to give fresh notices.—R. v. GROOM, Ex p. COBBOLD,** [1901] 2 K. B. 157; 70 L. J. K. B. 636; 84 L. T. 534; 65 J. P. 452; 49 W. R. 484; 17 T. L. R. 433; 45 Sol. Jo. 448, D. C.

**Annotations:—Folld. R. v. Richmond Confirming Authority, Ex p. Howitt,** [1921] 1 K. B. 248. **Reid. R. v. Butt, Ex p. Brooke** (1922), 36 T. L. R. 537.

**143. ——— Adjournment owing to press of business.]—If licensing justices, who are unable to dispose of the licensing business at the general annual licensing meeting or the statutory adjournment thereof within one month afterwards, hold a further adjourned meeting for the purpose of disposing of the business then before them but remaining undisposed of they have no jurisdiction at such further adjourned meeting to hear or dispose of new business or new applications which were not made & were not before them at the general annual licensing meeting or the**

**PART IV. SECT. 2, SUB-SECT. 1.**

**k. What justices have jurisdiction.]—TENNENT v. PARTICK MAGISTRATES** (1894), 31 R. (Ct. of Sess.) 735; 31 Sc. L. R. 619; 18 L. T. 594.—**SCOT.**

**l. Number of licenses allowed in district.]—MCKENZIE v. HOGG** (1894), 13 N. Z. L. R. 158.—**N.Z.**

**m. ———.]—Where the result of a poll in a licensing district is to determine that the number of licenses should continue as they then existed, the granting of a license which has lapsed since the poll was taken is not an increase of the number of licensed houses in the district.—COOPER v. SCOTT** (1895), 13 N. Z. L. R. 654.—**N.Z.**

**PART IV. SECT. 2, SUB-SECT. 2.**

**n. Notice of meeting.]—R. (MARSHALL) v. LICENSING COURT & MC-EVOY,** [1924] S. A. S. R. 431.—**AUS.**

**o. ———.]—MILES v. ROGERS, LEWIS v. LOVELY** (1903), 36 N. B. R. 345.—**CAN.**

**p. Change in personnel of board—Whether new board bound by decisions of old board.]—PRUDHOMME v. CITY OF PRINCE RUPERT BOARD OF LICENSE COMRS.** (1911), 19 B. C. R. 487.—**CAN.**

**q. Chairman—Stipendiary magistrates.]—MCKENZIE v. HOGG** (1894), 13 N. Z. L. R. 158.—**N.Z.**

**r. Procedure at meeting.]—A licensee-holder who had been refused a renewal of his certificate, brought an action**

for the reduction of the deliverance of the licensing ct. on the grounds that the magistrates first granted all the certificates which were not objected to by the agent & only thereafter proceeded to consider those to which he had taken objection, & this had made it impossible for them to exercise a proper judicial discretion with regard to the renewal of pursuer's certificate:—**Held:** the grounds of reduction were not relevant.—**GOODALL v. SHOW,** [1913] S. C. 630.—**SCOT.**

**a. ———.]—Where there is a bare quorum present at a sitting of a licensing ct., every member present must vote before a decision of the ct. can be held to be valid, but where there are more members present than a**



adjournment thereof one month afterwards; & therefore they are not bound to hear an application for the renewal of a license to a new tenant of a licensed house, whose tenancy began after the date of the statutory adjournment, & whose application consequently was not before them at the general annual licensing meeting or at the statutory adjournment thereof.—*R. v. BRISTOL LICENSING JJ.*, *Ex p. WHITING* (1903), 89 L. T. 474; 67 J. P. 375; 19 T. L. R. 596, D. C.

**144.** — New business not arising at general or adjourned meeting.]—*R. v. BRISTOL LICENSING JJ.*, *Ex p. WHITING*, No. 143, *ante*.

**145.** Date of general annual licensing meeting.—By whom appointed.]—A borough licensing committee appointed on Jan. 18, 1911, on Dec. 7, 1911, appointed Feb. 8, 1912, as the date for the general annual licensing meeting for 1912. On that date the next borough licensing committee appointed on Jan. 18, 1912, sat & adjudicated:—*Held*: the committee appointed in 1911 had power to appoint the general annual licensing meeting for 1912 at which their successors would sit & adjudicate.—*LONDON & NORTH WESTERN RY. CO. v. BEESLY, ETC.*, *BIRMINGHAM LICENSING JJ.* (1912), 77 J. P. 21, D. C.

*See, further*, Licensing (Consolidation) Act, 1910 (c. 24), s. 10 (1), (2).

#### SUB-SECT. 3.—BY WHOM GRANTED—DISQUALIFICATION OF JUSTICES.

*See, now*, Licensing (Consolidation) Act, 1910 (c. 24), s. 40.

**146.** General interest or bias—Wife of justice interested in competing house.]—W. having applied to the licensing justices for a license for a new hotel, & the three justices who were sitting having refused it, afterwards applied to the ct. for a *mandamus* to have the case heard again on the ground that B., one of the justices, was interested as owner in one of the licensed houses near the proposed hotel. The affidavits showed that B.'s wife had succeeded to the licensed house, & was tenant for life, but it was a small house without hotel accommodation, & not likely to be injured by the new license being granted:—*Held*: a *mandamus* could not be granted because the decision not having been set aside or quashed on *certiorari*, the case could not be heard again.—*R. v. KENT JJ.* (1880), 44 J. P. 298, D. C.

**147.** — Expression of objection before hearing.]—*R. v. FERGUSON* (1890), 54 J. P. Jo. 101, D. C.

*Annotation*:—*Reid. R. v. Howard, etc.*, *Farnham Licensing JJ.* (1902), 71 L. J. K. B. 754.

**148.** — [On notice of appeal from their refusal to renew or transfer a license, the licensing justices of a petty sessional division sent

a circular to all the justices for the county to say that their bench attached so much importance to

case that they had instructed counsel to appear in support of their decision, & hoped it might be convenient to all justices interested in licensing matters to attend the hearing of the appeal. In consequence of receiving this circular a larger number of magistrates than usual attended the hearing. Several justices from the division in question, some of whom had participated in the decisions appealed against, were also present in ct. at the hearing of the appeals, but did not sit on the bench during the hearing, & took no part judicially or by discussion in the hearing or determination. The appeals, after a full hearing, were dismissed by a large majority of the votes of the justices taking part in the determination:—*Held*: the mere receipt of the circular, & attending in consequence at the hearing, did not show that the minds of the justices deciding the appeals must necessarily have been biased in favour of supporting the decision of the licensing justices, & there was no reason to issue a *mandamus* to the quarter sessions to rehear the appeals.—*R. v. LONDON JJ.*, *Ex p. KERFOOT* (1896), 60 J. P. 726; 45 W. R. 58; 13 T. L. R. 2; 41 Sol. Jo. 13, D. C.

**149.** — Member of temperance body opposing license.]—A magistrate, being a member of a temperance body which is opposing the transfer or renewal of a license, is disqualified from taking part as a licensing justice in the decision of the question.—*R. v. FRASER* (1893), 9 T. L. R. 613; 37 Sol. Jo. 685; 57 J. P. Jo. 500, D. C.

*Annotations*:—*Reid. R. v. Howard, etc.*, *Farnham Licensing JJ.* (1902), 71 L. J. K. B. 754; *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685.

**150.** — [The renewal of a license having been refused by the compensation authority by a majority, one of the justices wrote a letter to a local paper giving the names of those who had voted for & against the granting of the renewal, & amongst the latter he gave the name of one W. Thereupon W. wrote a letter contradicting that statement, & adding: "I should be nothing less than a traitor considering the position I hold if I had voted as he states in his letter." It appeared that W. had been for many years a secretary of a branch of the Order of Rechabites, & as a member of that society had signed the following declaration: "I hereby declare that I will abstain from all intoxicating liquors . . . I will not engage in the traffic of them, but in all possible ways will discountenance the use, manufacture, & sale of them." The Div. Ct. having refused an application for an order *nisi* for a *mandamus* to the compensation authority to hear & determine the application for the renewal according to law, on the ground that there was evidence of bias on the part of W. in dealing with the application, the Ct. of Appeal granted the

quorum it is not necessary that every member should vote, provided that the decision is arrived at by the votes of a quorum of the members.—*GOVEIA v. CAPE LICENSING COURT* (1919), C. P. D. 304.—S. AF.

#### PART IV. SECT. 2, SUB-SECT. 3.

**147 i.** General interest or bias—Expression of objection before hearing.]—*Re SEYMOUR'S APPLICATION, Ex p. CONDIE* (1902), 22 N. Z. L. R. 145.—N.Z.

**147 ii.** — [The mayor of a town being ex officio chairman of the licensing board, shortly before the hearing of a pending application for a license received a deputation from the constituents of his ward who requested

him to use his influence to get the application refused. He intimated his concurrence with their opinions. At the hearing he was present & went into committee with the other members & voted for the refusal of the application:—*Held*: the proceedings of the board were thereby invalidated.—*NEWBERRY v. DURBAN MUNICIPALITY* (1895), 16 N. L. R. 221.—S. AF.

**148 i.** — Member of temperance body opposing license.]—*Held*: the mere fact of belonging to a temperance society pledged to the principle of "no license in any form under any circumstances for the sale of any liquors to be used as a beverage" did not operate as a disqualification for sitting as a member of a licensing ct.—

*M'GERHEN v. KNOX*, [1913] S. C. 688.—SCOT.

**t.** — [The suspicion of bias necessary in order to disqualify a magistrate, & to invalidate his decision must be supported by circumstances which would reasonably warrant a considerable number of persons in entertaining it.—*R. v. MOLESWORTH, REUER'S CASE* (1898), 23 V. L. R. 582.—AUS.

**a.** — [—*R. (FINDLATER) v. LUBIAN COUNTY RECORDER & JJ.*, [1904] 2 I. R. 75; 37 I. L. T. 202.—IR.

**b.** — [The fact that on a previous occasion the bench improperly refused a license & was compelled by *mandamus* to grant it is no evidence that a subsequent refusal of a license

**Sect. 2.—Justices' licenses: Sub-sects. 3, 4 & 5.]**

application & W. filed an affidavit in which he stated that having regard to the evidence against the renewal of the license he considered & meant when he wrote the letter that he would have been a traitor to his position as a magistrate if he had voted in favour of the renewal, & further that the word "position" in his letter had no reference to his office in the Order of Rechabites:—*Held*: the circumstances were such as to make bias on the part of W. so probable that he ought not to have taken part in the case, & the order for a *mandamus* should therefore be made absolute.—*R. v. HALIFAX JJ., Ex p. ROBINSON* (1912), 76 J. P. 233; 28 T. L. R. 288, C. A.

*Annotation*:—*Consd. R. v. Bath Compensation Authority*, [1925] 1 K. B. 685.

**151. — Former director of company applying for license.**—*R. v. HAIN, ETC., LICENSING JJ.* (1896), 12 T. L. R. 323; 40 Sol. Jo. 458, D. C.

*Annotations*:—*Reid. R. v. Sunderland JJ.*, [1901] 2 K. B. 357. *Mentd. R. v. Woodhouse*, [1906] 2 K. B. 501.

**152. — Brewer — Voting at election of licensing committee.**—Deft. was a justice of the peace, acting in & for the borough of Brighton, & was also a common brewer. There were upwards of ten justices acting in & for such borough. A meeting of such justices was held under Licensing Act, 1872 (c. 94), s. 38, for the election of a licensing committee. Deft. voted at such election:—*Held*: in so doing deft. had "acted for a purpose under the Act" within Licensing Act, 1872 (c. 94), s. 60, & had rendered himself liable to a penalty under that section.—*A.-G. v. WILLETT* (1896), 60 J. P. 643; 12 T. L. R. 494.

**153. — Justice signing petition in favour of licensee.**—*R. v. TAYLOR, ETC. JJ. & LAIDLER, Ex p. VOGWILL* (1898), 14 T. L. R. 185; 42 Sol. Jo. 235, D. C.

**154. Trade interest — Justice shareholder of brewery company applying.**—*R. v. GEE* (1901), 17 T. L. R. 374, D. C.

*Annotation*:—*Mentd. R. v. Woodhouse*, [1906] 2 K. B. 501.

**155. —**—A justice of the peace who held some shares in a brewery which carried on business in the licensing district sat as a justice on the confirming authority on the hearing of an application to confirm the grant of a new license, forgetting that he held the shares, was ordered to pay a penalty of £10 & costs for acting while disqualified under Licensing Act, 1872 (c. 94), s. 60.—*A.-G. v. BALL* (1902), 66 J. P. 553.

**156. —**—An application was made to the licensing committee of the borough of T. for the removal of a license to new premises. Three of the justices were members of the borough council of T., & one held shares in a brewery co. that sold beer within the district. A suggestion was made before the committee that if the transfer was granted another license would be given up & certain property would be placed at the disposal of the corp. for town improvements. The transfer was granted. The confirming authority, which included the four justices, confirmed the

transfer, but the offer above stated was withdrawn:—*Held*: there was not any likelihood of bias on the part of the three justices who were members of the borough council, so as to render the orders made invalid; & the orders were not invalid by reason of the fact that the fourth justice adjudicated, owing to proviso 3 of Licensing Act, 1872 (c. 94), s. 60.—*R. v. TEMPEST* (1902), 86 L. T. 585; 66 J. P. 472; 18 T. L. R. 433; *sub nom. R. v. TAMWORTH JJ., Ex p. CLARKE*, 46 Sol. Jo. 360, D. C.

**157. Holding municipal office**—Where municipality interested in application.]—An alderman of a borough was appointed by the corp. to be a member of a committee to negotiate the disposal of certain already licensed premises, the license of which subsequently became merged in that of other licensed premises, the alderman in question ultimately taking a part in deciding upon the granting of such license. Other objections were taken:—*Held*: the rule obtained to quash the order of the justices on the ground of interest or bias, must be dismissed.—*R. v. STOCKPORT JJ.* (1896), 60 J. P. 552, D. C.

*Annotations*:—*N.F. R. v. Sunderland JJ.*, [1901] 2 K. B. 357. *Reid. R. v. Tempest* (1902), 86 L. T. 585; *R. v. Johnson* (1905), 74 L. J. K. B. 585.

**158. —**—A municipal corp. having, for the purposes of a street improvement, purchased certain premises licensed for the sale of intoxicating liquors, an agreement was entered into between the corp. & a brewery co., by which the co. agreed to pay to the corp. a sum of money, in the event of a license being granted to the co. for the sale of intoxicating liquors on certain premises belonging to them, & the corp. agreed to close the before-mentioned licensed premises, & not to make, or allow to be made, any application for a renewal of the license in respect of them. Certain justices for the borough, who were also members of the borough council, had taken an active part in the council in support of the proposal that the above-mentioned agreement should be entered into by the corp. These justices subsequently sat on the hearing of an application to the licensing committee on behalf of the brewery co. for a license in respect of their before-mentioned premises, which was granted. On the application to the confirming authority under Licensing Act, 1872 (c. 94), for confirmation of the grant of the license to the co., the same justices again sat to hear the application, which was granted. On an application for a *certiorari* to bring up & quash the order confirming the grant of the license:—*Held*: there being a real likelihood of bias on the part of the before-mentioned justices with regard to the subject-matter of the application to the confirming authority, the writ of *certiorari* must be issued.—*R. v. SUNDERLAND JJ.*, [1901] 2 K. B. 357; 70 L. J. K. B. 946; 85 L. T. 183; 65 J. P. 598; 17 T. L. R. 551; 45 Sol. Jo. 575, C. A.

*Annotations*:—*Appl. R. v. Tempest* (1902), 86 L. T. 585. *Consd. R. v. Woodhouse*, [1906] 2 K. B. 501; *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685. *Mentd. R. v. Johnson*, [1905] 2 K. B. 59.

to the same house was partial & improper.—*HAMILTON v. FRASER* (1886), 5 N. Z. L. R. 1 (S. C.).—*N.Z.*

**c. —**—One of the members of the committee held debentures of the borough of W., which were charged, in case of deficiency, on the borough fund, to which all license fees were payable:—*Held*: he had not such a pecuniary interest in the matters before him for decision as to disqualify him from acting.—*Re WANGANUI LICENSING COMMITTEE* (1892), 19

N. Z. L. R. 583.—*N.Z.*

**d. —**—*Re O'DRISCOLL'S APPLICATION, Ex p. FRITHLEY* (1902), 21 N. Z. L. R. 317.—*N.Z.*

**e. —**—*PENNEY v. WAIKOU LICENSING COMMITTEE* (1902), 22 N. Z. L. R. 602.—*N.Z.*

**f. —**—*DOWNARD v. DURBAN LICENSING BOARD* (1904), 25 N. L. R. 15.—*S. AF.*

**g. —**—*HAY v. DURBAN LICENSING BOARD* (1912), 33 N. L. R.

152.—*S. AF.*

**h. —**—*GOGA v. LADYSMITH LICENSING BOARD* (1912), 33 N. L. R. 642.—*S. AF.*

**k. —**—*PORT ELIZABETH LICENSING COURT v. COXFORD* (1912), C. P. D. 1086.—*S. AF.*

**l. —**—*MILLER v. KENHARDT LICENSING COURT* (1914), C. P. D. 341.—*S. AF.*

**m. —**—*BRITISH LEAGUE CLUB*

159. — — —.]—*R. v. TEMPEST*, No. 156, ante.

**SUB-SECT. 4.—TO WHOM GRANTED.**

See *Sale of Beer Act*, 1795 (c. 113), s. 1; 33 & 34 Vict. c. 29, s. 14; *Prevention of Crime Act*, 1871 (c. 112), s. 10; *Licensing (Consolidation) Act*, 1910 (c. 24), ss. 34, 35, 65.

**160. Burgess—Custom of borough.]—Beerhouse Act**, 1830 (c. 64), for permitting the general sale of beer by retail in England, does not supersede the custom of a borough, that no person shall carry on the trade of an alehouse-keeper therein who is not a burgess.—*LEICESTER CORPN. v. BURGESS* (1833), 5 B. & Ad. 246; 2 Nev. & M. K. B. 131; 1 Nev. & M. M. C. 202; 2 L. J. K. B. 187; 110 E. R. 783.

*Annotation*:—*Reid*. R. v. Green (1874), 30 L. T. 255.

**161. Executor—Renewal in name of deceased owner.]—The exors. of the late owner of a public-house renewed the license in the name of the deceased owner:—Held**: the license was absolutely void, & the exors. could not make a good title to the public-house.—*COWLES v. GALE* (1871), 7 Ch. App. 12; 41 L. J. Ch. 14; 25 L. T. 524; 20 W. R. 70, L. J. J.

*Annotations*:—*Reid*. *Sharpe v. Wakefield* (1888), 21 Q. B. D. 66. *Mentd.* *Rutter v. Daniel* (1882), 30 W. R. 801; *Farnham Brewery Co. v. Hunt* (1893), 68 L. T. 440; *Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705; *Warren v. Moore* (1897), 14 T. L. R. 138.

**162. Felon—Date of conviction.]—33 & 34 Vict. c. 29, s. 14, applies to a person convicted of felony either before or after the Act passed; & licenses held by a person convicted before the Act become void on the passing of the Act.**—*R. v. VINE* (1875), L. R. 10 Q. B. 195; 44 L. J. M. C. 60; 31 L. T. 842; 23 W. R. 649; 13 Cox, C. C. 43.

*Annotations*:—*Consd.* *Hay v. Tower Division of London JJ.* (1890), 24 Q. B. D. 561; *Re Pulborough Parish School Board Election*, *Bourke v. Nutt*, [1894] 1 Q. B. 725; *Re Chaffers*, *Ex p. A.-G.* (1897), 70 L. T. 351. *Reid*. *Tower JJ. v. Chambers*, [1904] 2 K. B. 903; *R. v. Austin*, [1913] 1 K. B. 551. *Mentd.* *R. v. Griffiths* (1891), 60 L. J. M. C. 93.

**163. — Effect of subsequent pardon.]—Upon an application for a license to sell spirits by retail, it appeared that the appct. had been convicted of felony but had received a free pardon under the Royal Sign-manual:—Held**: the disqualification imposed on him by 33 & 34 Vict. c. 29, s. 14, was removed by the pardon, & that the license might be granted to him.—*HAY v. TOWER DIVISION OF LONDON JJ.* (1890), 24 Q. B. D. 561; 59 L. J. M. C. 79; 62 L. T. 290; 54 J. P. 500; 38 W. R. 414; 6 T. L. R. 169, D. C.

**164. Person convicted of**

ct. for a full publican's license under Licensing

*Act*, 1872 (c. 94), had formerly been convicted of selling spirits without a license. The licensing justices, notwithstanding this admitted fact, granted him an authority "to apply for & hold any excise licenses that may be held by a publican." Appct. took out an excise spirit license, under which he might also sell beer or wine by retail. Applt., the objector, applied for a writ of *certiorari* to quash the order of the justices, on the ground that appct. was disqualified from ever selling beer or wine by retail under Beerhouse Act, 1840 (c. 61), s. 7, & Refreshment Houses Act, 1860 (c. 27), s. 22:—*Held*: the justices had not exceeded their discretionary jurisdiction, inasmuch as there was nothing in the earlier Acts to disqualify appct. from holding a spirit license, & the order of the justices merely authorised appct. to obtain any license which as a publican he was entitled to hold; but the ct. expressed no opinion as to whether or not the licensee would subject himself to the penalties of the earlier Acts in selling wine or beer, notwithstanding that Inland Revenue Act, 1880 (c. 20), s. 43 (2), enabled him to sell beer or wine without taking out any other license than the spirit license.—*R. v. ROPER, ETC.*, J.J., *Ex p. PRICE* (1894), 63 L. J. M. C. 68; 70 L. T. 409; 58 J. P. 512; 10 T. L. R. 182; 10 R. 598, D. C.

**SUB-SECT. 5.—IN RESPECT OF WHAT PREMISES GRANTED.**

See *Licensing (Consolidation) Act*, 1910 (c. 24), ss. 31, 36–39, 80 (2), 109, sched. V., Part I.

**165. Valuation qualification—Unnecessary if premises licensed before Aug. 10, 1872.]—Licensing Act**, 1872 (c. 94), s. 45, enacts that premises not licensed at the time of the passing of the Act under the Acts recited in 32 & 33 Vict. c. 27, shall not be subject to any provision now in force prescribing a certain value as a qualification. *Licensing Act*, 1872 (c. 94), s. 46, enacts that if any premises licensed for the sale of intoxicating liquors at the passing of the Act are not of such annual value as authorises the grant of a license, the license may be renewed upon the condition that the owner improve the premises so as to make them of sufficient annual value:—*Held*: sect. 46 does not apply to alehouses already licensed under 9 Geo. 4, c. 61, as they must be taken to have been exempted by sect. 45 from the provisions in force as to value.—*R. v. MANN* (1873), L. R. 8 Q. B. 235; 21 W. R. 329; *sub nom. R. v. EXETER JJ.*, 42 L. J. M. C. 35; 37 J. P. 212; *sub nom. R. v. EXETER JJ.*, *Ex p. MANN*, 27 L. T. 847.

*Annotations*:—*Consd.* *Igoe v. Shann*, [1902] 2 K. B. 467. *Reid*. *R. v. Woodhouse*, [1906] 2 K. B. 501.

*v. PRETORIA LIQUOR LICENSING COURT* (1915), T. P. D. 291.—S. AF.

**PART IV. SECT. 2, SUB-SECT. 4.**

**a. Married women.]—A married woman living with her husband, whether she have the property to her separate use or not is prohibited from holding a license.**—*R. v. NICOLSON*, *Ex p. MINOGUE* (1884), 10 V. L. R. 255.—AUS.

*o. —.*—*Ex p. DAY* (1894), 15 N. S. W. L. R. 420; 11 N. S. W. W. N. 80.—AUS.

*p. —.*—*R. v. IPRWICH LICENSING AUTHORITY*, [1910] S. R. Q. 213.—AUS.

*q. —.*—*Re ROCHE* (1888), 7 N. Z. L. R. 206.—N.Z.

*r. —.*—No interest conferred on

*husband.*—The holding of a license by a wife in her own name & for her own benefit does not confer upon her husband a beneficial interest.—*Re MARTIN* (1897), 22 V. L. R. 559.—AUS.

**t. Agent of owner.]—The person receiving a tavern license is assumed to have satisfied the license comrs. that he is the true owner, but, notwithstanding, it can be shown that the licensee was merely the agent of another who was the real owner of the business.**—*HUFFMAN v. WALTERHOUSE* (1889), 19 O. R. 186.—CAN.

**a. Nationality immaterial.]—Re KANAMURA (1904), 10 B. C. R. 354.—CAN.**

**b. Companies.]—An hotel or retail liquor license cannot validly be granted to a co. Such licenses issued to a person as managing director of a**

company are issued to such person as the holder.—*SIMON v. IL* (1909), T. B. 5.—S. AF.

*o. —.*—*BRITTEN v. POPE* (1916), App. D. 150.—S. AF.

**d. Insolvent.]—When an insolvent obtains the renewal of a liquor license in his own name he acquires it for the use of his trustee.**—*PICK v. WOOLCOTT & OHLSSON'S CAFE BREWERIES, LTD.*, [1910] T. P. D. 1225.—S. AF.

**PART IV. SECT. 2, SUB-SECT. 5.**

**a. Inns & houses of public entertainment.]—Held**: municipal corps. could not prohibit altogether the licensing of inns for the sale of wines, or spirituous liquors by retail, or to be drunk therein, but they could give authority either to prohibit the



*Sect. 2.—Justices' licenses: Sub-sects. 5 & 6, A. (a) & (b) i. & ii.]*

**166. —** *Effect of temporary break in continuity of license.*—To justify an objection to the renewal of a beerhouse license on the ground that the premises are not of the annual value required by Licensing Act, 1872 (c. 94), s. 45, it must be shown that the premises were not at the date of the passing of that Act licensed for the sale of intoxicating liquors for consumption thereon. The fact that there was a break in the continuity of the license between that date & the application for the renewal is immaterial.

If it was necessary to have a continuity of the license there was no such continuity; it cannot be denied that there was a complete break. But the view which I entertain of this case is that notwithstanding the complete break, the language of sect. 45 of the Act of 1872 is too clear to admit of doubt that this house was qualified within the meaning of that sect. (*LORD HALSBURY, C.*)—*IGOE v. SHANN*, [1903] A. C. 320; 72 L. J. K. B. 693; 89 L. T. 105; 87 J. P. 333; 52 W. R. 111; 19 T. L. R. 598; 47 Sol. Jo. 652, H. L.

*Annotation:—Mentd. R. v. Walsall Compensation Authority, R. v. Walsall Licensing JJ. (1910), 102 L. T. 737.*

**167. — Application for off license.**—When an application is made to licensing justices under 32 & 38 Vict. c. 27, s. 8, for a certificate for license to sell beer, cider, or wine not to be consumed on the premises, it is not competent to such licensing justices to refuse, except upon one of the four grounds mentioned in such sect. Where, therefore, upon such an application one of the two justices refused the license upon general grounds, & that the prevalence of drunkenness & the large number of licensed houses was, in his opinion, an evil to be curtailed, & the license was refused:—*Held*: (1) the licensing justices had not exercised such a judicial discretion as the Act contemplated, & a rule for a *mandamus* to the justices to hold an adjourned licensing meeting & hear the application was made absolute; (2) where the application is made by a shopkeeper under Refreshment Houses Act, 1860 (c. 27), s. 3, it is immaterial what is the ratable value of the premises.—*R. v. BEDWELLTY, MONMOUTHSHIRE LICENSING JJ.* (1874), 38 J. P. 807.

**168. —** *—M., a grocer & baker, applied for an off wine & off spirit license, under Refreshment Houses Act, 1860 (c. 27), s. 3; Revenue (No. 1) Act, 1861 (c. 21), s. 2; & Licensing Act, 1872 (c. 94), s. 69. The justices refused the licenses because the house had not a valuation of £30, & had an internal communication with a bakehouse where a large trade was carried on on Sundays:—Held*: these were not sufficient grounds for refusing the licenses, & rule for *mandamus* made absolute accordingly.—*R. v. MORISON, ETC., PEMBROKE JJ.* (1891), 55 J. P. 87, D. C.

licensing of houses of public entertainment, only, as distinct from inns, the one having a public bar-room & the other not, or to prevent any one or more particular inns from being licensed.—*Re BARCLAY & DARLINGTON MUNICIPAL COUNCIL* (1854), 11 U. C. R. 470.—*CAN.*

**1. Public-houses.**—Municipal corps. have power to discriminate between the different kinds of public-houses, & to charge differently for a saloon & a tavern license, & require different accommodations.—*Re GHAND & GUELPH CORPN.* (1867), 27 U. C. R. 46.—*CAN.*

**2. Additional tavern license in summer resort.**—*Semble*: an application for an additional tavern license

in a locality largely resorted to in summer by visitors, may be made at any time so long as the license does not extend beyond the proscribed period.—*Re MILTON A. THOMAS'S LICENSE* (1895), 26 O. R. 448.—*CAN.*

**h. Clubs.**—License comrs. may, under certain conditions, grant permission to a club to keep liquor on the club premises for the use of its members, on payment of the prescribed fee. The exercise of this power by the license comrs. is discretionary, & not obligatory.—*Re CLUB LAUREL* (1913), 23 W. L. R. 380; 23 Man. L. R. 24; 10 D. L. R. 833.—*CAN.*

**k. House near other licensed premises.**—The fact that the premises for which an accommodation license

**169. —** *By holder of dealer's license.*—*R. v. BURY JJ.* (1879), 43 J. P. Jo. 236.

**170. —** *By holder of license under Beerhouse Act, 1840 (c. 61).*—An application for a license to sell beer by retail not to be consumed on the premises was refused by justices, on the ground that the house was not duly qualified by law, not being of sufficient value under sect. 1 of above Act. Wine & Beerhouse Act, 1869 (c. 27), s. 8, requires the justices, where such an application is refused on the ground that the house is not duly qualified as by law required, to specify in writing to appct. the grounds of their decision. A minute of the decision with the grounds of it was made & read out by the chairman in ct. in the presence of the appct., but no copy was delivered to him. On a rule for a *mandamus* to the justices to hear & determine the application:—*Held*: (1) the provisions as to rating qualification for houses for the sale of beer & cider for consumption off the premises under Beerhouse Act, 1840 (c. 61), s. 1, had not been affected by Licensing Act, 1872 (c. 94), s. 45, which must be construed as applying only to premises licensed before the Act, or to be licensed under it, for the sale of intoxicating liquor thereupon; (2) in the absence of any request by appct. for a writing showing the reasons for the decision of the justices, the notice was sufficient.—*R. v. CUMBERLAND JJ., Ex p. WAITING* (1881), 8 Q. B. D. 369; 51 L. J. Q. B. 142; 46 J. P. 7; 30 W. R. 178, D. C.

**171. — Premises licensed after Aug. 10, 1872—Premises less than requisite value.—Licensing (Consolidation) Act, 1910 (c. 24), ss. 34, 37.**—Upon an application at the general annual licensing meeting for the renewal of an old on license in respect of a fully licensed house which was first licensed since Aug. 10, 1872, it was proved that the annual value of the premises was less than that required by sect. 37 (1) (b), & sched. V., Part I., of above Act. The licensing justices refused the renewal upon the ground that as the premises were not of the required annual value, the license would be void:—*Held*: as the premises by reason of their deficiency in value were not qualified to receive the license, they were "disqualified premises" within sect. 34 of above Act, & therefore the license, if renewed, would have been void; & the licensing justices had jurisdiction under sect. 18 & sched. II., Part II. (B) (3), to refuse the renewal upon that ground, & were not bound to refer the question of renewal to the compensation authority under sect. 19.—*R. v. KINGSTON-UPON-HULL LICENSING JJ.*, [1913] 2 K. B. 425; *sub nom. R. v. HULL LICENSING JJ., Ex p. GLOSSOP & BULAY, LTD.*, 82 L. J. K. B. 946; 109 L. T. 184; 77 J. P. 303; 29 T. L. R. 500, D. C.

**172. Annual value.—At what date ascertained.—At time of hearing application.**—Where an indoor

is held are situated within five miles, by a public road, of other premises for which a license has been granted does not make the renewal of such license illegal.—*BIRLEY v. McDONALD* (1886), 4 N. Z. L. R. 427 (S. C.).—*N.Z.*

**1. Premises not yet built.**—A licensing committee has no power to grant a license in respect of a house not yet built.—*R. v. NEWMARKET LICENSING COMMITTEE* (1887), 5 N. Z. L. R. 431 (S. C.).—*N.Z.*

**m. Requirements as to accommodation.**—It is not necessary that the requirements in regard to accommodation should be complied with at the time of giving notice of intention to apply for a license. It is sufficient if they are complied with at the time of

beer license which had been renewed since 1869 was refused to be renewed by the licensing justices, on the ground that though the house was of sufficient annual value when the application was heard at the adjourned annual meeting, yet it had not been so on Aug. 25, the date of the original general annual meeting, the value having been increased during the interval:—*Held*: the justices had exceeded their jurisdiction, & a rule for *mandamus* was made absolute.—*R. v. MONTAGU* (1884), 49 J. P. 55, D. C.

SUB-SECT. 6.—DISCRETION TO GRANT OR REFUSE.

A. Absolute Discretion.

(a) In General.

173. General rule.]—An information against justices of the peace for refusing to grant licenses.

The power of licensing public-houses is so absolutely in the discretion of the justices, that this ct. will never award a *mandamus* for the licensing of a public-house. But it is equally true that the abuse of a discretionary power ought to be more severely punished than the abuse of a power which is not discretionary. In the present case it appears manifestly that the power of licensing public-houses was very grossly abused, for it is not probable that the occupiers of twenty public-houses should all have so misbehaved themselves at the same time as to make it improper to grant them licenses (*RYDER, C.J.*).—*R. v. NOTTINGHAM TOWN JJ.* (1755), Say. 216; 96 E. R. 858.

—*Expld. R. v. Young & Pitts* (1758), 1 Burr.

356.

174. —.]—Information for refusing an ale license refused.

This ct. has no power or claim to review the reasons of the justices upon which they form their judgments in granting licenses, by way of appeal from their judgments or overruling the discretion entrusted to them. But if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion & have consequently abused the trust reposed in them, they are liable to prosecution by indictment or information; or even possibly by action, if the malice be very gross or injurious (*LORD MANSFIELD, C.J.*).—*R. v. YOUNG & PITTS* (1758), 1 Burr. 556; 97 E. R. 447.

*Annotations*:—*Consd. Sharpe v. Wakefield* (1888), 21 Q. B. D. 66. *Held. R. v. Peters, Cavil v. Burnaford* (1758), 1 Burr. 568. *Mentd. Kennedy v. Hilliard* (1859), 1 L. T. 78.

175. —.]—Information against justices of the peace for acting from motives of resentment [in refusing to grant a license to sell ale].

The ct. should never interpose against magistrates unless they have acted from bad motives or *mala fide*; especially in such a case as this, where they are entrusted with an absolute

discretion (*LORD MANSFIELD, C.J.*).—*R. v. HANN & PRICE* (1765), 3 Burr. 1716; 97 E. R. 1062.

*Annotation*:—*Reid. R. v. Davie* (1781), 2 Doug. K. B. 588.

176. —.]—*BOODLE v. BIRMINGHAM JJ.*, No.

177. —.]—*SHARP v. WAKEFIELD*, No. 49, *ante*.

178. Discretion to refuse—Opposing evidence not supported.]—B., a licensed victualler, applied to the licensing justices for a renewal of his license. A written notice of opposition on the ground of a previous conviction of an offence was given, but no one supported it. No other opposition was offered, & the superintendent of police said there was no complaint since the previous conviction. The justices having refused the renewal:—*Held*: a *mandamus* to the justices to hear the application would not be granted, as they had a discretion, & had already exercised it by refusing the renewal.—*Ex p. BENDALL* (1877), 42 J. P. 88.

179. Discretion to grant—Opposing evidence rejected.]—*R. v. HULL LICENSING JJ.* (1883), 47 J. P. Jo. 820, D. C.

180. — Non-appearance of opponent.]—At the general annual meeting the hearing of an application for renewal was appointed for 10 a.m. Notice of opposition had been duly served, but, on the case being called, neither opponent nor his solr. was present. Justices, after sending for both, & they not attending, waited five minutes, & then decided by a majority of five to four to renew the license. The opponent & his solr. then arrived & asked to be heard, but the justices refused to reopen the matter. On an order *nisi* for a *mandamus*:—*Held*: (1) it was entirely a matter of discretion for the justices to treat the case as determined, or to reopen it: (2) as no motion for a *mandamus* was made for three months, the ct. discharged the order *nisi* with costs.—*R. v. ROBSON, ETC., HULL JJ.* (1893), 57 J. P. 133; 9 T. L. R. 163, D. C.

(b) To What Licenses Applicable.

i. In General.

181. Off license—For sale of beer.]—*R. v. KAY*, No. 189, *post*.

182. — For sale of wine & spirits.]—*R. v. WEM LICENSING JJ.* (1883), 47 J. P. Jo. 820, D. C.

ii. New Licenses.

183. Old license forfeited—Application by new tenant—Beerhouse license.]—*MARGREAVES v. DAWSON*, No. 246, *post*.

—*R. v. WEST RIDING JJ.*, No. 248, *post*.

185. — Refusal at special sessions.]—G., the occupier of a house, licensed under 9 Geo. 4, c. 61, having been fined for an offence against the tenor of his license, was ejected by his landlord on May 17. In June II. was let into possession, & on June 5 the petty sessions refused to indorse G.'s licence to H., under Licensing Act, 1842 (c. 44).

*FARLANE* (1918), 45 N. B. R. 318; 39 D. L. R. 187.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 6.—A. (b) II.

p. Old license cancelled—Recommendation for new license.]—A license was cancelled by the ct. The licensee then appealed to the Supreme Ct. On perfecting the appeal, the licensee claimed that the order cancelling the license was stayed & that being an existing licensee he was entitled to a new license without recommendation:—*Held*: he was not, & new license

the granting of the license.—*Re O'DRISCOLL'S APPLICATION, Ex p. GAUKRODGER* (1901), 20 N. Z. L. R. 660.—*N.Z.*

n. Premises must open on to public thoroughfare.]—*LEWIS & SON v. TRICHLARDT & SUTHERLAND LIQUOR LICENSING COURT* (1914), T. P. D. 535.—*S. AF.*

PART IV. SECT. 2, SUB-SECT. 6.—A. (a).

173 i. General rule.]—*Re BRIGHT & TORONTO CITY* (1862), 12 C. P. 433.—*CAN.*

173 II. —.]—*Held*: the action of the license commr. in cancelling a license could not be reviewed by the ct. as no appeal was provided for against any decision of theirs.—*R. v. CROTHERS* (1897), 11 Mad. L. R. 567.—*CAN.*

173 III. —.]—*Held*: the discretion of the licensing authority was absolute when exercised within the limits of its statutory authority.—*BOYLE v. WILSON*, [1907] A. C. 45.—*SCOT.*

PART IV. SECT. 2, SUB-SECT. 6.—A. (b) I.

s. For sale of beer.]—*Ex p. Mc-*

*Sect. 2.—Justices' licenses: Sub-sect. 6, A. (b) ii., iii. & iv., & (c) i., ii. & iii.]*

H. then gave up possession, & at the general licensing meeting on Sept. 4 the house was unoccupied, & no application was made for a license. Applt. afterwards became tenant, & applied at the special sessions on Nov. 20 for a new license under 9 Geo. 4, c. 61, s. 14; but after hearing the case on the merits the justices refused to grant a new license. On appeal the quarter sessions, finding applt. to be a proper person, dismissed the appeal on the ground that the granting or refusing of such new license was within the discretion of the justices at special sessions:—*Held*: the justices had a discretion to grant or refuse the license. *Qu.*: whether under the circumstances the special sessions had any jurisdiction.—*R. v. ROWELL* (1872), L. R. 7 Q. B. 490; 41 L. J. M. C. 175; 26 L. T. 732; *sub nom.* ROWELL *v. NORFOLK JJ.*, 37 J. P. 103.

*Annotations*:—*Folld. It. v. Hertfordshire JJ., Re Wroughton* (1881), 50 L. J. M. C. 121. *Apld. Ex p. Minnett* (1884), 51 J. P. 84. *Reid. Sharpe v. Wakefield* (1888), 21 Q. B. D. 66; *Traynor v. Jones*, [1894] 1 Q. B. 83.

### iii. Transfer.

**186. House required for public purposes.]**—*BOODLE v. BIRMINGHAM JJ.*, No. 251, *post*.

**187. Application after expiration of former license.]**—C. having a lease of a licensed house at M. till July, 1879, began in 1876 to build a new house of his own at I., for which he got a provisional license, & then a confirmation of that license in 1877, & then dropped the license at M. A new tenant entered M. in 1879, & duly applied for a new license in 1879, & in each year till 1883, & was always refused. After the decision of *R. v. Liverpool JJ.*, No. 319, *post*, the same new tenant applied for a transfer of the license at M., which had expired in 1877:—*Held*: the justices had a discretion to refuse the transfer, & could not be compelled by *mandamus* to hear the application.—*Ex p. MINNETT* (1884), 51 J. P. 84, D. C.

### iv. Renewal.

**188. Use of premises as inn discontinued.]**—A man who had had a public-house license granted him by the magistrates for many years previous to 1869, & continuously down to 1877, was refused the renewal of it at the general annual licensing meeting in the last-mentioned year, on the ground that the neighbourhood was sufficiently supplied by other existing public-houses, he not having for eight years taken out an excise license or used

his house as an inn:—*Held*: the application refused was for a renewal license, & not a new license; & the justices had a general discretion as to granting or refusing the application under 9 Geo. 4, c. 61, s. 1, & were not fettered by the limitations in 32 & 33 Vict. c. 27, ss. 8 & 19, which are confined to applications for licenses for the sale of beer, cider & wine.—*R. v. SMITH* (1878), 48 L. J. M. C. 38; 42 J. P. 295; *sub nom.* SMITH *v. HEREFORD JJ.*, 39 L. T. 604, D. C.

*Annotation*:—*Reid. Sharpe v. Wakefield* (1888), 22 Q. B. D. 239.

**189. Off license—For sale of beer.]**—The unqualified discretion which the licensing justices have under 45 & 46 Vict. c. 34, s. 1, to refuse a certificate for any license for sale of beer by retail to be consumed off the premises may be exercised, not only on an application for such certificate in respect of premises not theretofore similarly licensed, but also on an application for such certificate by way of renewal.—*R. v. KAY* (1882), 10 Q. B. D. 213; 52 L. J. M. C. 90; *sub nom.* KAY *v. OVER DARWEN JJ.*, 47 L. T. 411; 47 J. P. 388; 31 W. R. 273, D. C.

*Annotations*:—*Reid. R. v. Schneider* (1883), 11 Q. B. D. 66; *Sharpe v. Wakefield* (1888), 21 Q. B. D. 66.

### (c) Exercise of Discretion.

#### i. In General.

**190. Must be reasonable.]**—Although, under 9 Geo. 4, c. 61, justices have a discretion as to whether they will grant licenses to persons keeping or about to keep inns, alehouses & victualling houses, to sell excisable liquors, that discretion must be exercised in a reasonable manner; & therefore justices cannot by a general resolution determine not to renew the licenses of all such persons who shall not consent to take out an excise license for the sale of spirits in addition to the license for the sale of beer.

They [the justices] have not exercised their discretion & . . . have acted in an unreasonable manner. They came to the meeting with a general resolution already prepared (*WIGHTMAN, J.*).—*R. v. SYLVESTER* (1862), 2 B. & S. 322; 31 L. J. M. C. 93; 5 L. T. 794; 20 J. P. 151; 8 Jur. N. S. 484; 121 E. R. 1093.

*Annotations*:—*Consd. Sharpe v. Wakefield* (1888), 21 Q. B. D. 66. *Reid. Sharp v. Wakefield*, [1891] A. C. 173; *R. v. Sheerness U. D. C.* (1898), 62 J. P. 563; *R. v. London City Council, Ex p. Corrie*, [1918] 1 K. B. 68; *R. v. Port of London Authority, Ex p. Kynoch*, [1919] 1 K. B. 176.

**191. Must be according to law.]**—*SHARP v. WAKEFIELD*, No. 49, *ante*.

8 W. W. R. 1072; 32 W. L. R. 360; 14 D. L. R. 721; 18 B. C. R. 648.—*CAN.*

**191 i. Must be according to law.]**—The license comrs. have, in the exercise of their functions, a wide discretion; but it must be exercised judicially, & the ct. has power to compel them to so exercise it.—*HASLEM v. SCHNARR* (1898), 30 O. R. 89.—*CAN.*

**191 ii. —.]**—*Re QUINN* (1900), 32 N. S. R. 542.—*CAN.*

**191 iii. —.]**—The decision of the licensing bench on the question whether a licensed house is necessary or not is final, & cannot be reviewed if arrived at in a legal manner.—*HAMILTON v. FRASER* (1886), 5 N. Z. L. R. 1 (S. C.).—*N.Z.*

**b. May exercise discretion without hearing evidence.]**—*Ex p. SPANGENBERG* (1882), 8 V. L. R. 123.—*AUS.*

**c. —.]**—*Re LICENSING COURT, Ex p. LOGAN & BRITTEN* (1900), 26 V. L. R. 584.—*AUS.*

**d. Condition precedent—Inspector's report.]**—*Re VICTORIA COUNTY LICENSE*

issued to him must be cancelled.—*Re RICHLIKU HOTEL LICENSE* (1909), 12 W. L. R. 72.—*CAN.*

**g. Grant subject to surrender of an existing license.]**—*CULLINGWORTH v. EATATE v. HAMILTON* (1923), 44 N. L. R. 89.—*S. AF.*

### PART IV. SECT. 2, SUB-SECT. 6.—A. (b) iv.

**f. Not bound by local option poll.]**—The option by the electors upon a local option poll that the number of licenses be not increased or reduced, does not preclude the licensing ct. from exercising the absolute discretion given to the licensing authority to refuse to renew a license.—*WHITE v. LICENSING COURT*, [1919] A. C. 927.—*AUS.*

**t. Householders' certificate not essential.]**—The certificate from householders as to the character & conduct of a publican's business is not an essential preliminary to the jurisdiction exercised by the justices in granting a

certificate for the renewal of a license.—*R. v. ANTRIM JJ.*, [1917] 2 I. R. 347.—*IR.*

**a. Issue previously authorised—Not actually issued.]**—*KLEIN v. THRON & CALEDON LICENSING COURT*, [1918] C. P. D. 254.—*S. AF.*

### PART IV. SECT. 2, SUB-SECT. 6.—A. (c) i.

**190 i. Must be reasonable.]**—On an application for a retail license, the magistrates are bound to consider all the circumstances that make against as well as in favour of granting it, & are justified in refusing it if, for good reasons, they are satisfied that it ought not to be granted.—*Re CLOSE & BERRY* (1892), 2 B. C. R. 131.—*CAN.*

**190 ii. —.]**—The board of license comrs. have a discretionary power with respect to the renewal of licenses, which must be exercised according to the rules of reason & justice & not according to private opinion.—*R. v. POINT GREY LICENSE COMRS.* (1915),

192. —.]—JONES v. GOODMAN (1889), Times, Jan. 26, D. C.

193. Right of applicant to be heard.]—R. v. WALSALL JJ., No. 384, post.

## ii. What Justices may Consider.

194. Character & wants of neighbourhood.]—On an application under 32 & 33 Vict. c. 27, for a certificate for a license to sell beer to be consumed on the premises, in respect of a house not previously licensed, the justices have the same discretion as to granting or refusing the certificate as they have in granting or refusing a license under 9 Geo. 4, c. 61; & they may & ought to take into consideration the number of houses in the neighbourhood already licensed, & refuse the certificate if they think an additional beerhouse unnecessary or undesirable in the interest of the public.—R. v. LANCASHIRE JJ., Re TYSON'S APPEAL (1870), L. R. 6 Q. B. 97; 40 L. J. M. C. 17; 23 L. T. 461; 35 J. P. 170; 19 W. R. 204.

Annotations:—Ald. Boodle v. Birmingham JJ. (1881), 45 J. P. 635. Consd. R. v. Moore (1881), 7 Q. B. D. 542. Apprd. Sharpe v. Wakefield (1891), 64 L. T. 180. Refd. R. v. Smith (1873), L. R. 8 Q. B. 146.

195. —.]—HARGREAVES v. DAWSON, No. 246, post.

196. —.]—R. v. SMITH, No. 188, ante.

197. —.]—BOODLE v. BIRMINGHAM JJ., No. 251, post.

198. —.]—SHARP v. WAKEFIELD, No. 49, ante.

199. Applicant's intention to keep premises open.]—G. obtained a transfer of a country publican's license in Jan. 1885, but never opened the premises owing to a pending negotiation with another tenant, which ultimately fell through. In 1885 G. obtained a renewal on his promise to open the premises, but he never resumed possession & re-opened the house till the negotiation ended on Aug. 23, 1886. G. had some days previously been duly served with notice of opposition on the ground of the premises being closed, & at the general annual meeting on Aug. 26, 1886, the justices refused the renewal on the ground that the reopening was not a *bona fide* intention to keep open the premises. On appeal to quarter sessions this decision was affirmed:—Held: (1) the objection was relevant, & having been competently entertained & decided by the justices, the High Ct. would not interfere with the decision; (2) the objection was not a personal one requiring the attendance of the holder of the license under Licensing Act, 1874 (c. 49), s. 26, taken with

Licensing Act, 1872 (c. 94), s. 42.—GRIFFITHS v. LANCASHIRE JJ. (1887), 51 J. P. 453; 35 W. R. 732; 3 T. L. R. 672, D. C.

200. Remoteness from police supervision.]—SHARP v. WAKEFIELD, No. 49, ante.

201. Disorderly character of premises.]—S., before applying for renewal of his publican's license, had been duly served with notice of opposition on the ground that the house was not conducted satisfactorily, it being the habitual resort of prostitutes. It was proved that several times seventeen prostitutes were seen in the house at one time, & known to S., & no evidence was given that any refreshments were supplied. The quarter sessions refused the license:—Held: there being evidence admissible as to prostitutes frequenting, & the justices having held that they did frequent, this ct. could not interfere with their refusal of the license.—SHARP v. HUGHES (1893), 57 J. P. 104, D. C.

202. Applicant's willingness to be bound—By restrictions imposed by justices.]—On an application for a new off license justices at a general annual licensing meeting have no power to grant a license subject to conditions; but they may ascertain from applt. whether he consents to restrictions, being reasonable & proper restrictions, upon the user of the proposed license, & they may grant or refuse the license unconditionally according as he consents or refuses to submit to the restrictions.—R. v. BEESLY, Ex p. HODSON, [1912] 3 K. B. 583; 77 J. P. 19; sub nom. R. v. BIRMINGHAM LICENSING JJ., Ex p. HODSON, 82 L. J. K. B. 23; 29 T. L. R. 9, D. C.

Annotation:—Mentl. Halifax Theatre de Luxe v. Gledhill (1914), 13 L. G. R. 541.

## iii. Improper Exercise.

203. Grant of license to premises—On which no house exists.]—R. v. BINGHAM (1813), 1 Burn's Justice of the Peace, 30th ed. p. 120.

204. Justices acting on previous general resolution—Not to grant new licenses.]—Justices at their licensing meeting, under 9 Geo. 4, c. 61, are bound to hear an applt. for a license who has given due notice of his application; & where they refused to hear, on the ground that they had come to a general resolution not to grant any new licenses, this ct. made absolute a rule for a *mandamus* to compel them to hear.—R. v. WALSALL JJ. (1854), 3 C. L. R. 100; 24 L. T. O. S. 111; 3 W. R. 69; 18 J. P. Jo. 757.

Annotation:—Consd. Sharpe v. Wakefield (1888), 21 Q. B. D. 66.

COMRS., Ex p. DEMMINGS (1906), 2 F. L. R. 292; 37 N. B. R. 586.—CAN.

c. —.]—Re MADAWASKA LICENSE COMRS., Ex p. DESROSIERS (1912), 41 N. B. R. 395; 12 E. L. R. 395.—CAN.

f. —Written recommendation.]—Re RICHELIEU HOTEL LICENSE (1909), 10 W. L. R. 402; 2 Alta. L. R. 64.—CAN.

g. —Application—When made.]—Ex p. MIDDLETON (circa 1924), 42 N. S. W. N. 168.—AUS.

h. —.]—Re INVERCARGILL NORTH LICENSING DISTRICT COMMITTEE, CAMERONS CASE (1892), 11 N. Z. L. R. 507.—N.Z.

## PART IV. SECT. 2, SUB-SECT. 6.—A. (e) ii.

194 l. Character & wants of neighbourhood.]—The Bench, in determining which licenses shall not be renewed, shall consider the convenience of travellers, the site of the licensed premises, the convenience of the

majority of the residents near such premises, the length of time during which such premises have been licensed, & the general character thereof.—R. v. YORK'S PENINSULA LICENSING BENCH, [1906] S. A. L. R. 214.—AUS.

194 ii. —.]—HEWITT v. INVERCARGILL LICENSING COMMITTEE (1894), 12 N. Z. L. R. 631.—N.Z.

194 iii. —.]—The licensing ct. is entitled to rely on personal knowledge of the locality in forming an opinion that the number of licensed houses is in excess of the requirements of the inhabitants.—BOYLE v. WILSON (1906), 23 T. L. R. 124.—SCOT.

194 iv. —.]—PRETORIA LICENSED VICTUALLERS' ASSOCN. v. PRETORIA LIQUOR LICENSING COURT (1909), T. S. 618.—S. AF.

194 v. —.]—GOVEIA v. CAPE LICENSING COURT (1919), C. P. D. 304.—S. AF.

201 i. Disorderly character of premises.]—FABER v. FRASER (1886), 4 N. Z. L. R. 324 (S. C.).—N.Z.

k. Whether premises afford pre-

scribed accommodation.]—Upon an application for a renewal of a license, the question whether the premises are the same as previously licensed, & continue to afford the prescribed accommodation, is one of fact for the justices to decide.—R. v. ALLEY, Ex p. SLACK (1883), 9 V. L. R. 302.—AUS.

l. Sufficiency of special grounds for granting license.]—R. v. WILKINSON, Ex p. DUGUAY (1905), 37 N. B. R. 90.—CAN.

m. Private knowledge of members of court.]—A board of license comrs., in granting liquor licenses or renewals or transfers thereof, is acting as a ct. & in a judicial capacity; & while it may take judicial notice of notoriously known facts, it cannot act upon the private knowledge of its members.—Re MCEWEN & HEBSON (1914), 28 W. L. R. 137; 17 D. L. R. 303; 20 B. C. R. 94.—CAN.

## PART IV. SECT. 2, SUB-SECT. 6.—A. (e) iii.

205 i. Justices acting on previous general resolution—Not to renew

*Sect. 2.—Justices' licenses: Sub-sect. 6, A. (c) iii., (d) i., ii. & iii., B. (a) i. & ii., (b) & (c) i.]*

205. — *Not to renew licenses.*—*R. v. SYLVESTER*, No. 190, *ante*.

206. — *To refuse licenses except on conditions.*—It has been laid down that the body on whom is conferred the jurisdiction of granting licenses [to sell intoxicating liquors] must hear each application on its merits & cannot come to a general resolution to refuse a license to everybody who does not conform to some particular requirement (*DARLING, J.*).—*R. v. LONDON COUNTY COUNCIL, Ex p. CORRIE*, [1918] 1 K. B. 68; 87 L. J. K. B. 303; 118 L. T. 107; 82 J. P. 20; 34 T. L. R. 21; 62 Sol. Jo. 70; 15 L. G. R. 889, D. C.

*Annotation:—Mentd. R. v. Port of London Authority, Ex p. Kynoch*, [1910] 1 K. B. 176.

*Justices acting corruptly.*—*See* Nos. 209–213, *post*.

*Conditions annexed to grant.*—*See* Nos.

(d) *Proceedings against Justices.*

i. *Action.*

207. *For refusal to grant license.*—*R. v. YOUNG & PITTS*, No. 174, *ante*.

208. — *An action does not lie against the justices of peace, for refusing to one a license to keep an inn or an alehouse.*—*BASSETT v. GODSCHALL* (1770), 3 Wils. 121; 95 E. R. 967.

*Annotation:—Refd. Everett v. Griffiths*, [1920] 3 K. B. 163.

ii. *Information.*

209. *Improper exercise of discretion—Malicious or corrupt motives.*—*R. v. TEMPLE* (1664), 1 Keb. 727; 1 Sid. 192; 83 E. R. 1209.

210. — *—*—*R. v. YOUNG & PITTS*, No. 174, *ante*.

211. — *—*—*Information will lie against justices of the peace, for corrupt & oppressive practices.*—*R. v. WILLIAMS, R. v. DAVIS* (1762), 3 Burr. 1317; 97 E. R. 851.

*Annotation:—Consd. Sharp v. Wakefield* (1888), 52 J. P. 292.

212. — *—*—*Unless justices act corruptly & oppressively an information will not be granted.*—*R. v. BAYLIS, ETC., GLOUCESTER (CITY) JJ.* (1762), 3 Burr. 1318; 97 E. R. 851.

213. — *—*—*R. v. HANN & PRICE*, No. 175, *ante*.

214. — *—*—*R. v. NOTTINGHAM TOWN JJ.*, No. 173, *ante*.

215. — *—*—*R. v. FILEWOOD* (1780), 1 Burn's Justice of the Peace, 30th ed. p. 120; *subsequent proceedings* (1787), 2 Term Rep. 145.

*Annotations:—Refd. R. v. Holland & Forster* (1787), 1 Term Rep. 692. *Mentd. R. v. Savile* (1852), 18 Q. B. 703.

216. — *—*—*An information will be granted against a justice of the peace as well for granting as for refusing an ale license improperly.*—*R. v. HOLLAND & FORSTER* (1787), 1 Term Rep. 692; 99 E. R. 1324.

*Annotation:—Mentd. R. v. Gompertz* (1845), 9 Jur. 401.

217. *Refusal to grant license—Except on payment.*—*An information for extortion granted*

*against justices of the peace for refusing to grant licenses to publicans unless on the payment of 10s. although this had been the practice of the borough for twenty-five years before.*—*R. v. SEYMOUR* (1740), 7 Mod. Rep. 382; 87 E. R. 1305.

218. — *—*—*R. v. CORNELIUS* (1744), 2 Stra. 1210; cited in 1 Wils. at p. 242; 93 E. R. 1133.

*Annotations:—Consd. R. v. Purnell* (1748), 1 Wm. Bl. 37. *Mentd. Entick v. Carrington* (1765), 2 Wils. 275; *R. v. Shelley* (1789), 3 Term Rep. 141.

*See, also*, No. 209, *ante*.

iii. *Indictment.*

219. *Improper exercise of discretion—Malicious or corrupt motives.*—*R. v. YOUNG & PITTS*, No. 174, *ante*.

*B. Limited Discretion—Renewal or Transfer.*

(a) *Off Licenses.*

i. *In General.*

, Licensing (Consolidation) Act, 1910 (c. 24), s. 17, sched. I., Part I.

220. *For sale of wines & spirits.*—32 & 33 Vict. c. 27, s. 8, which enacts that certificates for off retail licenses under that Act are only to be refused upon one of the four grounds therein specified, is repealed by 43 Vict. c. 6, s. 1, only so far as it relates to beer licenses; & the discretion of licensing justices as to the granting of certificates for off retail wine or spirit licenses is still subject to the limitations imposed by 32 & 33 Vict. c. 27, s. 8.—*R. v. SCOTT, ETC., SOUTH SHIELDS LICENSING JJ.* (1889), 22 Q. B. D. 481; 58 L. J. M. C. 78; 60 L. T. 231; 53 J. P. 119; 37 W. R. 301; 5 T. L. R. 202, D. C.

ii. *Grounds for Exercise of Discretion.*

*See, now.* Licensing (Consolidation) Act, 1910 (c. 24), s. 17, sched. I., Part I.

221. *Failure to produce evidence of good character—No evidence given against applicant.*—*If an appct. for a certificate under 32 & 33 Vict. c. 27, for the renewal of a beerhouse license, does not produce evidence of good character, the justices may refuse the certificate on the ground that he has "failed to produce" such evidence, under sect. 8, although no evidence has been given against him, & he has not been called upon for evidence of good character, & it has been the practice of the justices not to require an appct. to produce such evidence in cases where a certificate for renewal of a license is asked for.*—*Ex p. MORGAN* (1870), 23 L. T. 605; 35 J. P. 37.

*Annotation:—Refd. Sharp v. Wakefield* (1888), 53 J. P. 20.

222. — *Admissibility of evidence of character—Fresh evidence—On appeal.*—*R. v. PILGRIM*, No. 485, *post*.

223. — *—*—*Evidence given on previous charge of suffering gaming—Applicant acquitted.*—*LATIMER v. BIRMINGHAM JJ.* (1896), 60 J. P. Jo. 660, D. C.

224. — *What constitutes "failure"—Necessity for written certificate.*—*R. v. MONMOUTHSHIRE JJ.* (1874), 38 J. P. Jo. 724.

*licenses.*—*LETT v. TAYLOR* (1892), 10 N. Z. L. R. 646.—N.Z.

n. *Non-compliance with municipal act.*—Non-compliance with the municipal act by a board of license comrs., in granting an application for a liquor license, renders the license null & void.—*FREEMAN v. NEW WESTMINSTER LICENSE COMRS.* (1914), 30 B. C. R. 438; 39 W. L. R. 692.—CAN.

o. *Exclusion of sale of spirits in renewal.*—Holders of full licenses, including spirits, applied for renewal of certificate. The ct. granted them certificates for sale of wine & beer only.—*Held: exclusion of sale of spirits from certificates amounted to refusal of renewal of certificate, & as appcts. were not heard before renewals were refused, proceedings of licensing*

*ct. were ultra vires & could not stand.*—*HAILLIE v. WILSON*, [1917] S. C. 65, 246.—SCOT.

PART IV. SECT. 2, SUB-SECT. 6.—A. (d) ii.

209 i. *Improper exercise of discretion—Malicious or corrupt motives.*—*R. v. RITCHIE, Ex p. BLAINE* (1905), 37 N. B. R. 213.—CAN.



**225. — Sufficiency of evidence—Discretion of justices.]—**H. applied to the licensing justices of A. for a certificate to hold the excise beer dealer's additional retail license under Revenue Act, 1863 (c. 33), s. 1. He produced his beer dealer's license, & tendered three certificates of character, but called no witnesses nor tendered as witnesses those who signed these certificates. The justices, without objecting to the want of evidence of character, & no opposition being made, refused the certificate without stating reasons, but at an adjourned meeting, on application, they stated the reason to be that the evidence of character was insufficient:—*Held*: a *mandamus* would not be granted to hear & adjudicate, as the justices had already done so, & they were entitled to come to such a decision if H. chose to rest his application on evidence other than that of witnesses.—*R. v. HANLEY JJ.* (1877), 42 J. P. 102.

**226. Confined to grounds enumerated in Act—Licensing (Consolidation) Act, 1910 (c. 24), s. 17, sched. I, Part I.]—***R. v. BEDWELLY, MONMOUTHSHIRE LICENSING JJ.*, No. 167, *ante*.

**227. That house not duly qualified—Ratable value.]—***R. v. BRADFORD JJ.* (1874), 38 J. P. Jo. 756.

**228. — —.]—***R. v. CUMBERLAND JJ., Ex p. WAITING*, No. 170, *ante*.

**229. Fitness for license in particular locality.]—***R. v. LANCASTER JJ.*, No. 98, *ante*.

**230. Structural unsuitability—Alteration in licensed premises.]—***MARSHALL v. SPICER*, No. 341, *post*.

(b) *On Licenses other than Old Beerhouse Licenses*

*See, now*, Licensing (Consolidation) Act, 1910 (c. 24), ss. 18, 23, sched. II.

**231. Grounds for refusal—That renewal or transfer would be void.]—**Certain licensed premises were kept going as licensed premises & small sales of liquor were made for the purpose of preserving the continuity of the business & selling such premises with the license, but for no other purpose. There was no actual interruption beyond the interruption caused by the falling off of trade, & the sale of liquor was continuous. The licensing justices refused to renew the license on the ground that the renewal thereof under the circumstances would be void, & this refusal was upheld by quarter sessions:—*Held*: the decision of the justices & quarter sessions was wrong, & license must be renewed.—*WEBB v. LONDON (CITY) LICENSING JJ.* (1910), 102 L. T. 70; 74 J. P. 79, D. C.

**232. — —.]—***R. v. KINGSTON-UPON-HULL LICENSING JJ.*, No. 171, *ante*.

**233. — Premises badly conducted.]—**A brewery co. were the owners of a public-house, & a full license for the public-house was transferred to one D., the lessee of the brewery co., in 1908. In 1909 the brewery co. came to a fresh arrangement with D., but the change in the relationship between the brewery co. & D. was unknown to the justices, who renewed the license in 1910, 1911, 1912, & 1913. In the last named year the arrangement was terminated, D. left the public-house, & the brewery co. applied for a transfer of the license to H. For many years the justices had refused to grant licenses to persons other than *bona fide* tenants carrying on business for their own benefit & profit, & had refused to license managers, & had made a practice of inspecting & approving agreements or other assurances under which proposed licensees were to hold licenses.

When the brewery co. applied for the transfer of the license to H., the justices refused to grant it on the ground that under the arrangement made between the brewery co. & D., the latter had acted as the co.'s agent; that the brewery co. although unlicensed persons, had been selling their own liquor on the premises, & that consequently the public-house had been ill-conducted. On appeal to quarter sessions, whilst it was admitted that the public-house was of good character, that H. was a fit & proper person to hold a license, & that he was in possession of the public-house, the justices found that D. had been merely a manager of the brewery co. between the years 1909 & 1913, & that, therefore, the public-house had been ill-conducted within Licensing (Consolidation) Act, 1910 (c. 24), sched. II. They dismissed the appeal subject to a case stated:—*Held*: although a case stated by quarter sessions is not, under Judicature Act, 1894 (c. 16), s. 2, an appeal upon facts as well as upon law, nevertheless it is within the powers of the High Ct. to determine whether upon the evidence quarter sessions were justified in arriving at the conclusion stated in the case, & as there was no evidence that the brewery co. had been selling their own liquor upon the premises, the appeal must be allowed.—*HICKTON v. HODGSON* (1913), 110 L. T. 380; 78 J. P. 93; 30 T. L. R. 221, D. C. *Annotation*:—*Fold. Mitchell v. Croydon JJ.* (1911), 111 L. T. 632.

**234. — Verbal agreement that brewer shall bear increased duty.]—**The licensing justices cannot refuse the transfer of an old on license, i.e. an on license which was in force on Aug. 15, 1904, on the ground that a verbal agreement made between the brewers who own the premises & the tenant applying for the transfer, that the brewers shall pay the increased license duty imposed by Finance (1909–1910) Act, 1910 (c. 8), has not been inserted in the written tenancy agreement, as the incidence of the increased duty is regulated by sect. 46 of the Act.—*R. v. UNDERWOOD, Ex p. BESWICK* (1912), 76 J. P. 154, D. C.

(c) *Old Beerhouse Licenses.*

i. *In General.*

**235. Limitation of justices' discretion—Wine & Beerhouse Act, 1869 (c. 27), ss. 8, 19.]—**33 & 34 Vict. c. 29, s. 4 (4), which enacts that it shall be in the discretion of the justices to whom an application for a transfer of a license is made either to allow or refuse the application, or to adjourn the consideration thereof, is intended only to affect the procedure as to adjournment at sessions for the transfer of licenses. Therefore on an application to justices at special sessions for a transfer of a license to sell beer to be consumed on or off premises in respect of which such a license was in force on May 1, 1869, & has since been renewed from time to time, the discretion of the justices is limited as it is on an application at the general licensing meeting for a grant by way of renewal of the license, & the application for the transfer can only be refused on one or more of the four grounds specified in Wine & Beerhouse Act, 1869 (c. 27), ss. 8, 19.—*SIMONDS v. BLACKHEATH JJ.* (1886), 17 Q. B. D. 765; 55 L. J. M. C. 166; 50 J. P. 742; 35 W. R. 167; 3 T. L. R. 9, D. C. *Annotations*:—*Distd. Traynor v. Jones*, [1894] 1 Q. B. 83. *Fold. Ex p. Ffynn*, [1899] 2 Q. B. 607.

*See, now*, Licensing (Consolidation) Act, 1910 (c. 24), s. 23.

**236. Application must be for same license as one previously held.]—**(1) Upon an application to licensing justices under Wine & Beerhouse Act,

**Sect. 2.—Justices' licenses: Sub-sect. 6, B. (c)***ii., iii. & iv., & (d)*

1869 (c. 27), s. 19, for a certificate for a license to sell wine to be consumed on the premises, it appeared that on May 1, 1869, a license was in force with respect to the house for the sale of beer to be consumed on the premises:—*Held*: upon the true construction of sect. 19, the discretion of the justices in refusing the application was unlimited, for the existence of a license with regard to the sale of beer did not confer any privilege upon an application for a certificate in respect of the sale of either wine or cider. (2) Upon a *mandamus* to justices to hear & determine an application for a certificate to sell wine to be consumed on the premises, they made a return of unconditional compliance with the writ. Plea, that the justices were only entitled to refuse the application upon one or more of the four grounds specified in sect. 8 of the Wine & Beerhouse Act, 1869 (c. 27), s. 8, but that they refused the application on other grounds contrary to the statute:—*Held*: the plea was good, as it must be taken to mean that in refusing the application the justices had assumed to exercise a jurisdiction which they did not possess, & they had therefore not substantially heard & determined the matter submitted to them.—*R. v. KING* (1888), 20 Q. B. D. 430; 57 L. J. M. C. 20; 58 L. T. 607; 52 J. P. 164; 36 W. R. 600; *sub nom.* *R. v. MANCHESTER LICENSING JJ.*, 4 T. L. R. 202, C. A.

*Annotations*:—*As to* (2) *Folld. R. v. Lancaster JJ.* (1891), 55 J. P. 580. *Reid. R. v. London JJ.*, [1895] 1 Q. B. 616.

**237. Renewal refused on ground within discretion.—Though transfer granted at previous meeting**—*Same objection taken.*—Where, upon an application for the transfer of a license to sell beer by retail on or off premises licensed prior to May 1, 1869, an objection is made upon one of the four grounds enumerated in Wine & Beerhouse Act, 1869 (c. 27), s. 8, but the justices in the exercise of their discretion grant the transfer, the same objection upon the same facts may be taken at the next general annual licensing meeting to the renewal of the license, & the renewal may be refused on that ground.—*SMITH v. SHANN*, [1898] 2 Q. B. 347; 67 L. J. Q. B. 819; 79 L. T. 77; 14 T. L. R. 443, D. C.

*ii. Grounds for Exercise of Discretion.*

*See, now, Licensing (Consolidation) Act, 1910* (c. 24), s. 23.

**238. That premises frequented by persons of bad character.**—*WHIFFEN v. MALLING (OR MAIDSTONE) JJ.*, No. 478, *post*.

**239. What justices may consider—Objections taken—Limited to objections set out in Act.**—*WHIFFEN v. MALLING (OR MAIDSTONE) JJ.*, No. 478, *post*.

**240. — Terms of agreement of tenancy.**—*R. v. NORTHAMPTON JJ.* (1912), cited in Halsbury's Laws of England Supplement (1926), Vol. XVIII., para. 188, D. C.

**241. —**—*R. v. HYDE JJ.*, No. 299, *post*.

**242. — Fitness of applicant.**—*R. v. HYDE JJ.*, No. 299, *post*.

**243. Objections distinct from one another.**—*WHIFFEN v. MALLING (OR MAIDSTONE) JJ.*, No. 478, *post*.

*iii. What is an Old Beerhouse.*

**244. License in force on May 1, 1869—Con-**

**tinuous existence—Existence at date of application.]**

—*FREEE v. MURRAY*, No. 253, *post*.

*See, also, Nos. 245–253, post.*

*See, now, Licensing (Consolidation) Act, 1910* (c. 24), s. 18, sched. II., Part II.

**245. Effect of interruption.**—Where a license or certificate of a house licensed on May 1, 1869, has afterwards dropped or been refused, the justices on the true construction of Wine & Beerhouse Act, 1869 (c. 27), s. 19, have the same discretion to refuse a fresh certificate for a license to sell beer to be consumed on the premises as if the application were in respect of a house which had not been licensed on May 1, 1869, & the repeal of the declaratory sect. 3 of 34 & 35 Vict. c. 88, is immaterial.—*R. v. CURZON* (1873), L. R. 8 Q. B. 400; 42 L. J. M. C. 155; 29 L. T. 32; 37 J. P. 774; 21 W. R. 887.

*Annotations*:—*Apprvd. Freer v. Murray*, [1894] A. C. 576. *Consd. Wernham v. R.*, [1914] 1 K. B. 468. *Reid. R. v. West Riding, Yorks, J. J.* (1888), 52 J. P. 455; *Igoe v. Shann*, [1902] 2 K. B. 467; *Tower JJ. v. Chambers*, [1904] 2 K. B. 903.

**246. — Licence forfeited by conviction of holder—Application by owner.**—Although, by 32 & 33 Vict. c. 27, s. 19, justices cannot refuse to grant a certificate in respect of a house which was licensed on May 1, 1869, except for one of the causes mentioned in sect. 8, yet if the license has been actually forfeited, they may treat a subsequent application for a certificate as an original application, & may exercise a discretion in refusing it.

The house of applt. had an existing license [as a beerhouse] on May 1, 1869, but at the licensing meeting in the following Aug. the said license was lost on account of the personal misconduct of the then tenant. At the licensing meeting in Aug. 1870, the present applt. applied for a certificate which was refused, on the ground that he had not shown the necessity for such a house in the neighbourhood:—*Held*: the magistrates were justified in treating such application as an original one, & in exercising their discretion in refusing it.—*HARGREAVES v. DAWSON* (1871), 24 L. T. 428; 35 J. P. 342.

*Annotations*:—*Apld. R. v. Curzon* (1873), L. R. 8 Q. B. 400. *Apprvd. Murray v. Freer*, [1893] 1 Q. B. 635. *Consd. Wernham v. R.*, [1914] 1 K. B. 468. *Reid. R. v. West Riding, Yorks, JJ.* (1888), 52 J. P. 455; *Igoe v. Shann*, [1902] 2 K. B. 467; *Tower JJ. v. Chambers*, [1904] 2 K. B. 903.

**247. — — — — —**—*Ex p. O'CONNOR* (1877), 41 J. P. Jo. 740, D. C.

**248. — — — — —**—A license existing on May 1, 1869, for the sale of beer to be consumed on the premises was forfeited by the conviction of the holder under Licensing Act, 1872 (c. 94), s. 15, for permitting the premises to be used as a brothel:—*Held*: the license was not "in force" within 32 & 33 Vict. c. 27, s. 19, & the licensing justices at special sessions had a general discretion to refuse applications by the landlord & a new tenant of the premises for a transfer of the license, & were not limited to the four grounds of refusal specified in sect. 8.—*R. v. WEST RIDING JJ.* (1888), 21 Q. B. D. 258; 57 L. J. M. C. 103; 52 J. P. 455; 36 W. R. 855; 4 T. L. R. 619, D. C.

*Annotations*:—*Consd. Wernham v. R.*, [1914] 1 K. B. 468. *Reid. Murray v. Freer*, [1893] 1 Q. B. 281; *Tower Division Licensing JJ. v. Chambers* (1904), 90 L. T. 228.

**249. — — — — —**—The holder of a license to sell beer to be consumed on & off the premises, which had been continuously in force from a date anterior to 1869, having forfeited this license in consequence of his conviction for selling spirits without a license, the owner of the premises applied to a court of summary jurisdiction, under

**Licensing Act, 1874 (c. 49), s. 15**, for authority to carry on the same business on the same premises until the next special licensing sessions:—*Held*: the ct. of summary jurisdiction had no authority to refuse this application on any ground other than those specified in Wine & Beerhouse Act, 1869 (c. 27), s. 8.—*Ex p. FLINN & SONS* (No. 2), [1899] 2 Q. B. 607; 68 L. J. Q. B. 1025; 81 L. T. 221; 63 J. P. 740; 48 W. R. 29; 15 T. L. R. 532, D. C.

*Annotation*:—*Dbtd. Tower J.J. v. Chambers*, [1904] 2 K. B. 903.

**250.** ————*]*—A beerhouse license, which had been continuously renewed in respect of premises licensed prior to May 1, 1869, was forfeited by reason of the conviction of the holder for selling spirits without a license. The owners subsequently applied at a special licensing sessions under Licensing Act, 1874 (c. 49), s. 15, for a grant of a license in respect of the premises to another tenant:—*Held*: the license was not "in force" within Wine & Beerhouse Act, 1869 (c. 27), s. 19, at the date of the application, & therefore the licensing justices had a general discretion to refuse the application, & were not limited to the four grounds of refusal specified in Wine & Beerhouse Act, 1869 (c. 27), s. 8.—*TOWER J.J. v. CHAMBERS*, [1904] 2 K. B. 903; 73 L. J. K. B. 951; 91 L. T. 643; 68 J. P. 581; 20 T. L. R. 784, C. A.

*Annotation*:—*Distd. Wernham v. R.*, [1914] 1 K. B. 468.

**251.** ————*]*—**House demolished for public purposes**—**Application for transfer.**—*B.*, the holder of a beerhouse license in the country under Beerhouse Act, 1830 (c. 64), got a notice to quit his house, as it was taken for a public purpose, & he quitted on Oct. 4. On Nov. 5, he entered on another house about two miles off, & then at the next special transfer sessions on Dec. 2, applied to the justices for a transfer under 9 Geo. 4, c. 61, s. 14, but the justices refused it on the ground that the locality of the new house was already fully supplied with licensed houses:—*Held*: the justices had an absolute discretion, & it could not be interfered with by the High Ct.—*BOODLE v. BIRMINGHAM J.J.* (1881), 45 J. P. 635, D. C.

*Annotation*:—*Refd. Sharp v. Wakefield* (1888), 53 J. P. 20.

**252.** ————*]*—A house, in respect of which a license to sell beer to be consumed on the premises was in force on May 1, 1869, & was thenceforward renewed from time to time, was about to be pulled down for a special purpose. The holder of the license applied to the justices in special sessions, under 9 Geo. 4, c. 61, s. 14, for a grant of a corresponding license to sell beer to be consumed on the premises at another house to which it was proposed to remove:—*Held*: the justices had a general discretion to refuse the application, & were not confined to the four grounds of refusal mentioned in Wine & Beerhouse Act, 1869 (c. 27), s. 8.—*TRAYNOR v. JONES*, [1894] 1 Q. B. 83; 63 L. J. M. C. 31; 69 L. T. 862; 58 J. P. 183; 42 W. R. 201; 38 Sol. Jo. 27; 10 R. 26, D. C.

**253.** ————*]*—**Application for transfer after expiry.**—A license for the sale of beer had been held for a house from a date before May 1, 1869, continuously down to Oct. 10, 1891, when it expired, the tenant's application for a renewal having been refused in Sept. On Oct. 9, 1891, a new tenant gave notice that he intended to apply, & on Nov. 17 he did apply, to the justices in special sessions for a transfer of the licence under 9 Geo. 4, c. 61, s. 14:—*Held*: that under Wine & Beerhouse Act, 1869 (c. 27), s. 19, & 33 & 34 Vict. c. 29, s. 7, the justices were not restricted to the

four grounds of refusal specified in the Act of 1869, but had a general discretion; since the restriction applies only where there has been a license in existence continuously from a date before May 1, 1869, down to the date of the application.

The prohibition, or the limitation, perhaps I should rather say, of the free jurisdiction of the justices only applies where there was a license in force on May 1, 1869, & where that license has been renewed from time to time, so that it has been throughout & is in existence at the date of the application. If at any time subsequent to May 1, 1869, & prior to or at the date of the application, there was not a license in existence in respect of that house, it appears to me that sect. 19 is inapplicable (*LORD HERSHELL, C.*)—*FREER v. MURRAY*, [1894] A. C. 576; 63 L. J. M. C. 242; 71 L. T. 444; 58 J. P. 508; 10 T. L. R. 547; 6 R. 237, H. L.; *affg. S. C. sub nom. MURRAY v. FREER*, [1893] 1 Q. B. 635, C. A.

*Annotations*:—*Distd. Igoo v. Shann*, [1903] A. C. 320; *Wernham v. R.*, [1914] 1 K. B. 468. *Refd. Ex p. Flinn* (1899), 63 J. P. 740; *Tower J.J. v. Chambers*, [1904] 2 K. B. 903.

**254. Effect of non-exercise of license.**—A beerhouse license had been continuously renewed in respect of premises which had been licensed prior to May, 1869; but the license had not been exercised & no beer had been sold on the premises for a long period:—*Held*: this fact gave the justices no jurisdiction to refuse to renew the license to a new tenant who intended to carry on the premises as *bona fide* licensed premises, but they were still limited to the four grounds of objection specified in 32 & 33 Vict. c. 27, s. 8.—*MACKRELL v. BRENTFORD J.J.*, [1900] 2 Q. B. 387; 69 L. J. Q. B. 748; 83 L. T. 31; 64 J. P. 603; 48 W. R. 648; 16 T. L. R. 439; 41 Sol. Jo. 553, D. C.

*Annotation*:—*Refd. Wilson v. Crowe J.J.* (1905), 74 L. J. K. B. 394.

#### iv. Alteration of Premises.

**255. What justices have to determine.**—*R. v. BRADFORD J.J.*, No. 334, *post*.

#### (d) Statement of Grounds for Refusal.

**256. Necessity for—Written statement.**—*R. v. ASHTON-UNDER-LYNE J.J.* (1873), 37 J. P. Jo. 85.

**257.** ————*]*—**Statement not requested.**—*R. v. ASHTON-UNDER-LYNE J.J.* (1873), 37 J. P. Jo. 85.

**258.** ————*]*—By the provisions of the statutes relating to licensing, certain licenses for the sale of intoxicating drinks not to be consumed on the premises are not to be refused, except on one or more of four grounds specified. Justices on refusing to grant such a license did not state any ground for such refusal. They were not, however, asked to state their ground for such refusal; & on an application for a *mandamus* against them to hear & determine the application for the license, the chairman of the justices made an affidavit that they had in fact acted on one of the grounds on which they were empowered to refuse the license:—*Held*: on the authority of *Reg. v. Sykes*, No. 260, *post*, the justices were bound to state their grounds at the time of refusing the application, & the *mandamus* therefore went.—*Ex p. SMITH* (1878), 3 Q. B. D. 374; *sub nom. R. v. SURREY, CHERTSEY DIVISION J.J.*, 47 L. J. M. C. 104; 42 J. P. 598; 26 W. R. 682, D. C.

*Annotations*:—*Consd. R. v. Eales, Eales v. Philpotts, etc.*, *Devon J.J.* (1880), 42 L. T. 735. *Apd. Tranter v. Lancashire J.J.* (1887), 51 J. P. 454. *Consd. Ex p. Gorman*, [1894] A. C. 23.



**Sect. 2.—Justices' licenses: Sub-sect. 6, B. (d) & C.; sub-sect. 7, A.]**

**259.** ———.]—*R. v. CUMBERLAND JJ., Ex p. WAITING*, No. 170, *ante*.

**260.** ———.]—Wine & Beerhouse Act, 1869 (c. 27), s. 8, provides that no application for a certificate under that Act in respect of a license to sell by retail beer, cider or wine not to be consumed on the premises, shall be refused, except upon one or more of four grounds which are specified in the sect.:—*Held*: justices who refuse a license to an appct. under this Act are bound to state to him upon which of the four grounds they have so refused it.—*R. v. SYKES* (1875), 1 Q. B. D. 52; 45 L. J. M. C. 39; 24 W. R. 141; *sub nom. R. v. HUDDERSFIELD JJ., SYKES' CASE*, 33 L. T. 566; 40 J. P. 39, D. C.

*Annotations*:—*Apld. Ex p. Smith* (1878), 3 Q. B. D. 374. *Consd. R. v. Eales, Eales v. Philpotts, etc., Devon JJ.* (1880), 42 L. T. 735; *R. v. Kent JJ.* (1880), 44 J. P. 298. *Fold, Tranter v. Lancashire JJ.* (1887), 51 J. P. 454. *Apld. R. v. Thomas*, [1892] 1 Q. B. 426. *Consd. Ex p. Gorman*, [1894] A. C. 23.

**261.** ———.]—*E.*, keeper of a beerhouse for consumption on the premises, was convicted of trading on Sunday. Next annual licensing meeting the clerk was directed by the justices to ask her to attend in person if she wished a renewal. *E.* did so, & the justices, without hearing evidence on oath, refused to renew the license, & gave no grounds for refusal. *E.* appealed to quarter sessions, & the decision was affirmed subject to a case stated as to whether there was any discretion to reverse the decision of licensing justices:—*Held*: as the licensing justices had not received evidence on oath, nor stated the ground of refusal as being one of the four mentioned, their refusal was without jurisdiction, & the quarter sessions should have granted the renewal.—*R. v. EALES, EALES v. PHILPOTTS, ETC., DEVON JJ.* (1880), 42 L. T. 735; 44 J. P. 553, D. C.

*Annotations*:—*Reid. Whiffen v. Bligh, etc., Malling Licensing JJ.* (1891), 61 L. J. M. C. 82; *R. v. Farnham JJ., Ex p. Smith* (1902), 86 L. T. 839; *R. v. Howard*, [1902] 2 K. B. 363.

**262.** ———.]—*J.*, the holder of an indoor country beerhouse license, was convicted in Nov. 1885, of allowing prostitutes to remain on his premises. He received notice of opposition to his renewal on that ground before next general annual meeting, & gave up possession, & *T.* became tenant on Sept. 16, 1886, & at once gave notice that she would ask for the renewal license in her own name. At the general annual meeting on Sept. 24, 1886, the justices refused the renewal either to *T.* or to *J.*, without stating any ground. On appeal the quarter sessions confirmed the decision:—*Held*: the justices were not entitled to refuse the license without stating the ground of their decision.—*TRANTER v. LANCASHIRE JJ.* (1887), 51 J. P. 454; 3 T. L. R. 678, D. C.

**263.** ———.]—Where justices refuse an application for the license of a beerhouse which was licensed on May 1, 1869, & has been continuously so licensed, they are bound to state their grounds at the time of refusing the application, & if they do not so state them, a *mandamus* will be granted commanding them to hear & determine the application.—*R. v. THOMAS*, [1892] 1 Q. B. 426; 56 J. P. 161; 8 T. L. R. 299; *sub nom. R. v. THOMAS, ETC., JJ., Ex p. KELLAND*, 66 L. T. 289; 40 W. R. 478; *sub nom. R. v. BRISTOL JJ.*, 61 L. J. M. C. 141, D. C.

*Annotations*:—*Consd. Symonds v. Wedmore*, [1894] 1

Q. B. 401. *Reid. Baldwin v. Dover JJ.*, [1892] 2 Q. B. 421; *Price v. James*, [1892] 2 Q. B. 428.

**264. Sufficiency of—Minute of clerk.]—R. v. CUMBERLAND JJ., Ex p. WAITING, No. 170, *ante*. ———.]—*See, also*, No. 256, *ante*.**

### C. Attaching Conditions to License.

**265. Off license—General rule.]—R. v. BEESLY, Ex p. HODSON, No. 202, *ante*.**

**266. What conditions may be annexed—Condition for payment of money—Collateral debt.]—R. v. ATHAY (1758), 2 Burr. 653; 97 E. R. 494.**

*Annotations*:—*Consd. R. v. Sylvester* (1861), 26 J. P. 151; *R. v. Bowman*, [1898] 1 Q. B. 663. *Reid. R. v. Shann*, [1910] 2 K. B. 418; *Brocklebank v. R.*, [1924] 1 K. B. 647.

**267.** ———.]—**To be applied in reduction of rates.]—**At a general annual licensing meeting an application was made for a license to sell intoxicating liquors. The justices granted the license upon appct. paying to them a sum of money, which money they intended to apply in reduction of the rates of the borough, or for some other similar public purpose. Certain persons, who had appeared before the justices in opposition to the application, then obtained a rule for a *certiorari* to bring up the license to be quashed, & also a rule for a *mandamus* to hear & determine the application for a license according to law:—*Held*: (1) the rule for a *mandamus* must be made absolute, on the ground that the objectors had a right to be heard before the licensing justices according to law, that the justices in annexing to the grant of the license the condition of the payment of money showed that they had allowed their decision to be influenced by extraneous considerations, & that the hearing under such circumstances was equivalent to no hearing at all; (2) the rule for a *certiorari* must, on the authority of *R. v. Sharman, Ex p. Denton*, No. 352, *post*, be discharged on the ground that the grant by licensing justices of a license to sell intoxicating liquor is not a judicial order.—*R. v. BOWMAN*, [1898] 1 Q. B. 663; 14 T. L. R. 303; *sub nom. R. v. BOWMAN, ETC., JJ. & DUNCAN, Ex p. PATTON*, 67 L. J. Q. B. 463; 78 L. T. 230; 62 J. P. 374, D. C.

*Annotations*:—*As to* (1) *Consd. Stephens v. Brentford Licensing JJ.* (1901), 65 J. P. 345; *R. v. Grinwade, Ex p. Catchpole & Stowe, R. v. Dodds, Ex p. Roberts & Walker* (1905), 69 J. P. 184. *Apld. R. v. Dodds*, [1905] 2 K. B. 40; *Southwark Corp. v. Partington Advertising Co.* (1905), 69 J. P. 183; *R. v. Shann*, [1910] 2 K. B. 418. *Reid. R. v. Cotham*, [1898] 1 Q. B. 802; *R. v. Nicholson*, [1899] 2 Q. B. 455; *R. v. Drinkwater*, [1905] 2 K. B. 469. *As to* (2) *Reid. R. v. Johnson* (1905), 74 L. J. K. B. 585; *R. v. Woodhouse, etc., Leeds JJ.* (1906), 75 L. J. K. B. 745. *Generally, Mentd. R. v. L. C. C., Ex p. London & Provincial Electric Theatres*, [1915] 2 K. B. 466; *R. v. Brighton Corp.*, *Ex p. Tilling* (1916), 85 L. J. K. B. 1552; *R. v. Port of London Authority, Ex p. Kynoch*, [1919] 1 K. B. 176.

**268. ———.]—Condition to secure monopoly value.]—**Licensing Act, 1904 (c. 23), s. 4 (2), giving licensing justices power to attach conditions to the grant of a new on license in order to secure to the public the monopoly value, does not apply to an order for the removal of a license, & licensing justices therefore have no power to attach those condition to the making of an order for removal.—*R. v. DRINKWATER, WINCOTT'S CASE*, [1905] 2 K. B. 469; 74 L. J. K. B. 722; 93 L. T. 165; 69 J. P. 300; 54 W. R. 95; 21 T. L. R. 514, D. C.

**269. ———.]—Meaning of.]—R. v. CUSTOMS & EXCISE COMRS.**, No. 128, *ante*.

### PART IV. SECT. 2, SUB-SECT. 6.—B. (d).

**260 i. Necessity for.]—R. (FINDLATER) v. DUBLIN COUNTY RECORDER & JJ.**, [1904] 2 I. R. 75; 37 I. L. T. 202.—*IR.*

**270.** **How calculated.]—R. v. CUSTOMS & EXCISE COMRS., No. 128, ante.**

**271.** ———.]—By Licensing (Consolidation) Act, 1910 (c. 24), s. 14 (1) (a), the justices on the grant of a new justices' on license shall attach to the grant of the license such conditions as they think best adapted "for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, & the value of the same premises if they were not licensed":—*Held*: where a new on license is granted in respect of premises, the justices in fixing the amount of the monopoly value cannot take into account the fact that the owner of the premises has surrendered the license of another public-house as a condition of the granting of the new license, this not being a method by which the monopoly value of premises can be secured to the public.—*R. v. PITFIELD*, [1919] 2 K. B. 249; 88 L. J. K. B. 933; 83 J. P. 157, D. C.

*See, also*, No. 279, *post*.

**272.** ———.]—**Condition as to mode of payment.]—**A new license to sell intoxicating liquors cannot be granted in respect of premises in respect of which there is a similar license, that is to say, a license to sell the same kinds of intoxicating liquor, in force at the date of the application. A license granted in such circumstances, though in form a new license, is in substance a license by way of renewal, & consequently cannot contain conditions as to payment of monopoly value different from those contained in the original license. *Qu.*: whether justices can grant a license subject to a condition that the payments on account of monopoly value shall be made for an indefinite number of years.—*R. v. TAYLOR, R. v. AMENDT*, [1915] 2 K. B. 593; 84 L. J. K. B. 1489; 113 L. T. 167; *sub nom.* *R. v. TAYLOR, Ex p. A.-G., R. v. AMENDT, Ex p. SAME*, 79 J. P. 332; 31 T. L. R. 317, D. C.

*Annotation*:—*Reid. R. v. Corfield* (1923), 128 L. T. 305.

**273.** ———.]—**Undertaking as to conduct of business.]—**The justices of a licensing district have no authority, under Licensing Act, 1904 (c. 23), s. 9, to make the renewal of an existing on license conditional on appct. giving an undertaking as to the conduct & management of the business, in respect of matters not covered by the grounds for refusing the renewal of such a license specified in Licensing Act, 1904 (c. 23), s. 1.

What the justices have done is to decide in favour of renewal with a condition which they had no power to impose & which is therefore nugatory, & a *mandamus* ought to go to compel them to deliver the renewal licenses without the

condition (*COLLINS, M.R.*).—*R. v. DODDS*, [1905] 2 K. B. 40; 74 L. J. K. B. 599; 93 L. T. 319; 69 J. P. 210; 53 W. R. 559; *sub nom.* *R. v. DODDS, Ex p. ROBERTS & WALKER & SON*, 21 T. L. R. 391, C. A.

*Annotations*:—*Consd. R. v. JACKSON* (1906), 96 L. T. 77; *Smith v. Portsmouth J.J.*, [1906] 2 K. B. 229. *Fold. R. v. CREWE LICENSING J.J., Ex p. BRICKER* (1914), 111 L. T. 1074. *Reid. R. v. Southampton J.J., Ex p. Fuller, Smith & Turner* (1906), 70 J. P. 13; *R. v. Shann*, [1910] 2 K. B. 418; *R. v. Customs & Excise Comrs.*, [1914] 2 K. B. 390.

**274.** ———.]—Upon the application for the transfer of an old on license the licensing justices have no power since the passing of Licensing Act, 1904 (c. 28), to impose upon the transferee an undertaking or to make the transfer of the license conditional, upon the transferee giving an undertaking as to the management of the licensed premises, even though such undertaking was given when the license was first granted before 1904.—*R. v. CREWE LICENSING J.J., Ex p. BRICKER* (1914), 111 L. T. 1074; 79 J. P. 26; 30 T. L. R. 626, D. C.

#### SUB-SECT. 7.—DIFFERENT KINDS OF GRANT.

##### A. *New Licenses.*

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 12 (1).

**275.** **What constitutes—Application of new tenant—Previous license forfeited.]—**HARGREAVES v. DAWSON, No. 246, *ante*.

**276.** ———.]—*R. v. WEST RIDING J.J.*, No. 248, *ante*.

**277.** ———.]—*STEVENS v. GREEN*, No. 287, *post*.

**278.** ———.]—**License to sell different kind of liquor.]—**By Licensing Act, 1872 (c. 94), s. 37, a new license shall not be valid unless confirmed by the licensing committee. By sect. 74 a new license means a license granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors:—*Held*: a license to sell excisable liquors under 9 Geo. 4, c. 61, & Licensing Act, 1872, upon premises theretofore licensed for the sale of wine & beer only, is a new license within above sects. & requires confirmation by the licensing committee.—*MARWICK v. CODLIN* (1874), L. R. 9 Q. B. 509; 43 L. J. M. C. 169; 30 L. T. 719; 38 J. P. 518; 22 W. R. 823, D. C.

*Annotations*:—*Expld. R. v. King, etc., Manchester Licensing J.J.* (1888), 52 J. P. 164. *Reid. Customs & Excise Comrs. v. Curtis* (1913), 110 L. T. 584; *R. v. Taylor, R. v. Amendt*, [1915] 2 K. B. 593.

**279.** ———.]—Licensing justices granted to the holder of an old beerhouse license a license

#### PART IV. SECT. 2, SUB-SECT. 6.—C.

**273 i.** **What conditions may be annexed—Undertaking as to conduct of business.]—**Justices are entitled to insert in the certificates which they grant to publicans to sell spirits reasonable conditions as to the mode of conducting the sale & in particular, as to the premises in which the spirits shall be sold.—*MILLAR v. CAMPBELL* (1849), 11 Durl. (Cl. of Sess.) 355; 21 Sc. Jur. 98.—*SCOT.*

**273 ii.** ———.]—*HENDERSON v. LORD ADVOCATE* (1888), 16 R. (Cl. of Sess.) 147; 26 Sc. L. R. 105.—*SCOT.*

**273 iii.** ———.]—*CAMERON v. GLASGOW MAGISTRATES* (1903), 5 F. (Cl. of Sess.) 490; 40 Sc. L. R. 577; 10 S. L. T. 644.—*SCOT.*

**273 iv.** ———.]—*ROOSEBOOM v. PIQUETBERG LICENSING COURT* (1893), 10 S. C. 195.—*S. AF.*

**p.** ———.]—**Condition as to windows of building.]—**A regulation by license comrs. requiring the lower half of bar-room windows to be left uncovered during prohibited hours is valid & reasonable.—*R. v. MARTIN* (1894), 21 A. R. 145.—*CAN.*

**q.** ———.]—**Premises to be made suitable.]—**License comrs. have no power to say to an appct. for a transfer of a license that, if he will put certain premises into a suitable state for compliance with the law in the future, they will transfer a license to such premises.—*EAST v. O'CONNOR* (1901), 2 O. L. R. 355; 21 C. L. T. 498.—*CAN.*

**r.** ———.]—**As to sale of liquor to natives.]—***R. v. SCHMIDT* (1899), 9 H. C. 39.—*S. AF.*

—.]—*BELL v. ALBANY*

LICENSING COURT (1899), 13 E. D. C. 140.—*S. AF.*

**a.** ———.]—*LAND v. WODEHOUSE LICENSING COURT* (1899), 16 S. C. 232; 9 C. T. R. 231.—*S. AF.*

**b.** ———.]—*R. v. PARROTT* (1899), 16 S. C. 452; 9 C. T. R. 480.—*S. AF.*

**c.** ———.]—*BEYERS v. WILLOWMORE LICENSING BOARD* (1900), 17 S. C. 254.—*S. AF.*

**d.** ———.]—**Transfer to approved person.]—**The holder of an accommodation license applied for a renewal. The licensing committee granted the renewal subject to the condition that the licensee transfer the license within three months to some approved person:—*Held*: such a condition was invalid.—*WHITTLE v. BISHOP* (1894), 13 N. Z. L. R. 670.—*N.Z.*

**Sect. 2.—Justices' licenses: Sub-sect. 7, A., B., C. & D. (a).]**

authorising him to hold an excise license "to sell by retail at the licensed premises . . . spirits" for consumption either on or off the premises:—*Held*: the justices' license was bad in form inasmuch as justices have no power under Licensing (Consolidation) Act, 1910 (c. 24), to grant a license for the sale of spirits only.—*CUSTOMS & EXCISE COMRS. v. CURTIS*, [1914] 2 K. B. 335; 83 L. J. K. B. 931; 110 L. T. 584; 78 J. P. 173; 30 T. L. R. 232, D. C.

*Annotation*:—*Mentd. R. v. Pitfield*, [1919] 2 K. B. 249.

**280. — License under different conditions.—Seven-day license substituted for six-day.]—R. v. CREWKERNE LICENSING JJ.**, No. 562, *post*.

**281. — Early closing restriction removed.]—R. v. CORFIELD**, No. 565, *post*.

**282. — Similar license existing at time of application.]—R. v. TAYLOR**, *R. v. AMENDT*, No. 272, *ante*.

**Renewal of license.]—See Sub-sect. 7, B., *post*.**

**B. Renewal.**

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 16 (1).*

**283. To what licenses referable.—Previous license forfeited.—Application by new tenant.]—HARGREAVES v. DAWSON**, No. 246, *ante*.

**284. — Existing license.—Existing in previous year.]—A new occupier of an inn licensed under 9 Geo. 4, c. 61, was refused a transfer of the license, on the ground of a conviction for drunkenness. Three years afterwards, at the first licensing meeting after the owner was able to obtain possession of the premises, the present appet. applied for a renewal of the previous license, & was refused on the ground that the neighbourhood did not require it.**

Upon appeal, quarter sessions, without hearing the merits, decided that this was an application for a new licence, & that they had no jurisdiction under Licensing Act, 1872 (c. 94):—*Held*: upon a rule for a *mandamus*, quarter sessions were right, & the definition of renewal of a license in sect. 74 of 1872 Act refers only to a license existing during the previous year.—*Ex p. TARBATH* (1874), 31 L. T. 513; *sub nom. Ex p. TABARTH*, 39 J. P. 101.

*Annotation*:—*Reid. Wernham v. R.*, [1914] 1 K. B. 468.

**285. — House not used as inn for eight years previously.]—R. v. SMITH**, No. 188, *ante*.

**286. — Application by new tenant.]—**

**PART IV. SECT. 2, SUB-SECT. 7.—A.**

**280 i. What constitutes.—License under different conditions.—Seven-day license substituted for six-day.]—The holder of a six-day license has no right, on the renewal of his license, to exchange it for a general or seven-day license.—R. v. DUBLIN RECORDER** (1878), 2 L. R. Ir. 385.—*IR*.

**280 ii. —.]—R. v. FERRAMANAGH COUNTY COURT JUDGE**, [1924] 2 I. R. 191.—*IR*.

**e. —.]—ORBALDISTON v. WANGARATTA LICENSING JJ.** (1883), 9 V. L. R. 9.—*AUS*.

**f. —.]—Re PATTERSON v. MOERAKI LICENSING COMMITTEE** (1889), 8 N. Z. L. R. 1.—*N.Z.*

**g. Power of licensing authority to grant.]—R. v. ANTRIM JJ.**, [1903] 2 I. R. 671; 37 I. L. T. 130.—*IR*.

**PART IV. SECT. 2, SUB-SECT. 7.—B.**

**284 i. To what licenses referable—**

*Existing license.—Existing in previous year.]—Re LIQUOR LICENSE, HALIFAX COUNTY* (1876), 10 N. S. R. (1 R. & C.) 257.—*CAN*.

**289 i. — Application for license under different conditions.]—An application for leave to keep open a second bar can only be made on an application for the original license, or an application for renewal of a license.—R. v. TILSTON** (1897), 8 Q. L. J. 6.—*AUS*.

**h. —.]—EDGAR v. VICTORIA LICENSING COURT** (1921), 29 C. L. R. 321.—*AUS*.

**k. —.]—R. v. ANTRIM JJ.**, [1900] 2 I. R. 492.—*IR*.

**l. Only granted at express wish of licensee.]—Re DE MERY** (1894), 20 V. L. R. 95.—*AUS*.

**m. After local option vote against new licenses.]—Ex p. PRATT** (1896), 17 N. S. W. L. R. (L.) 295; 13 N. S. W. W. N. 9.—*AUS*.

At an adjourned general annual licensing meeting in 1885, the renewal of a public-house license was refused to P. P. did not appeal to quarter sessions, & his current license expired on Oct. 10, following. He closed the premises as a public-house, & continued to occupy them as his private residence until Midsummer, 1886, when he left, & C. became tenant. At the general annual licensing meeting in 1886, C. applied for a license, but the justices, considering his application to be one for the grant of a new license, in their discretion refused it, on the ground that there were already a sufficient number of licensed houses in the district. Upon an application by C. for a rule for a *mandamus* to be directed to the justices:—*Held*: C.'s application was not an application for a "new" license, but one for the "renewal" of a license. The justices accordingly could not refuse it upon the ground they did, & they ought to hold an adjournment to hear & determine the application.—*R. v. MARKET BOSWORTH LICENSING JJ.* (1887), 56 L. J. M. C. 96; 57 L. T. 56; 51 J. P. 438; 35 W. R. 734; 3 T. L. R. 620, D. C.

*Annotations*:—*Expld. Sharp v. Wakefield* (1891), 55 J. P. 197. *Consd. Symons v. Wedmore*, [1894] 1 Q. B. 401. *Expld. R. v. Bath JJ., Ex p. Splers & Pond* (1908), 99 L. T. 54.

**287. — License-holder disqualified.]—Where a licensed person has become personally disqualified or has had his license forfeited, the owner of the premises cannot apply under 9 Geo. 4, c. 61, s. 14, for a renewal of the license, but must apply under 37 & 38 Vict. c. 49, s. 15, for the grant of a new license, & such application must be made to the next special sessions.—STEVENS v. GREEN** (1889), 23 Q. B. D. 143; 58 L. J. M. C. 167; *sub nom. STEVENS v. SHARNBROOK DIVISION OF BEDFORD JJ.*, 61 L. T. 240; 53 J. P. 423; 5 T. L. R. 450; *sub nom. STEVENS v. BEDFORDSHIRE JJ.*, 37 W. R. 605, D. C.

*Annotation*:—*Expld. Wernham v. R.*, [1914] 1 K. B. 468.

**288. — Failure by old tenant to sell.]—MACKRELL v. BRENTFORD JJ.**, No. 254, *ante*.

**289. — Application for license under different conditions.]—R. v. CREWKERNE LICENSING JJ.**, No. 562, *post*.

**290. —.]—R. v. CORFIELD**, No. 565, *post*.

**— Provisional license.]—See No. 322, *post*.**

**C. Removal.**

*See Licensing (Consolidation) Act, 1910 (c. 24), ss. 24, 26.*

**291. Jurisdiction to grant.—House pulled down**

**n. —.]—After local option vote against new licenses renewals can only be granted in respect of premises remaining substantially the same.—BROSHAN v. R.** (1912), 15 C. L. R. 466.—*AUS*.

**o. Extension of license.]—The license comrs. have no power to extend the duration of an existing license for a greater period than three months of the next ensuing license year, or to grant a second extension.—R. v. WILKINSON, Ex p. CORMIER** (1905), 37 N. B. R. 53.—*CAN*.

**p. Withdrawal of application.]—Appet. for the renewal of an hotel-keeper's license can withdraw his application at any time before hearing, & the owner of the hotel cannot compel the application to be heard.—JOEL v. PAIRD** (1885), 3 N. Z. L. R. 448 (S. C.).—*N.Z.*

**PART IV. SECT. 2, SUB-SECT. 7.—C.**

**g. Jurisdiction to grant.—New premises not constructed.]—There is no**

for private building scheme.]—*Semble*: where a public-house was in the way of some building speculations about to be carried out, & its site was needed for a public street but no statute had been obtained nor any compulsory process begun to order the removal, the justices were not entitled under 9 Geo. 4, c. 61, s. 14, to transfer the license to a new house; where the justices renewed a license & afterwards on Oct. 5 granted a transfer of the renewed license to a new house, being five days before the old license expired, the justices could not, under 9 Geo. c. 61, s. 14, make this transfer to continue to Oct. 10 of the next following year.—*R. v. NORTHUMBERLAND JJ.* (1879), 43 J. P. 271.

**292. Jurisdiction to attach conditions.]—***R. v. DRINKWATER, WINCOTT'S CASE*, No. 268, *ante*.

**293. What constitutes removal—Application for new license—Licensee agreeing to give up old license.]—**The holder of an "off license" for the sale of beer, wine & spirits in respect of certain premises applied at the general annual licensing meeting for a renewal of that license. He also applied for a new license of a similar description in respect of other premises, having given the notices requisite in applications for new licenses, but not those requisite in applications for orders for removal. The licensing justices granted the application for the new license on condition that he gave up the license for the first-mentioned premises & ceased forthwith to carry on the sale of beer, wine & spirits there. Appct. agreed to do this & the new license was granted:—*Held*: this was neither in form nor in substance an order sanctioning the removal of a license, & the justices had an absolute discretion to grant the new license.—*LACEY v. LACON & CO.*, [1899] A. C. 222; 68 L. J. Q. B. 480; 80 L. T. 473; 63 J. P. 371; 47 W. R. 497; 15 T. L. R. 283; 43 Sol. Jo. 348, H. L.; *revisg. S. C. sub nom. R. v. THORNTON, Ex p. LACON & CO.*, [1898] 1 Q. B. 334, C. A.

*Annotations*:—*Mentd. R. v. Nicholson*, [1899] 2 Q. B. 455; *R. v. Johnson* (1905), 74 L. J. K. B. 585; *It. v. Woodhouse*, [1906] 2 K. B. 501; *R. v. Shaw* (1911), 6 Cr. App. Rep. 103.

**294. Duration of removed license.]—***R. v. NORTHUMBERLAND JJ.*, No. 291, *ante*.

*See, now*, Licensing (Consolidation) Act, 1910 (c. 24), s. 41.

**Consent of owner—Necessity for.]—***See* Licensing (Consolidation) Act, 1910 (c. 24), s. 26 (5).

**295. —Misrepresentation as to—Effect of.]—***R. v. NORWICH LICENSING JJ. & BACK* (1899), 15 T. L. R. 356, D. C.

**Notice of application.]—***See* No. 531, *post*.

#### D. Transfer.

##### (a) In General.

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 23.

**296. What amounts to—Authority to carry on business granted to owner's agent—Licensee convicted of felony.]—**By Licensing (Consolidation) Act, 1910 (c. 24), s. 21, the compensation authority

shall, except as therein mentioned, impose in respect of all old on licenses renewed in respect of premises within their area charges at rates therein specified, to be levied & paid as part of the duties on the corresponding excise license.

By sect. 23 (1), a transfer of a justices' license is the grant of a justices' license to one person in substitution for another person who holds or has held the license. By sub-sect. 2 (a), a transfer can only be authorised in the cases & to the persons mentioned in sched. IV., to the Act, including the case where the owner of licensed premises or some person on his behalf on the forfeiture of the license has obtained temporary authority to carry on business until the next transfer sessions & applies for a transfer at those sessions; in which case the transfer may be granted to the owner or any person applying on his behalf, as if the license to be transferred were, notwithstanding forfeiture, still valid.

In sched. II., Part I., to the Act "old on licenses" are described as "justices' on licenses which were in force on Aug. 15, 1904, including licenses granted by way of renewal of a license so in force . . . whether the license continues to be held by the same person or has been . . . transferred to any other person or persons."

Suppliant was since 1911 holder of a license in respect of a certain house & thereby authorised to sell intoxicating liquors for consumption either on or off the premises. A license in respect of the same house granted before 1904 had been renewed year by year, & a renewal license was in force on July 18, 1907. On that date the then holder was convicted of felony. The owners of the house through their agent applied for & obtained under Licensing Act, 1874 (c. 49), s. 15, & 9 Geo. 4, 1828, c. 61, authority to carry on the business until the next special sessions. On application to those sessions a license was granted to the owners' agent which remained in force until the next general annual licensing meeting, at which the owners' agent was granted, by way of renewal of the license then held by him, a license which had been continuously renewed until it was transferred on June 26, 1911, to suppliant.

In Jan. 1911, the compensation authority, acting under Licensing (Consolidation) Act, 1910 (c. 24), s. 21, imposed a compensation levy in respect of all old on licenses within their area. In respect of this levy the excise officer demanded of suppliant, who under protest paid, the sum of £20. Suppliant claimed to recover this sum on the ground that the forfeiture in 1907 prevented his license from being one which was in force on Aug. 15, 1904, within sched. II., Part I., & therefore from being an "old on license" within the meaning of sect. 21:—*Held*: the authority & license granted to the owners' agent in 1907 were a transfer within the meaning of Licensing Act, 1904, & were therefore a "transfer" within the meaning of sect. 23 of the Act of 1910; the license had been transferred to the owners' agent within sched. II., Part I., & it was therefore in force on Aug. 15, 1904, within that enactment; & the levy was properly made.—*WERNHAM v. R.*,

authority for the grant of an application for the removal of a licensed victualler's license when the premises to which the license is intended to apply have not been constructed.—*R. v. YOUNG, Ex p. CAIRNS*, [1910] S. R. Q. 387.—*AUS.*

*r. Certificate of fitness unnecessary.]—*A certificate of the fitness of appct. to have a license is not required in the case of an application by the

holder of an existing license for its removal from one place to another.—*FALCONER v. WILLIAMS* (1896), 14 N. Z. L. R. 502.—*N.Z.*

#### PART IV. SECT. 2, SUB-SECT. 7.—D. (a).

t. To whom transfer permitted.]—It is no ground of refusal of a transfer of a publican's license, that the trans-

is bound by his lease to buy all his beer & spirits from his landlord.—*R. v. TEMPLETON, Ex p. JONES* (1877), 3 V. L. R. 24.—*AUS.*

a. —.]—*R. v. CORK RECORDER & JJ.*, [1895] 2 I. R. 104.—*IR.*

b. —.]—*FICK v. WOOLCOTT & OHLSON'S CAFE BREWERIES, LTD.* (1911), App. D. 214.—*S. AF.*

c. —.]—*CAPE TOWN COUNCIL*

**Sect. 2.—Justices' licenses: Sub-sect. 7, D. (a)**

[1914] 1 K. B. 408; 83 L. J. K. B. 395; 110 L. T. 111; 78 J. P. 74.

See, further, Licensing (Consolidation) Act, 1910 (c. 24), s. 23 (1).

**297. To whom transfer permitted—Any new tenant coming in during continuance of license.]—***Ex p. TODD*, No. 317, *post*.

**298. — Husband of licensee upon marriage.]—***P.*, a single woman, held a beerhouse license under 1 Will. 4, c. 64, in the country, & in Nov. she married H., who applied for a transfer to himself under 9 Geo. 4, c. 61, s. 14, & the justices refused it, holding that as P. was no longer the real resident occupier the license became void on her marriage:—*Held*: the justices were wrong, & the license remained good till its expiration on Oct. 10, then next.—*HAZELL v. MIDDLETON* (1881), 45 J. P. 540, D. C.

**299. — "Fit & proper person."]**—Licensing justices have jurisdiction under Licensing (Consolidation) Act, 1910 (c. 24), s. 23 (2) (b), to consider, upon an application for the transfer of an old beerhouse license, whether the proposed transferee is a fit & proper person to be the holder of the license.

In the exercise of that jurisdiction the justices have no power to attempt to regulate the terms upon which appt. is to conduct his business if those terms do not in any proper sense affect his fitness to hold the license. But the justices may properly come to the conclusion that appt. is not a fit & proper person to hold the license, if the terms upon which he intends to carry on his business, either as between himself & his landlord or as between himself & the public, are such that the only legitimate inference from a consideration of those terms is that appt. cannot carry on his business without infringing the law.—*R. v. HYDE JJ.*, [1912] 1 K. B. 645; *sub nom. R. v. COOKE, ETC.*, JJ., 81 L. J. K. B. 383; *sub nom. R. v. COOKE, Ex p. ATHERTON*, 106 L. T. 152; 76 J. P. 117, D. C.

*Annotation:—Consd. R. v. Monmouthshire JJ.*, *Ex p. Nevill* (1912), 108 L. T. 797.

See, further, Licensing (Consolidation) Act, 1910 (c. 24), s. 23 (2) (a), sched. IV.

**300. To whom possession must be yielded.]—**The tenant of a beerhouse, holding a beerhouse license under 32 & 33 Vict. c. 27, assigned his interest in the premises to another, & gave up possession to him on Feb. 14. At the general licensing sessions, on Mar. 6, the old tenant applied for a certificate for a renewal of the license, & was refused on the ground that he had been convicted of an offence under 32 & 33 Vict. c. 27, s. 8. The new tenant had not time after the transfer to him to give the requisite notices to enable him to apply at the general licensing sessions:—*Held*: he was entitled to apply at a special sessions, under 9 Geo. 4, c. 61, s. 14.—*R. v. MIDDLESEX JJ.* (1871), L. R. 6 Q. B. 781; 40 L. J. M. C. 184; 25 L. T. 41; 19 W. R. 960; *sub nom. R. v. MIDDLESEX JJ.*, *Ex p. PARSONS*, 35 J. P. 599.

*Annotations:—Consd. Simpkin v. Birmingham JJ.* (1899), 26 L. T. 620. *Expld. Murray, etc.*, Manchester JJ. v. NATHAN (1914), C. P. D. 229.—S. AF.

**d. Jurisdiction to grant.]—Re LOBB** (1898), 24 V. L. R. 632.—AUS.

**e. —.]—R. v. BOOTH** (1883), 3 O. R. 144; 9 P. R. 452.—CAN.

**f. —.]—Re DUNLOP** (1892), 22 O. R. 22.—CAN.

**g. —.]—R. v. FERMANAGH COUNTY, COUNTY COURT JUDGE**, [1909] 2 I. R. 132.—IR.

**h. Transfer refused—Position of licensee.]—**Where a person holding license to sell liquor in a public-house applied for a transfer of it to another, but the justices refused the transfer:—

*Freer* (1893), 62 L. J. M. C. 100. *Reid. White v. Coquetdale JJ.* (1881), 7 Q. B. D. 238.

**301. Jurisdiction to grant—Renewal refused to licensee—Application for transfer by landlord.]—***R. v. HOLMES* (1881), 45 J. P. Jo. 372.

**302. — Death of licensee without legal representative.]—**A licensee holder, holding a license from Aug. 1896, to Oct. 1897, died in Nov. 1896, intestate; no letters of administration were given as to an heir-at-law. Appt. took possession of the premises from the landlord in Nov. 1896, under an agreement to date from Sept. 1896. The licensee holder at the time of her death, being indebted to a beer merchant, he handed over her license to appt. Upon an application by appt. for a license under 9 Geo. 4, c. 61, s. 14, to him as a new tenant or occupier until the expiration of the original license, the licensing justices made no order. On appeal to quarter sessions the justices there decided that the case did not fall within any one of the cases mentioned in 9 Geo. 4, c. 61, s. 14, & that they had no jurisdiction to grant the license:—*Held*: the justices had jurisdiction, & the case must go down to be dealt with on the merits.—*DAVIES v. EVANS* (1898), 77 L. T. 688; 62 J. P. 120; 14 T. L. R. 163, D. C.

**303. — Premises left unused.]—**By 9 Geo. 4, c. 61, s. 4, licensing justices at special transfer sessions have power to license persons, "intending to keep inns theretofore kept by other persons being about to remove from such inns," to sell excisable liquors by retail. Justices acting under that sect. granted a license by way of transfer from a person who was not & had not been in occupation of the premises in respect of which he held it, & no excisable liquors had been sold upon those premises for many years:—*Held*: as the justices had disregarded the provisions of the statute giving them jurisdiction, & must have acted upon some considerations altogether outside that statute, they had not heard & determined the matter according to law, & that a *mandamus* ought to go commanding them so to hear & determine it.—*R. v. COTHAM*, [1898] 1 Q. B. 802; 67 L. J. Q. B. 632; *sub nom. R. v. PILKINGTON, ETC.*, JJ. & WALLACE, *Ex p. WILLIAMS, R. v. COTHAM, ETC.*, JJ. & WEBB, *Ex p. WILLIAMS*, 78 L. T. 468; 62 J. P. 435; *sub nom. R. v. COTHAM, ETC.*, & WEBB, *Ex p. COTHAM, ETC.*, & WEBB, 46 W. R. 512; 14 T. L. R. 367; 42 Sol. Jo. 470, D. C.

*Annotations:—Consd. Mackrell v. Brentford JJ.*, [1900] 2 Q. B. 387. *Expld. & Distd. Wilson v. Crowe JJ.*, [1905] 1 K. B. 491. *Reid. R. v. Manchester Corp.*, [1911] 1 K. B. 560; *R. v. Monmouthshire JJ.*, *Ex p. Nevill* (1913), 109 L. T. 788. *Mentd. R. v. Manchester JJ.*, [1899] 1 Q. B. 671; *R. v. Nicholson*, [1899] 2 Q. B. 455; *R. v. Dodds*, [1905] 2 K. B. 40; *R. v. Woodhouse*, [1906] 2 K. B. 501; *R. v. Offlow General Income Tax Comrs.* (1911), 27 T. L. R. 353; *R. v. Port of London Authority*, *Ex p. Kynoch*, [1919] 1 K. B. 176.

**304. — Condition attached to license—For giving up license on quitting premises.]—**An off license was granted to the occupier of a grocer's shop upon the condition that the license should be given up upon appt. leaving or ceasing to carry on the grocery business upon the premises. The licensee sold his business, & the purchaser applied to the licensing justices for a transfer of the license to him. The justices refused to grant

*Held*: his rights as licensee remained in him, notwithstanding his application.—*R. v. MOLLISON, Ex p. FITZGERALD* (1875), 1 V. L. R. 78.—AUS.

**k. Indorsation of license.]—**The indorsation of a license certificate by the person in whose name it has been issued has no legal effect & is of no



the transfer, on the ground that they were debarred from so doing by the condition upon which the license was granted:—*Held*: the condition was not an absolute bar to the transfer of the license, but only a matter to be taken into consideration when considering whether or no in their discretion they would grant the transfer. —*OLDHAM JJ. v. GEE* (1902), 86 L. T. 389; 66 J. P. 341; *sub nom.* *GEE v. OLDHAM JJ.*, 50 W. R. 394; 18 T. L. R. 348; *sub nom.* *GEE v. TAYLOR, ETC., OLDHAM LICENSING JJ.*, 46 Sol. Jo. 298, D. C.

**305. — Transfer not authorising sale of liquor —Subsequent transfer.]**—By 9 Geo. 4, c. 61, s. 4, justices are given jurisdiction in special sessions to license by way of transfer "persons intending to keep inns theretofore kept by other persons being about to remove from such inns."

By sect. 14, "If any person so licensed," that is, duly licensed under the Act, "shall remove from or yield up the possession of the house specified in such license," the justices may transfer the license "to any new tenant or occupier of the house having so become unoccupied."

The license holder of an inn having become bkpt. the premises were assigned to W., who applied at the general annual licensing meeting for a renewal of the license to him. The renewal was granted, but the justices at the same time stated that W. was not a fit & proper person to hold the license, & that they only granted it on the terms that he would not sell liquor under it, but would proceed to transfer it to some one else. W. occupied the house by putting furniture into it, & he let some of the rooms for club meetings, but he sold no liquor there. He subsequently applied at special sessions for a transfer to S., he having in the meantime given up possession to S.:—*Held*: the fact of the justices having stated at the time of granting the license to W. that he was not a fit & proper person to hold it did not prevent the grant from being valid, & consequently W. was at the time of the application for the transfer a "person so licensed" within the meaning of sect. 14; the requirement of sect. 4 that the person removing from the licensed premises should, as a condition of the exercise of jurisdiction under that sect., have therefore kept them as an inn, applies as well to a case in which the license holder has already removed from the house at the date of the application for the transfer, as to one in which he still remains in possession at that date, but that W. had sufficiently kept the premises as an inn to satisfy the provisions of the sect., notwithstanding that he had sold no liquor there; & under the circumstances the justices had jurisdiction to grant the transfer to S.—*WILSON v. CREWE JJ.*, [1905] 1 K. B. 491; 74 L. J. K. B. 394; 92 L. T. 164; 69 J. P. 111; 53 W. R. 382; 21 T. L. R. 233; 49 Sol. Jo. 200, D. C.

*Annotation*:—*Held*. *Webb v. City of London Licensing JJ.* (1910), 102 L. T. 70.

**306. Temporary authority pending transfer—Whether cancels existing license.]**—*ANDREWS v. DENTON*, No. 600, *post*.

**307. Grant of license to unfit person—For purposes of transfer.]**—*WILSON v. CREWE JJ.*, No. 305, *ante*.

(b) *Assignment of Premises before Expiration of License.*

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 23.

**308. Jurisdiction of justices—Refusal of renewal to old tenant—Subsequent application for transfer by new tenant.]**—*R. v. MIDDLESEX JJ.*, No. 300, *ante*.

**309. — Refusal of renewal to new tenant—Subsequent application for transfer.]**—A house in Middlesex having been licensed for some years under 9 Geo. 4, c. 61, l., the licensed tenant, gave up possession on Feb. 6, to T. At the adjourned general annual licensing meeting on Mar. 24, application for a license was made on behalf of T. This was refused & no appeal was made under sect. 27. The license having expired on Apr. 5, the house was shut up. On May 4, T. applied under sect. 14 to the special sessions, who refused the license on the ground that the renewal of the license had been refused at the general meeting. T. again applied on July 4, to the special sessions, under sect. 14; & the justices refused a license on the ground that the case was not within sect. 14. On appeal, the general sessions refused on the same ground:—*Held*: having applied to the general licensing meeting & been refused, T. could not afterwards go to the special sessions.—*R. v. TAYLOR* (1872), L. R. 7 Q. B. 487; 42 L. J. M. C. 13; 37 J. P. 101.

*Annotation*:—*Folld. R. v. West Riding, Yorkshire JJ.*, *Ex p. Hill* (1895), 59 J. P. 278.

**310. — — — — —.]**—After the licensed tenant had gone out of occupation & before the license expired, H., as a new tenant, applied to the general annual licensing meeting for the renewal to him of the license of a beerhouse licensed before & continuously since May 1, 1800, but it was refused on the ground of the disorderly character of the house. From this refusal H. appealed to quarter sessions, & the appeal was dismissed after a full hearing. After the expiration of the license H. applied to the special sessions for a new license in his own name, which was refused on the same grounds after a full hearing. H. appealed to quarter sessions, who refused to rehear the evidence & dismissed the appeal as *res judicata*. H. applied for a *mandamus* for a rehearing:—*Held*: a *mandamus* should not be granted.—*R. v. WEST RIDING OF YORKSHIRE JJ.*, *Ex p. HILL* (1895), 59 J. P. 278, D. C.; *affd.*, 59 J. P. Jo. 308, C. A.

**311. — Refusal of transfer to first new tenant—Application by subsequent new tenants.]**—*Ex p. TODD*, No. 317, *post*.

**312. — — — — — Refusal of new license to new tenant—Application for transfer by subsequent new tenant.]**—The holder of a country publican's license left the house in Apr. F., a new tenant, applied for transfer on Aug. 31, but the justices refused it, & suggested an application for a new license. The new license was applied for, & being opposed was refused on Sept. 28. W., a new tenant, entered on Oct. 7, & applied on Nov. 2 for a transfer, when the justices refused to hear W., on the ground that they had heard F.'s application & refused it, holding that the matter was *res judicata*:—*Held*: justices were bound to hear W.'s application, & rule for *mandamus* made

value to a new tenant applying to the magistrates for a transfer of the license.—*HARWICK HERITABLE INVESTMENT BANK, LTD. v. HUGGAN* (1902), 5 F. (Ct. of Sess.) 75; 40 Sc. L. R. 33; 10 S. L. T. 320.—*SCOT*.

PART IV. SECT. 2, SUB-SECT. 7.—D. (b).

1. *By bankrupt to official assignee.]*  
—If a licensee becomes bkpt. before the expiration of his license, his official

assignee may carry on the business of such licensee until the expiration of the license.—*DUNLOP v. UHR* (1893), 14 N. S. W. L. R. 430.—*AUS*.

m. *Upon death of owner intestate.]*

**Sect. 2.—Justices' licenses: Sub-sect. 7, D. (b), (c), & E.]**

absolute accordingly.—*R. v. UPPER GOLDCROSS JJ.* (1889), 62 L. T. 112; *sub nom. R. v. UPPER OSGOLDCROSS JJ.*, 53 J. P. 823, D. C.

**313. —Appeal to quarter sessions pending—Application for transfer in new licensing year.]—**T., in Oct. 1888, applied for transfer of an indoor beer license, & was refused. He appealed to quarter sessions, who refused to hear him, & held he had no right to appeal, but stated a case for the High Ct. on that point only. The High Ct. in Oct. 1889, held T. had a right to appeal. T. next applied at transfer sessions, on Nov. 27, 1889, for a transfer as before, & the justices refused to hear him as they had heard the same application before in 1888:—*Held*: the justices were bound to hear the application, as it was made in a new licensing year.—*R. v. WELBY* (1890), 54 J. P. 183, D. C.

**314. —Transfer granted to new tenant—Neglect to apply for renewal at general sessions—Application for transfer in new licensing year.]—**On Sept. 2, 1890, the duly licensed tenant of a country beerhouse removed from the house without having applied for the renewal of the license at the general annual licensing meeting on Aug. 30. On the same day a new tenant entered into occupation of the house, & on Sept. 5, obtained at petty sessions a temporary license under Licensing Act, 1842 (c. 44), until Sept. 27. On Sept. 27, an adjournment of the general annual licensing meeting was held, & also a special session for the transfer of licenses under 9 Geo. 4, c. 61, s. 14, & at the latter the new tenant applied for & obtained a license until Oct. 10, then next ensuing. On Jan. 3, 1891, he again applied at a special transfer session held on that day under the same sect. for a grant of a license to continue until Oct. 10, 1891:—*Held*: having already held a license in respect of the premises from Sept. 27, to Oct. 10, 1890, he was not a "new tenant" within the sect. & the justices had no jurisdiction to grant the application.—*R. v. POWELL*, [1891] 2 Q. B. 693; 60 L. J. Q. B. 594; 65 L. T. 210; 56 J. P. 52; *sub nom. R. v. SWANSEA JJ.*, 39 W. R. 630; 7 T. L. R. 586, C. A.

**Annotations:—***Distd. Baldwin v. Dover JJ.*, [1892] 2 Q. B. 421. *Reid. Price v. James*, [1892] 2 Q. B. 428; *Symons v. Wedmore*, [1894] 1 Q. B. 401.

(c) *Transfer after Expiration of License.*

See Licensing (Consolidation) Act, 1910 (c. 24), s. 23 (1).

**315. Jurisdiction of justices—Refusal of renewal to former occupier—Continuance of occupation till after expiry—Application by new tenant at transfer sessions.]—**W., duly licensed under 9 Geo. 4, c. 61, applied at a general annual licensing meeting on Sept. 15, for a renewal of his license, which was refused. The license expired upon Oct. 10, following, & he then ceased to sell excisable liquors, but continued in occupation of the house until Oct. 13; he then gave up possession to S., who, after giving the proper notices, applied at a special sessions for a new license in respect of the premises, under sect. 14. The justices refused the application, on the ground that as W. was not licensed within the terms of above sect. at the time of his removal from the house, they had no jurisdiction:—*Held*: the decision of the justices

was right.—*SIMPKIN v. BIRMINGHAM JJ.* (1872), L. R. 7 Q. B. 482; 26 L. T. 620; 36 J. P. 709; *sub nom. R. v. BIRMINGHAM JJ.*, 41 L. J. M. C. 102; 20 W. R. 702.

**Annotations:—***Fold. Ex p. Todd* (1878), 3 Q. B. D. 407; *White v. Coquetdale JJ.* (1881), 7 Q. B. D. 238. *Expld. R. v. Liverpool JJ.* (1883), 11 Q. B. D. 638. *Fold. R. v. London County JJ.*, [1903] 2 K. B. 19. *Reid. R. v. Wakefield, etc.*, *Westmoreland JJ.* (1888), 58 L. T. 494; *Baldwin v. Dover JJ.*, [1892] 2 Q. B. 421.

**316. —**—The tenant of an alehouse who was duly licensed under 9 Geo. 4, c. 61, applied for a renewal of his license, which was refused. He continued in occupation of the house after his license had expired, & then removed. A new tenant took possession of the premises, & applied for a license under 9 Geo. 4, c. 61, s. 14. The justices refused the application on the ground that, as the outgoing tenant was not licensed at the time of his removal, they had no jurisdiction to entertain the application:—*Held*: the decision of the justices was right.—*R. v. LONDON COUNTY JJ.*, [1903] 2 K. B. 19; 72 L. J. K. B. 647; *sub nom. R. v. LONDON JJ.*, *Ex p. REED*, 88 L. T. 673; 67 J. P. 277; 51 W. R. 629; 19 T. L. R. 444, C. A.

**317. —Possession given up during existence of license—Refusal of transfer to new tenant—Application by subsequent new tenant for transfer.]—**The power of granting a license at special sessions under 9 Geo. 4, c. 61, s. 14, to a new tenant, where a person duly licensed under that Act gives up possession of the house during the continuance of his license, extends only to the period for which the former tenant's license would have lasted. F., duly licensed under 9 Geo. 4, c. 61, on Aug. 3, 1877, gave up possession of the licensed premises, & B. became tenant. The license expired on Oct. 10, following. At the general annual licensing meeting, held on Aug. 28, 1877, B. applied for a transfer of the license to him, but the justices refused the application on the ground of his previous misconduct. On Sept. 28, B. gave up his tenancy, & was succeeded by G., who on Nov. 29, also gave up the tenancy, & was succeeded by T. After giving the proper notices, T. applied at a special sessions, under 9 Geo. 4, c. 61, s. 14, for a license in respect of the premises. The justices declined to entertain the application, on the ground that they had no jurisdiction:—*Held*: inasmuch as the application was made after the expiration of the period for which the previous license remained in force, the decision of the justices was right. *Semble*: the power to grant a license under sect. 14 is not confined to the case of the tenant immediately succeeding the outgoing holder of the license.—*Ex p. TODD* (1878), 3 Q. B. D. 407; *sub nom. Re TODD*, 47 L. J. M. C. 89; 42 J. P. 662.

**Annotations:—***Consd. White v. Coquetdale JJ.* (1881), 7 Q. B. D. 238. *N.F. R. v. Liverpool JJ.* (1883), 11 Q. B. D. 638. *Reid. R. v. Market Bosworth, Licensing JJ.* (1887), 56 L. J. M. C. 96; *Stevens v. Green* (1889), 23 Q. B. D. 143; *Murray v. Freer*, [1893] 1 Q. B. 281; *R. v. London JJ.*, *Ex p. Reed* (1903), 88 L. T. 673.

**318. —Death of license holder.]—**K., licensed to sell intoxicating liquors under 9 Geo. 4, c. 61, died on Sept. 27. At the general annual licensing meeting on Oct. 2, application was made by the lessees of the house for a fresh license, without giving the requisite notices under 35 & 36 Vict. c. 94, as there was no time to give them. This application was rejected on the ground that they

—*Re BALLHAUSEN, Ex p. McMANUS* (1893), 19 V. L. R. 66.—**AUS.**

n. —.]—**KELLY v. MONTAGUE** (1892), 29 L. R. Ir. 429.—**IR.**

**PART IV. SECT. 2, SUB-SECT. 7.—**  
**D. (c).**

**o. Jurisdiction of justices.]—**A transfer of a license must be a transfer

of an existing license; there is no jurisdiction to grant a transfer after the license has ceased to operate.—*R. v. LONGFORD COUNTY QUARTER SESSIONS*, [1923] 3 I. R. 109.—**IR.**

were not in occupation of or about to occupy the premises. K.'s license expired on Oct. 10. On Nov. 13, W., as assignee of the heir of K., gave notice that he would apply at the special sessions on Dec. 4, for a new license in respect of the house under 9 Geo. 4, c. 61, s. 14:—*Held*: the justices had no jurisdiction to entertain the application, as it was made after the expiration of the period for which the previous license remained in force.—*WHITE v. COQUETDALE JJ.* (1881), 7 Q. B. D. 238; 50 L. J. M. C. 128; 44 L. T. 715; 45 J. P. 539; 30 W. R. 16, D. C.

*Annotations*:—*N.F. R. v. Liverpool JJ.* (1883), 11 Q. B. D. 638. *Refd.* *R. v. London JJ.*, *Ex p. Reed* (1903), 88 L. T. 673.

**319. — Wilful neglect of previous holder to apply for renewal.**—S., tenant of a house & licensed to sell excisable liquors therein, made over the house in June, 1881, to W., who forthwith sub-let it to B. B. applied at a special sessions for a transfer of the license, which was opposed by S., & refused. At the time of the general licensing meeting B. was in occupation, but was about to leave owing to illness in her family, & did not apply for a renewal of the license. She left shortly afterwards & the house was shut up, & no excisable liquors had been sold there since June. In Sept., after the close of the licensing meeting, the landlord learnt that the house was vacant & took possession. The license expired on Oct. 10. The landlord afterwards let to D., who in Jan. 1882, applied to a special sessions for a renewal of the license:—*Held*: (1) B. as occupier, though not holding a license, was a person entitled to apply at the general sessions for a renewal of the license, & the event mentioned in 9 Geo. 4, c. 61, s. 14, of the occupier of a house being about to quit the same neglecting to apply at the general meeting for a license to continue to sell excisable liquors therein, had occurred, so that an application under that sect. could be made; (2) it was not necessary that the application should be made before the expiration of the period for which the old license was in force, & the justices in special sessions had jurisdiction to grant the application.—*R. v. LIVERPOOL JJ.* (1883), 11 Q. B. D. 638; 52 L. J. M. C. 114; *sub nom. R. v. LANCASHIRE JJ.*, 49 L. T. 244; 32 W. R. 20; *sub nom. R. v. LAWRENCE*, 47 J. P. 596, C. A.

*Annotations*:—*As to (1) Follid. R. v. Newcastle Licensing JJ.* (1886), 51 J. P. 101. *Appld. R. v. Market Bosworth Licensing JJ.* (1887), 56 L. J. M. C. 96. *Distd. Stevens v. Green* (1889), 23 Q. B. D. 143. *Follid. R. v. Powell*, [1891] 3 Q. B. 693; *Baldwin v. Dover JJ.*, [1892] 2 Q. B. 421. *Consd. Price v. James*, [1892] 2 Q. B. 428. *Follid. Symons v. Wedmore*, [1894] 1 Q. B. 401. *Expld. R. v. London County JJ.*, [1903] 2 K. B. 19. *Refd. R. v. West Riding of Yorkshire JJ.* (1888), 36 W. R. 855; *Thornton v. Clegg*, etc., *Sheffield JJ.* (1889), 53 J. P. 742; *Sharp v. Wakefield* (1891), 55 J. P. 197; *R. v. West Riding, Yorkshire JJ.*, *Ex p. Hill* (1895), 59 J. P. 278; *Wilson v. Crewe JJ.* (1905), 74 L. J. K. B. 394; *R. v. Bath JJ.*, *Ex p. Splers & Pond* (1908), 99 L. T. 54. *As to (2) Refd. Murray v. Freer*, [1893] 1 Q. B. 281; *Wernham v. R.*, [1914] 1 K. B. 468.

**320. — Renewal refused to first new tenant.—Application by subsequent new tenant.**—The license holder of an inn yielded up possession of the premises in Dec. 1890; at a special session in May, 1891, a new tenant unsuccessfully applied for a transfer of the license; at the adjourned general annual licensing meeting in Sept. 1891, another new tenant unsuccessfully applied for a renewal of the license, neither of the applicants appealed to quarter sessions. The then current license expired on Oct. 10, 1891. In Mar. 1892, applt., who had become tenant of the house, applied, under 9 Geo. 4, c. 61, s. 14, for a license:—*Held*: the justices had jurisdiction to grant the

application.—*BALDWIN v. DOVER JJ.*, [1892] 2 Q. B. 421; 61 L. J. M. C. 215; 56 J. P. 423; 8 T. L. R. 574, D. C.

*Annotations*:—*Refd. Wilson v. Crewe JJ.* (1905), 74 L. J. K. B. 394; *R. v. Bath Licensing JJ.*, *Ex p. Splers & Pond* (1908), 72 J. P. 356.

#### E. Provisional Grant.

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 33.*

**321. May be made for a term.**—*R. v. JOHNSTONE*, No. 322, *post*.

**322. Validity.—Only when final order made.**—Licensing Act, 1904 (c. 23), s. 4 (3), which provides that "the justices may, if they think fit, instead of granting a new license as an annual license, grant the license for a term not exceeding seven years," applies as well to a provisional license under Licensing Act, 1874 (c. 49), s. 22, in respect of a house about to be built as to an ordinary license for an existing house. Such a provisional license is not operative as a license until the house has been completed & the final order made, & consequently a grant of a provisional license to be in force for seven years from the date of the final order is a grant of a license "for a term not exceeding seven years" within above sect.—*R. v. JOHNSTONE*, [1906] 1 K. B. 228; *sub nom. R. v. JOHNSTONE*, *Ex p. COBBOLD*, 75 L. J. K. B. 229; 94 L. T. 377; 70 J. P. 118; 54 W. R. 347; 22 T. L. R. 226; *sub nom. KING v. JOHNSTONE*, *Ex p. COBBOLD*, 50 Sol. Jo. 207, D. C.

**323. Renewal.**—By Licensing Act, 1874 (c. 49), s. 22, where premises are about to be constructed for the purpose of being used for the sale of intoxicating liquors to be consumed on the premises, the licensing justices if satisfied with the plans of such premises submitted to them, may make a provisional grant of a license in respect of such premises, such grant to be of no validity until declared to be final by an order of the licensing justices. The provisional grant of a license shall be subject to the same conditions as to the giving of notices & generally as to procedure as if such grant were not provisional:—*Held*: (1) a provisional license granted under sect. 22 of the Act is capable of renewal, & may be renewed although the premises have been completed, & an application to the justices for an order declaring the license final has been made & refused; (2) an appeal lies to quarter sessions against the refusal of the justices to renew such provisional license.—*R. v. LONDON COUNTY JJ.* (1889), 24 Q. B. D. 341; 59 L. J. M. C. 71; 62 L. T. 458; 54 J. P. 213; *sub nom. R. v. LONDON COUNTY JJ.*, *Ex p. BUCKLE*, 38 W. R. 269, D. C.; *subsequent proceedings, sub nom. R. v. POWNALL* (1890), 63 L. T. 418, D. C.

*Annotation*:—*Refd. R. v. Johnstone*, [1906] 1 K. B. 228.

**324. — Compensation money delayed.—Premises improperly conducted.**—In Feb. 1911, the licensing justices referred the question of the renewal of a license to the compensation authority, & in July, 1911, the compensation authority refused the renewal subject to the payment of compensation. The license was provisionally renewed by the licensing justices in Feb. 1911, & again in Feb. 1912, & in Feb. 1913. As the compensation money was not likely to be paid by Apr. 5, 1914, an application for a further provisional renewal of the license was made to the licensing justices, in Feb. 1914. That application was refused as the licensing justices were of opinion that the parties interested in the compensation money had unreasonably delayed the



**Sect. 2.—Justices' licenses: 'Sub-sect. 7, E.; sub-sect. 8.]**

proceedings, & that but for such delay the compensation money would have been paid in such time as to make the application for the further provisional renewal unnecessary. The licensee having obtained a rule *nisi* for a *mandamus* requiring the licensing justices to hold a further meeting in order to hear & determine his application for a further provisional renewal:—*Held*: the rule must be made absolute on the ground that even if there had been delay on the part of those interested in the compensation money, that was no ground for refusing to grant the provisional renewal, & there was no evidence that there had been wilful delay by those parties. *Qu.*: whether personal misconduct by a licensee in the carrying on of the licensed premises after the question of renewal of his license has been referred to the compensation authority entitles the licensing justices to refuse to grant a further provisional renewal.—*R. v. NEWINGTON LICENSING J.J., Ex p. MAKEMSON*, [1914] 2 K. B. 710; 83 L. J. K. B. 1367; 111 L. T. 72; 78 J. P. 271; 30 T. L. R. 426, D. C.

**325. Final order — Whether justices bound to grant.]**—Licensing justices agreed to grant a provisional license for a railway refreshment room according to plans shown, though they directed change of site, which appct. agreed to. But there was never any further assent of justices to any other site. At the application for the final order the eight justices were equally divided, & neither adjourned the matter nor was an adjournment asked for. A rule *nisi* for a *mandamus* being granted, the justices thereafter met again & agreed by a majority to make the final order:—*Held*: the rule for *mandamus* may be made absolute, but without costs, & not to be drawn up except on further application.—*R. v. COX* (1884), 48 J. P. 440.

**326. — Building in substantial accordance with plans.]**—*R. v. LONDON COUNTY J.J., No. 323, ante.*

**327. — — — — —.]**—A provisional license had been granted upon plans which had been confirmed by the confirming committee. These plans had been prepared for a site on a level surface, whereas the site was on a slope, & it became necessary to make certain alterations in the plans. The premises having been completed in accordance with the altered plans, an application was made to the licensing justices for the final order, but this application was refused, as the justices thought that the building was not "in accordance with the plans" & that they had no jurisdiction to sanction any variation in plans which had been confirmed by the confirming authority:—*Held*: to be "in accordance with the plans" means to be "in substantial accordance with the plans," & the premises having been completed as nearly as possible in accordance with the original plans, the justices had power to allow a variation from the approved plans, & had jurisdiction to grant, & were in fact bound to grant, the final order, although the altered plans had not been before or approved by the confirming authority, but that, if there be a substantial variation in the plans, that is, a variation which makes the premises intended to be used as a public-house less

fit for that purpose than they would have been if the plans had been accurately followed, the justices would have the right to refuse the final order.—*R. v. POWNALL* (1890), 63 L. T. 418; 54 J. P. 438; 6 T. L. R. 282, D. C.

**328. Grant of license to unfit person—For purpose of compensation.]**—A county borough corpn. under statutory powers for the improvement of a district, bought land in the borough, including licensed premises, dismantled the premises & put caretakers therein with a view to suppressing unnecessary licensed premises on payment of compensation to the corpn. under Licensing Act, 1904 (c. 23). At the next annual licensing sessions the caretakers, in pursuance of an arrangement between the corpn. & the justices, applied for renewal licenses, some under 9 Geo. 4, c. 61, & some under Beerhouse Act, 1840 (c. 61). The licensing justices provisionally granted renewal licenses subject to a reference to quarter sessions, the compensation authority under Licensing Act, 1904 (c. 23), s. 1. It was contended that the renewals were void because the caretakers were not persons keeping or about to keep alehouses under 9 Geo. 4, c. 61, or real resident holders & occupiers under Beerhouse Act, 1840 (c. 61), & because some of the justices who granted the renewals were members of the corpn. & parties to the arrangement:—*Held*: the justices having honestly exercised their discretion & the transaction being *bond fide* & for the purpose of carrying out the object of Licensing Act, 1904, the renewals were valid.—*LEEDS CORPN. v. RYDER*, [1907] A. C. 420; 76 L. J. K. B. 1032; 97 L. T. 261; 71 J. P. 484; 23 T. L. R. 721; *sub nom.* *LEEDS CORPN. v. WOODHOUSE*, 51 Sol. Jo. 716, H. L.; *reversq.* *S. C. sub nom. R. v. WOODHOUSE*, [1906] 2 K. B. 501, C. A.

*Annotations*:—*Consd.* *R. v. JACKSON* (1906), 96 L. T. 77; *R. v. SHAUN*, [1910] 2 K. B. 418; *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685. *Refd.* *R. v. Walsall Compensation Authority*, *R. v. Walsall Licensing J.J.* (1910), 102 L. T. 737. *Mentd.* *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), Ltd., [1924] 1 K. B. 171.

**SUB-SECT. 8.—EXTENT OF LICENSE—PREMISES COVERED.**

**329. Altered premises—Identity—Question of fact.]**—If a licensed alehouse has additions made to it, it does not follow that the occupier must give the notice provided for by 9 Geo. 4, c. 61, s. 10, as "for a house not theretofore kept as an inn." It is a question of fact for the justices whether by such additions the house has become a new house.

A., the occupier of a licensed house, added to his premises the adjoining house, & made them all one establishment. Upon applying for a renewal of his license, the magistrates refused, upon the ground that the premises were not the same, & that no notice had been given as for an original license. Upon an appeal against this refusal, the quarter sessions renewed the license, subject to a case as to whether, under the circumstances, the notices were necessary:—*Held*: upon the foregoing facts, the sessions were right in renewing the license.—*R. v. SMITH* (1866), 15 L. T. 178; 31 J. P. 259.

*Annotation*:—*Apld.* *R. v. Raffles* (1876), 45 L. J. M. C. 61.

**PART IV. SECT. 2, SUB-SECT. 3.**

**p. Land appurtenant to the building.]**—A license for the sale of liquor at a public-house covers the land appurtenant thereto. — *CAIRNS v.*

*PETERSON* (1876), 2 V. L. R. 143.—*AUS.*

*q. — — — — —.]*—*R. v. YALDWYN* (1899), 9 Q. L. J. 442.—*AUS.*

*r. — — — — —.]*—*Ex p. MCCONNELL* (1906),

6 S. R. N. S. W. 88; 23 N. S. W. W. N. 9.—*AUS.*

*t. — — — — —.]*—*PEDDER v. GLEESON* (1907), 3 Tas. L. R. 10.—*AUS.*

*a. — — — — —.]*—*Deft. was licensed to*

**330.** — — — — —.]—A house licensed under the Licensing Act, 1872 (c. 94), for the sale of intoxicating liquors by retail, was enlarged by the occupier & the sale of such liquors was carried on in the part added:—*Held*: the license must be taken to include reasonable additions to the original premises, & it was a question of fact whether, after such alterations, the premises were substantially the same as those licensed.—*R. v. RAFFLES* (1876), 1 Q. B. D. 207; 45 L. J. M. C. 61; 34 L. T. 180; 24 W. R. 536; 40 J. P. Jo. 68, D. C.

*Annotations*:—*Consd.* Ballam v. Wiltshire, R. v. Hampshire JJ. (1879), 44 J. P. 72. *Distd.* Deer v. Bell, Deer v. Wirral Licensing JJ. (1895), 64 L. J. M. C. 85. *Refd.* R. v. Sheffield (1899), 63 J. P. 595.

**331.** — — — — —.]—M., licensed under 9 Geo. 4, c. 61, had premises & stables covering a large area, the public-house being at one end & facing into O. Street. He converted some stables into additional private rooms & a refreshment bar, & opening an entrance to the premises from H. Street, a street parallel with O. Street. The alterations affected about one-third of the premises formerly stables only, but all were within the area of the old premises. M. being charged under 35 & 36 Vict. c. 94, s. 3, with selling in the new refreshment bar without a license, the justices holding that the premises were entirely altered, convicted M.:—*Held*: as it was a question of fact for the justices the ct. would not interfere, & the conviction was affirmed accordingly.—*MAHON v. GASKELL* (1878), 42 J. P. 582, D. C.

**332.** — — — — —.]—W. bought a small two-storeyed inn in an obscure cross street, & on applying to the justices for a transfer, showed them plans representing a three-storeyed house, which he had also bought in the leading thoroughfare, the back yard of which joined the back yard of the inn, & that he proposed to join the two houses & use them as one. The justices approved & granted the transfer. At next general annual meeting W. informed the justices that he had joined the two houses, thereby doubling the premises, & no one opposing, a renewal license was granted. W. was then charged with selling liquors in the new house without a license, & the justices dismissed the case, holding the new part of the premises covered by the license:—*Held*: as it was a question of fact for the justices whether the licence covered the added portion as well as the original inn, the ct. could not interfere in any way, & there was no question of law involved.—*BALLAM v. WILTSHIRE, R. v. HAMPSHIRE JJ.* (1879), 44 J. P. 72, D. C.

**333.** — — — — —.]—Where on an application for the renewal of the license in respect of a beerhouse licensed before & continuously since May 1, 1869, the licensing justices determined as a fact that in consequence of alterations completed since the last renewal of the license, the premises were substantially different from the premises theretofore licensed, they had a discretion to refuse the renewal, on the ground that the house was not necessary, having regard to the requirements of the neighbourhood.—*R. v. SHEFFIELD JJ.* (1899), 63 J. P. 595, C. A.

sell "in & upon the premises known as P." P. stood upon the front part of a deep lot owned by deft., the rear part of which had been for many years enclosed & used as a fair ground, immediately within which enclosure deft. sold liquor, for which he was convicted:—*Held*: as the fair ground, though part of the lot on which the hotel stood, was not used in connection with or for the enjoyment of the hotel, it was not covered by the license, &

the conviction was right.—*R. v. PALMER* (1881), 46 U. C. R. 262.—*CAN.*

b. — — — — —.]—*PHILLIPS v. LORD ADVOCATE* (1899), 1 F. (Ct. of Sess.) 828.—*SCOT.*

c. — — — — —.]—*PHILIP v. ELGINSHIRE ASSESSOR*, [1912] S. C. 774.—*SCOT.*

d. — — — — —.]—*MARSHALL & HENDRIE v. R.* (1915), 36 N. L. R. 466.—*S. AF.*

e. *Vendor for municipality.*—A vendor of intoxicating liquor

**334.** — — — — — **Duty of justices—To decide whether premises are the same or not.**—Where no objection on any of the four grounds specified in 32 & 33 Vict. c. 27, s. 8, is made to the renewal of the certificate for a beerhouse licensed on, & continuously since May 1, 1869, but the premises have been structurally altered since the last renewal, it is the duty of the justices upon an application for renewal, either to renew or to refuse to renew the certificate, & they can only refuse to renew on the ground that the premises are not substantially the same premises as those which were licensed on & ever since May 1, 1869. They cannot, against the will of appct., renew the certificate only as to such parts of the premises as were so licensed without deciding whether the premises are substantially the same or not, & without refusing to renew the certificate in the form in which it had been always previously granted.—*R. v. BRADFORD JJ.* (1896), 74 L. T. 287; *sub nom.* *R. v. BRADFORD LICENSING JJ., Ex p. HARDCASTLE*, 60 J. P. 265, D. C.

**335.** — — — — — **What alterations will change identity—Improvements.**—(1) Applt. was the holder of a license for a beerhouse existing previous to 1869. He rebuilt the premises, bringing forward the front wall over a strip of garden in front of the old premises, & substituting brick for a wooden structure forming part of the old house. The new bar stood on the site of the former strip of garden. The justices convicted him of selling on unlicensed premises, & the conviction was affirmed at quarter sessions subject to a case being stated:—*Held*: there was no evidence to support the conviction, on the ground that there was no real addition to the premises, & the beer was sold on a spot which was substantially a part of the old licensed premises.

(2) Applt. having applied for a renewal of his license, this was also refused, & the refusal confirmed by the justices at quarter sessions subject to a case stated:—*Held*: in view of the former decision, it was not open to the justices to treat the new premises as other than the old licensed premises in an improved condition, & they had, therefore, no jurisdiction to refuse the renewal of the license.—*DEER v. BELL, DEER v. CHESHIRE WIRRAL DIVISION LICENSING JJ.* (1895), 64 L. J. M. C. 85; 58 J. P. 513; 43 W. R. 286; 11 T. L. R. 188; 15 R. 280, D. C.

**336.** — — — — — **Reasonable additions.**—*R. v. RAFFLES*, No. 330, *ante*.

**337. Prescription of metes & bounds of house—Power of justices.**—S. applied in 1875 for renewal of his license to keep an inn or victualling house. No notice of opposition had been given. Since the previous general licensing meeting, a room which originally was part of the structure of the premises, but which had been let separately & used as a shop, was now intended to be used as part of the licensed premises, & the shop had been discontinued. The justices renewed the license, but inserted words describing the premises as including those parts previously used by a former tenant, when the room in question was a

appointed for a municipality in the province has no authority to sell in a city or town the boundaries of which are not included within the boundaries of the municipality.—*R. v. FIELDING* (1919), 52 N. S. R. 412.—*CAN.*

f. *Public fairs & markets.*—The holder of a certificate for the sale of excisable liquors is entitled to sell liquor at a public fair or market in the same parish with his licensed premises,

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shop & no part thereof. S. appealed to quarter sessions against this condition:—*Held*: the justices were entitled to insert the words, for being mere words of description, they did not substantially alter the existing license. *Qu.*: whether S. was now prevented from using the shop as part of his premises notwithstanding the words of description in the renewed license.—*STRINGER v. HUDDERSFIELD JJ.* (1875), 33 L. T. 568; 40 J. P. 22.

*Annotations*:—*Distd. R. v. Bradford JJ.* (1896), 74 L. T. 287. *Alpd. Customs & Excise Comrs. v. Griffith*, [1924] 1 K. B. 163.

**338.** ———.]—(1) Messrs. Harrods were the owners of a large block of buildings, in one room of which they had an off-license. In another room they had a restaurant which communicated with rooms used by the public, & in respect of this restaurant the justices granted a license, confined by metes & bounds to the actual restaurant, which license was duly confirmed.

In another part of the premises was a cellar to which the public had no access, from which Messrs. Harrods supplied the wants of the restaurant & of the off-license. The justices fixed the monopoly value as the difference between the value of the restaurant when unlicensed, & its value when licensed:—*Held*: Licensing (Consolidation) Act, 1910 (c. 24), s. 70, did not interfere with the power of the justices to grant a license to premises with such internal communication, although the owner was not entitled to use it; & the decision of the justices as to the monopoly value was correct.

(2) Finance Act, 1911 (s. 48), s. 4, was passed for purposes of excise, & does not limit the rights of justices in granting a license.—*CUSTOMS & EXCISE COMRS. v. GRIFFITH*, [1924] 1 K. B. 163; 93 L. J. K. B. 315; 88 J. P. 11; 40 T. L. R. 110; 68 Sol. Jo. 303; 22 L. G. R. 27, D. C.; *affd.*, [1924] 1 K. B. 735; 93 L. J. K. B. 791; 131 L. T. 111; 88 J. P. 85; 40 T. L. R. 444; 68 Sol. Jo. 683, C. A.

*See, also*, Sub-sect. 5, A. & B., *post*.

**SUB-SECT. 9.—STRUCTURE OF LICENSED PREMISES.**

**A. Consent to Alterations.**

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 71.

**339. Conditional consent—Power of justices.]**—Where under the Licensing (Consolidation) Act, 1910 (c. 24), s. 71, the owners of licensed premises in respect of which justices on license was in force made an application to the licensing justices for their consent to an alteration in the premises which would give increased facilities for drinking:—*Held*: (1) the justices were not entitled to take into consideration the fact that if they gave their consent to the alteration no monopoly value would be payable in respect of the increased drinking facilities thereby given; (2) the justices were not entitled to make it a condition of giving their consent to the alteration that appcts. should sur-

render the license of some other house of theirs anywhere in the district. *Qu.*: whether the justices might not invite the surrender of the license of another small house of appcts. in the immediate neighbourhood of the premises in question.—*R. v. WANDSWORTH LICENSING JJ.*, *Ex p. WHITBREAD & Co.*, [1921] 3 K. B. 487; 90 L. J. K. B. 1114; 125 L. T. 540; 85 J. P. 171; 37 T. L. R. 619, D. C.

**340. Matters to be considered—Non liability to monopoly value in respect of increased drinking facilities.]**—*R. v. WANDSWORTH LICENSING JJ.*, *Ex p. WHITBREAD & Co.*, No. 339, *ante*.

**341. When consent refused—But alterations made—Power of justices to refuse renewal.]**—In 1896 licensed premises included two buildings, a hotel & a restaurant, & with the consent of the licensing justices, in 1903 part of the ground was excluded from the licensed area & various structures, including a theatre, were erected on the excluded portion. At the beginning of 1910 the construction of a stage door communicating between the theatre & the licensed area was commenced without the knowledge or consent of the licensing justices, but there was no evidence that this door had been used. In June, 1909, application was made to the licensing justices to exclude from the licensed area a further portion of the ground originally included therein, known as the kitchen garden, for the purpose of erecting a skating rink thereon. This application was refused by the justices, but, notwithstanding such refusal, applt., or certain lessees of the owners of the premises, proceeded to build upon this portion of ground a skating rink. No intoxicating liquors had been sold or consumed thereon. Four exits from the skating rink into portions of the licensed area & a main entrance from a public street called P. Avenue to the skating rink were made without the knowledge & consent of the licensing justices. There was no evidence that the exits had been used. Applt., or the owners of the premises, also without the permission & without the knowledge of the licensing justices leased with an option of purchase a portion of the ground forming part of the area originally included in the licensed area. The justices at quarter sessions held that the matters set out made the premises ill-conducted within 4 Edw. 7, c. 23, s. 1. They also further held that by reason of the hereinbefore mentioned alterations, the premises were not structurally suitable; & that the justices of the licensing district had rightly refused the renewal of the license:—*Held*: there was evidence to support the finding of the justices.—*MARSHALL v. SPICER* (1911), 103 L. T. 902; 75 J. P. 138, D. C.

*See, also*, Sub-sect. 4, *ante*.

**B. Alterations Ordered by Justices.**

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 72.

**342. What alterations may be ordered—Structural alterations—Alterations in means of access.]**—By Licensing Act, 1902 (c. 28), s. 11 (4), licensing justices, on renewing a license, may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in "that part of the premises where

or in any adjoining parish, without obtaining special permission.—*LAMB v. BROWN* (1894), 21 R. (Ct. of Sess.) 35; 31 Sc. L. R. 518; 1 S. L. T. 564, J.

**—SCOT.**  
*g. Whether license personal to grantee.]*—*MCGREGOR'S ESTATE v.*

*SYDOW* (1913), C. P. D. 33.—*S. AF.*

*h. ———.]*—In the absence of any special agreement, a license is personal to the grantee & does not attach to premises so as to give the owner of the premises a right that the license shall continue in respect of them.—

*CULLINGWORTH ESTATE v. HAMILTON* (1923), 44 N. L. R. 89.—*S. AF.*

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*k. What alterations may be ordered.]*—*LOPES v. GREENOCH CORPN.*, [1916] S. C. 405.—*SCOT.*

intoxicating liquor is sold or consumed":—*Held*: under this sub-sect. licensing justices had jurisdiction, upon granting an application for renewal, to make an order that the back entrance to the licensed premises should be closed & kept locked & the passage leading from the back entrance to the bars where intoxicating liquor was sold & consumed should be closed, their power including the right to decide what alteration in the means of access was reasonably necessary to the proper conduct of the business.—*BUSHELL v. HAMMOND*, [1904] 2 K. B. 563; 73 L. J. K. B. 1005; 91 L. T. 1; 68 J. P. 370; 52 W. R. 453; 20 T. L. R. 413, C. A.

*Annotations*.—*Distd.* *Smith v. Portsmouth JJ.*, [1906] 2 K. B. 229; *R. v. Merioneth JJ.*, *Ex p. Kisbey* (1908), 99 L. T. 89. *Consd.* *R. v. Shann*, [1910] 2 K. B. 418. *Refd.* *R. v. Bath Recorder*, [1904] 2 K. B. 570. *Mentd.* *Wilkes & Jones v. Goodwin* (1923), 129 L. T. 44.

**343.** ————*]*—Where licensed premises had doors giving access respectively from different streets to a part of the premises where intoxicating liquor was sold, & licensing justices, intending to act under the Licensing Act, 1902 (c. 28), s. 11 (4), on the renewal of the license, made an order that one of these doors should be kept locked & not used except for domestic purposes, or for delivering intoxicating liquor, coals, or other goods, when necessary, or for the private use of the licensee, or his household, or *bona fide* lodgers on the premises, & that the key of the door should be kept by the licensee:—*Held*: the Licensing Act, 1902 (c. 28), s. 11 (4) referred only to structural alterations, & therefore did not authorise the justices to make the before-mentioned order.—*SMITH v. PORTSMOUTH JJ.*, [1906] 2 K. B. 229; 75 L. J. K. B. 851; 70 J. P. 407; 54 W. R. 598; 22 T. L. R. 650; 50 Sol. Jo. 575; *sub nom.* *SMITH v. COUZENS, ETC. PORTSMOUTH LICENSING JJ.*, 95 L. T. 5, C. A.

*Annotations*.—*Refd.* *R. v. Merioneth JJ.*, *Ex p. Kisbey* (1908), 99 L. T. 89; *R. v. Shann*, [1910] 2 K. B. 418.

**344. When may be ordered—On application for transfer.**—*]*—On an application for the transfer of a license the justices have no power under Licensing Act, 1902 (c. 28), s. 11, to order structural alterations in the licensed premises.—*R. v. MERIONETH JJ.*, *Ex p. KISBEY* (1908), 99 L. T. 89; 72 J. P. 389, D. C.

#### SUB-SECT. 10.—PROCEDURE OF LICENSING JUSTICES.

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 7 (1), 16, 19, 25, 43, 52.

**345. Power to act by majority—Majority accepting decision in accordance with view of chairman.**—*R. v. ROGERS, ETC. SOMERSETSHIRE JJ.*, No. 347, *post*.

**346. — Majority of justices present.**—*]*—On an application for the renewal of a license there were sixteen justices present, of whom eight voted for it, six against it, while two declined to vote:—*Held*: the justices were right in refusing the renewal, as there was not a majority of those present in favour thereof, as required by 0 Geo. IV., c. 61, s. 9.—*GARTON v. SOUTHAMPTON JJ.* (1893), 57 J. P. 328; 9 T. L. R. 430, D. C.

**347. Justices present equally divided—Casting vote of chairman.**—*]*—On an application by H. for

renewal of license at the general annual licensing meeting, six justices retired. On returning to ct. the chairman stated that the justices had been equally divided, but he had given a casting vote in favour of the renewal. On a *certiorari* to quash the license, cause was shown by the chairman, who stated that he had in the private room told the other justices that it would be no use for him to vote unless he gave a casting vote, & that the others agreed that he should so vote. It did not appear whether the other justices fully understood that the chairman had by law no casting vote. Moreover, the renewal license bore the name of four justices:—*Held*: as the license bore the name of a majority of justices present, the ct. would not interfere by *certiorari* to quash the license.—*R. v. ROGERS, ETC. SOMERSETSHIRE JJ.* (1892), 56 J. P. 183; 8 T. L. R. 214, D. C.; *affd.*, 8 T. L. R. 348, C. A.

**348. Evidence—On oath—Necessity for—Admitted facts.**—*]*—*Semble*: where licensing justices on an application for renewal of a license entertain an objection on the ground of a previous conviction for an offence against the Licensing Acts, & all parties treat the fact of such conviction as admitted, it is no ground of appeal against their refusal of the renewal that such evidence was not on oath under Licensing Act, 1872 (c. 94), s. 42, as that part of the enactment is only directory, & not a condition precedent. Where an appeal is brought to quarter sessions against a refusal to renew an alehouse license, & the quarter sessions reverse the decision on a preliminary objection, they should nevertheless hear evidence, & decide on the question of applt.'s fitness to hold a license.—*R. v. KENT JJ.* (1877), 41 J. P. 263, D. C.

**349.** ————*]*—*R. v. EALES, EALES v. PHILPOTTS, ETC. DEVON JJ.*, No. 261, *ante*.

**350.** ————*]*—(1) An application for a license at special sessions under 9 Geo. 4, c. 61, s. 11, was refused, & appt. appealed to quarter sessions, where the appeal, after full hearing, was dismissed. Appt. thereupon applied for a *mandamus* to the justices at special sessions to hear the application, on the ground that they had refused his application without hearing him:—*Held*: as appt. had elected to pursue his remedy by appeal to quarter sessions, the ct. could not now grant a *mandamus*.

(2) Justices, before deciding these licensing cases, ought to be extremely careful to hear the parties & extremely cautious about receiving & acting on the unsworn statements of police constables or fellow magistrates without hearing the parties (LORD ESHER, M.R.).—*R. v. NEWCASTLE-UPON-TYNE LICENSING JJ.* (1887), 51 J. P. 244; 3 T. L. R. 351, C. A.

**351. ———— Objection taken by magistrate.**—*]*—It is not competent for justices to refuse to grant the renewal of a license on account of an objection originated by themselves, unless they have first given notice of objection & taken evidence in accordance with the provisions contained in the Licensing Act, 1872 (c. 94), s. 42 (2), (3).

The magistrates must comply with all the provisions of the statute which enacts that all evidence must be given on oath (CAVE, J.).—*GASCOTNE v. RISLEY* (1888), 36 W. R. 605, D. C.

**352. ———— Witness refusing to be**

#### PART IV. SECT. 2, SUB-SECT. 10.

**346 i. Power to act by majority—Majority of justices present.**—*R. v. O'CONNELL* (1888), 20 L. R. Ir. 625.—*IR.*

**346 ii.** ————*]*—Where out of a

ct. consisting of five justices, one justice only is recorded as dissenting from the decision of the ct., the K. B. Div. is bound by the record, & cannot receive evidence to prove that the decision of the ct. as appearing by the record is not the decision of the

majority of the justices.—*R. v. TYRONE JJ.*, [1917] 2 I. R. 437.—*IR.*

**1. Power to adjourn hearing.**—*ANDERSON v. MOONEY*, [1907] V. L. R. 623.—*AUS.*

**m. Signature of mayor & inspector.]**

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**Part V. Sects. 1 & 2: Sub-sects. 1, 2 & 3.]**

**sworn.]**—On the hearing, at a general annual licensing meeting, of an application for a new license for a hotel, witnesses were called on behalf of persons who opposed the granting of the license, & these witnesses gave evidence on oath. Another person then appeared to oppose, & proposed to make statements of fact. The justices required that he should be sworn. He refused, & they declined to hear him, & granted the license. On an application for a *certiorari*, or for a *mandamus* to the justices to hear & determine:—**Held:** (1) the *certiorari* ought not to be granted, & *semble:* as the justices at the licensing meeting were not acting as a ct. of summary jurisdiction, but in an administrative capacity, *certiorari* would not lie:—**Held:** (2) the justices were acting within their jurisdiction in refusing to hear statements not made upon oath, & a *mandamus* must be refused.—**R. v. SHARMAN, Ex p. DENTON**, [1898] 1 Q. B. 578; 87 L. J. Q. B. 460; 78 L. T. 320; 62 J. P. 296; 46 W. R. 367; 14 T. L. R. 269; 42 Sol. Jo. 326.

**Annotations:**—As to (1) **Fold.** **R. v. Bowman**, [1898] 1 Q. B. 663; **R. v. Cotham**, [1898] 1 Q. B. 802. **Consd.** **R. v. Nicholson**, [1899] 2 Q. B. 455. **Distd.** **R. v. Manchester JJ.**, [1899] 1 Q. B. 571; **R. v. Johnson**, [1905] 2 K. B. 59. **N.F.** **R. v. Woodhouse**, [1906] 2 K. B. 501. **Generally, Reld.** **R. v. Butt, Ex p. Brooke** (1922), 38 T. L. R. 537.

**353.** ————**]**—**R. v. TOLHURST, Ex p. FARRELL, R. v. COX, Ex p. WEST**, No. 84, *ante*.

**354.** ————**Should be in open court.]**—(1) The licensing justices at the general meeting, on hearing the report read of the superintendent of police that appct. for renewal of indoor beer license had been convicted, told him to come again at the adjournment day. Notice to attend was given, but not stating any specific objection, & after hearing the superintendent on oath prove the conviction, & afterwards calling him into their private room, refused the renewal, & stated no reason:—**Held:** the justices had not heard & determined the case according to the statute, & a *mandamus* to hear the application was directed.

(2) It is not necessary that the objection should be upon oath.—**R. v. REDDITCH JJ.** (1885), 50 J. P. 246; 2 T. L. R. 193, D. C.

*See, also, No. 350, ante.*

**355.** ————**Preliminary investigation as to houses in district—Discretion of justices.]**—The attention of licensing justices having been called to the number of licensed houses in their district, they appointed some of their number a committee to investigate & report on the condition, position, & circumstances of the licensed houses. A detailed report was made, & a recommendation that all applications for renewal should be objected to, & notice given to each of the licensees to attend at the hearing. The report was adopted, & the justices at the annual licensing meeting objected through their chairman to the renewal of all the licenses, & directed that notice should be given to each holder of a license to attend at an adjourned meeting. At that meeting evidence was heard upon oath in each case, & the justices decided against the renewal of nine of the licensees:—**Held:** since the justices were entitled to take,

or direct their officer or agent to take, objection to the renewal of licenses, they were within their rights in making a preliminary investigation as to the licensed houses in their district, & the fact that they had done so, & adopted the report of the committee appointed for the purpose of making the investigation, did not debar them from hearing the applications & deciding on the question of renewal.—**R. v. HOWARD, ETC. FARNHAM LICENSING JJ.**, [1902] 2 K. B. 363; 71 L. J. K. B. 754; 51 W. R. 21; 18 T. L. R. 690; *sub nom.* **R. v. FARNHAM LICENSING JJ., Ex p. SMITH**, 86 L. T. 839; 66 J. P. 579, C. A.

**Annotations:**—**Consd.** **Raven v. Southampton JJ.**, [1904] 1 K. B. 430; **R. v. Tolhurst, Ex p. Farrell, R. v. Cox, Ex p. West**, [1905] 2 K. B. 478. **Apld.** **Morgan v. Aylesford Licensing JJ.** (1906), 94 L. T. 483. **Consd.** **R. v. Bath Compensation Authority**, [1925] 1 K. B. 685. **Reld.** **R. v. Dodds**, [1905] 2 K. B. 40; **R. v. Woodhouse**, [1906] 2 K. B. 501; **Attwood v. Chapman**, [1914] 3 K. B. 275. **Mentd.** **R. v. Russell, Ex p. Morris**, (1905), 93 L. T. 407.

**356. Right of applicant to be heard.]**—**R. v. TOLHURST, Ex p. FARRELL, R. v. COX, Ex p. WEST**, No. 84, *ante*.

**Objection to application.]**—*See* Part III., Sect. 2, sub-sect. 1, A. (b), *ante*.

**SUB-SECT. 11.—FEES IN RESPECT OF LICENSES.**

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 45.

**357. Additional fees — Whether claimable — Custom.]**—**R. v. SEYMOUR**, No. 217, *ante*.

**358.** ————**]**—The mayor of the borough of Yarmouth, who, in right of his office, is a justice of the peace, took four shillings as a fee for assenting to the grant of a license to an innkeeper to sell ale. There was proof of a custom for the mayor to take that fee, as far back as living memory could go, but no evidence of its having been taken before the reign of Edw. 6:—**Held:** the mayor had no right to such a fee; the innkeeper could recover back the sum paid in an action for money had & received, & it was not necessary to give a notice of action.—**MORGAN v. PALMER** (1824), 2 B. & C. 729; 4 Dow. & Ry. K. B. 283; 2 Dow. & Ry. M. C. 232; 2 L. T. O. S. K. B. 145; 107 E. R. 554.

**Annotations:**—**Consd.** **Cook v. Leonard** (1827), 6 B. & C. 351; **Maule v. White, Maule v. Herbert, Maule v. Green** (1896), 60 J. P. 567; **Glamorgan County Council v. Glasbrook**, [1924] 1 K. B. 879. **Reld.** **Waterhouse v. Keen** (1825), 4 B. & C. 200; **Butler v. Ford** (1833), 1 Cr. & M. 662; **Atlee v. Backhouse** (1838), 3 M. & W. 633; **Parker v. G. W. Ry.** (1844), 7 Man. & G. 253; **Steele v. Williams** (1853), 8 Exch. 625; **Hooper v. Exeter Corp.** (1887), 56 L. J. Q. B. 457; **Brocklebank v. R.**, [1925] 1 K. B. 52.

**359.** ————**Fee for administration of oath to witness.]**—9 Geo. 4, c. 61, s. 15, which provides the sums which are payable by the person to whom a license is granted, is exhaustive. Therefore the clerk to the justices of a petty sessional division is not entitled to receive a fee for the administration of the oath to a witness called at an adjourned annual licensing meeting of the justices to give evidence in opposition to an application for the grant of a license.—**WHITTRUCK v. WITHEY**, [1907] 2 K. B. 526; 76 L. J. K. B. 773; 96 L. T. 912; 71 J. P. 317; 23 T. L. R. 458, D. C.

—After the council has authorised a license, signing by the mayor & inspector is a mere ministerial act, & neither can defeat the will of the council by refusing to sign or hand out the formal license.—**R. v. MAC-**

**KASEY** (1908), 6 E. L. R. 330; 43 N. S. R. 169.—**CAN.**

**n. Cancellation under authority of bye-law.]**—When cancelling a license under the authority of a bye-law which

contains no provisions as to procedure, a licensing board is not bound to observe the principles governing procedure. *Id.* **Re MILLS, Re VAN-COEVER LICENSING BOARD**, [1917] 3 W. W. R. 449.—**CAN.**



## Part V.—Confirmation of Justices' Licenses.

### SECT. 1.—LICENSES REQUIRING CONFIRMATION.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 12 (2), 26.

**360. New license.**—*MARWICK v. CODLIN*, No. 278, *ante*.

### SECT. 2.—THE CONFIRMING AUTHORITY.

#### SUB-SECT. 1.—WHO IS THE CONFIRMING AUTHORITY.

**In counties.**—See Licensing (Consolidation) Act, 1910 (c. 24), ss. 2 (2) (b), 6 (2)–(4); Licensing Act, 1921 (c. 42), ss. 6 (2), 11, 13; sched. I.

**In boroughs.**—See Licensing (Consolidation) Act, 1910 (c. 24), ss. 2, 4, 7, 14 (5).

#### SUB-SECT. 2.—JURISDICTION.

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 13, 40.

**361. Exercise — Discretionary — Not merely ministerial.**—A license granted by the licensing justices was refused by the licensing committee, although no opposition was made to the grant of the license. Upon an application for a rule for a *mandamus* to the licensing committee to confirm the grant:—*Held*: the duty of the confirming body was not merely ministerial, & they had a discretion to confirm or refuse, & the rule must, therefore, be refused.—*Re ANNANDALE DISTRICT, CUMBERLAND LICENSING COMMITTEE* (1873), 37 J. P. Jo. 85.

**362.** — — — — — A licensing committee refused to entertain an application for confirmation of a new license granted under 9 Geo. 4, c. 61, on the alleged ground that during the preceding year appt. having been too late to apply to the previous general annual licensing meeting had obtained from the Inland Revenue a consent that he might, at his own risk, sell liquors without their interference on paying the usual excise duty, until the next year's general annual meeting, when a justices' license could be asked for:—*Held*: as the justices had an absolute discretion, the ct. could not grant a *mandamus* to them to hold another meeting to entertain the application.—*R. v. MIDDLESEX LICENSING COMMITTEE, Ex p. LINDSAY* (1878), 42 J. P. 469.

**Powers exceeded—Certiorari.**—See Part X., Sect. 3, sub-sect. 1, A., *post*.

**363.** — — — — — Determination of "populous places."—*NICHOLAS v. DAVIES*, No. 553, *post*.

**364. Extent—Variation of conditions attached to license—Alteration of monopoly value.**—*R. v. JACKSON*, No. 369, *post*.

**365.** — — — — — Death of licensee before confirmation — Confirmation to substituted person.]—An application was made to licensing justices by T., the assistant secretary of L. & co., for a license for the sale of intoxicating liquor in respect of premises occupied by L. & co. as a restaurant. The application was opposed by H., the licensee of other premises in the same borough, but was granted by the licensing justices. Before the con-

firmation of the grant T. died. At the meeting of the confirming authority an application was made to confirm the grant but to substitute in the license the name of B., the secretary of L. & co., for that of T. This application was opposed by H. on the ground that the confirming authority had no jurisdiction to grant it; but the application was nevertheless granted. A rule for a *certiorari* having been obtained by H. to bring up the order of the confirming authority:—*Held*: the confirming authority acted in excess of its jurisdiction, H. was a person aggrieved thereby, & as such he was entitled to the writ *ex debito justitiae*.—*R. v. RICHMOND CONFIRMING AUTHORITY, Ex p. HOWITT*, [1921] 1 K. B. 248; 90 L. J. K. B. 413; 124 L. T. 345; 85 J. P. 84; 37 T. L. R. 62, D. C.

*Annotation—Reid. R. v. Butt, Ex p. Brooke* (1922), 38 T. L. R. 537.

**366.** — — — — — Consideration of sufficiency of notice.]—(1) The twenty-one days' notice required by 32 & 33 Vict. c. 27, s. 7, is to be computed, not from the first day of the licensing sessions, but from the day on which the application is actually heard.

(2) Without positively expressing an opinion as to whether the county licensing committee have any jurisdiction to consider the sufficiency of the notices I think it right to say that in my judgment they probably have not (*WRIGHT, J.*).—*R. v. POWNALL*, [1893] 2 Q. B. 158; 62 L. J. M. C. 174; 70 L. T. 138; 57 J. P. 424; 5 R. 486, D. C.

**367.** — — — — — Power to make rules of procedure.]—*R. v. BIRD, Ex p. NEEDES*, No. 308, *post*.

#### SUB-SECT. 3.—PROCEDURE.

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 13, 40.

**368. Objection to confirmation—Condition imposed on objector—Beyond statutory authority—Ultra vires.**—By Licensing Act, 1872 (c. 94) s. 37, a grant of a new license in counties by licensing justices is not valid unless confirmed by the county licensing committee. By s. 43, any person who opposes before licensing justices the grant of a new license, & no other person, may oppose the confirmation of the grant by the confirming authority; by the same sect. power is given in counties to the justices in quarter sessions to make rules as to the proceedings to be adopted for confirmation of new licenses.

A court of quarter sessions, acting under s. 43, made a rule that every person intending to oppose the confirmation of any provisional license before the county licensing committee must, within seven days after the grant of the provisional license, give notice to appt. & to the clerk of the peace of his intention to oppose the confirmation:—*Held*: the rule was *ultra vires*, as imposing a condition upon the statutory right to oppose the confirmation of the license not imposed or authorised by the statute.—*R. v. BIRD, Ex p. NEEDES*, [1898] 2 Q. B. 340; 79 L. T. 156; 62 J. P. 422; 46 W. R. 528; 14 T. L. R. 384; 42 Sol. Jo. 471, D. C.

**369. Evidence must be on oath.**—In granting an

#### PART V. SECT. 1.

**o. Seven-day hotel certificate.**—*QUINN v. PAISLEY MAGISTRATES*, [1909] S. C. 1085; 46 Sc. L. R. 826; 2 S. L. T. 36.—SCOT.

*Sect. 2.—The confirming authority: Sub-sect. 3.*  
*Part VI. Sects. 1 & 2: Sub-sects. 1, 2, 3 & 4.*  
*Part VII. Sect. 1: Sub-sects. 1 & 2.]*

application for a new on license, the licensing justices, acting upon the sworn evidence before them, fixed the monopoly value at £2,250. Upon the application for confirmation of the license, the confirming authority, acting upon the report of a valuer which was not made on oath, made an order that the license should be confirmed & that the conditions attached to the license under Licensing Act, 1904 (c. 23), s. 4, should, with the consent of the justices, be varied by fixing the monopoly value at £5,000. The licensing justices declined to consent to this alteration of the monopoly value as fixed by them.

Appct. for the license thereupon applied to the Div. Ct. for a *mandamus* to the confirming authority to deliver up to him a certificate of confirmation of the license as granted by the licensing justices or, in the alternative, to hear & determine his application for a confirmation of the license:—*Held*: the fixing of the amount of the monopoly value was a condition attached to the license which the confirming authority had power to vary under Licensing Act, 1904 (c. 23), s. 4 (6), but, as the confirmation was conditional upon the consent of the justices being given to the proposed variation, & as that condition had not been fulfilled, the only remedy was that which had been granted by the Div. Ct.—*R. v. JACKSON* (1906), 96 L. T. 77; 71 J. P. 25; 23 T. L. R. 128; 51 Sol. Jo. 130, C. A.

## Part VI.—Temporary Authority to sell Intoxicating Liquor.

### SECT. 1.—EXCISE.

*See Licensing (Consolidation) Act, 1910 (c. 24) s. 88 (6), 89.*

### SECT. 2.—JUSTICES.

#### SUB-SECT. 1.—AUTHORITY UNTIL NEXT TRANSFER SESSIONS.

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 88.*

**370. Indorsement of license—Refusal of original licensee to deliver up—Acceptance by justices of certified copy.]**—Where G., the holder of a publican's license, was evicted, & P., the new tenant, & the landlord both applied for delivery of the license to have it indorsed by the justices at petty sessions to P., & G. refused it to both, & the justices on the application refused to receive a duly certified copy of such license for the purpose of indorsement:—*Held*: a *mandamus* to the justices would not be.—*Ex p. PHILLIPS* (1877),

*v. Licensing (Consolidation) Act, 1910 (c. 24), s. 43 (3).*

**371. Premises quitted by licensee—License jeopardised—Authority to receiver appointed by court.]**—Deft. was tenant of a public-house under an agreement, dated in 1893, whereby plffs. agreed to let, & deft. agreed to take the premises for one year certain. Under the agreement deft. was not to do or cause or suffer to be done, any act, deed, or thing whereby the license might be jeopardised suspended, forfeited or lost; he was, upon quitting the premises, to assign over the licenses to plffs.; & he was to reside on the premises & not to shut them up, or cause or suffer the same to be shut up or the trading thereon to be suspended. It was thereby also agreed that if the tenant should commit any breach of the agreement, or the licenses should be jeopardised, the tenancy should cease, & the landlords should have power at once, without notice or legal proceedings, to re-enter upon the premises & resume possession thereof. Deft. continued tenant upon the terms of the agreement until Nov. 1901, when he closed the house & went away.

In an action for recovery of possession & for a receiver the ct. appointed a receiver of the licenses & of the rents & profits, ordered the licenses to be handed over to the receiver, & gave him possession of the premises so far as was

necessary for the purpose of preserving the licenses.—*CHARRINGTON & Co., LTD. v. CAMP*, [1902] 1 Ch. 386; 71 L. J. Ch. 196; 80 L. T. 15; 18 T. L. R. 152; 46 Sol. Jo. 138.

*Annotations:—Folld. Whitbread v. Grain* (1907), 23 T. L. R. 462. *Consd. Loney v. Callingham & Thompson*, [1908] 1 K. B. 79.

**372. ———.]**—Deft. who was tenant to plffs. of a public-house, disappeared & vacated the premises, & his address was unknown. Plffs. commenced an action to recover possession of the premises, & moved *ex p.* for the appointment of a receiver of the rents & profits of the public-house & of the licenses belonging thereto, & that the receiver when appointed might be at liberty to appoint some fit & proper person to reside upon the premises & to hold the licenses under his supervision. The ct., following, though doubting *Charrington & Co., Ltd. v. Camp*, No. 371, *ante*, made an order as asked.—*WHITBREAD & Co. v. GRAIN* (1907), 23 T. L. R. 462.

*Annotation:—Apld. Loney v. Callingham & Thompson*, [1908] 1 K. B. 79.

**Sale by original licensee—Notwithstanding authority to other person—Whether an offence.]**—*See*

**Sale before grant of authority.]**—*See* No. 603, *post*.

#### SUB-SECT. 2.—LICENSE TO SELL PENDING APPEAL FROM CONVICTION.

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 90.*

#### SUB-SECT. 3.—TEMPORARY AUTHORITY TO OWNER.

*See Licensing (Consolidation) Act, 1910 (c. 24), ss. 43 (3), 87.*

**373. When owner may apply—After expiry of existing protection order.]**—*R. v. POWELL*, No. 314, *ante*.

**374. ——— Conviction of licensee “for first time” —Two separate offences—Disqualification on second conviction.]**—A licensed person was convicted on the same day of two separate offences, for selling spirits without a spirit license on two different days, &, on the second conviction, was ordered to be disqualified from holding a license. The



owner applied for authority to carry on the business. The justices held that they had no jurisdiction to hear & determine the application:—*Held*: that the words in Licensing Act, 1874 (c. 49), s. 15, "for the first time," govern the words "becomes personally disqualified or has his license forfeited," as well as the words specifying the offences, & therefore the owner was entitled to apply, & the justices had jurisdiction to make an order.—*Ex p. FLINN & SONS*, [1899] 2 Q. B. 154; 68 L. J. Q. B. 777; 81 L. T. 27; 63 J. P. 660; 47 W. R. 697; 15 T. L. R. 406; 19 Cox, C. C. 375, D. C.; *subsequent proceedings*, [1899] 2 Q. B. 607, D. C.

*Annotation*:—*Reid*. Tower Division Licensing JJ. v. Chambers (1904), 90 L. T. 228.

#### SUB-SECT. 4.—SALE BY HEIRS, EXECUTORS, ETC.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 65 (7).

**375. Death of licensee—Heir under twenty-one—Discretion of justices.**—The term "heir" in the Licensing Act, 1872 (c. 94), includes a person under the age of twenty-one years.—*ROSE v. FROGLEY* (1893), 62 L. J. M. C. 181; 69 L. T.

346; 57 J. P. 376; 9 T. L. R. 466; 17 Cox, C. C. 685; 5 R. 530, D. C.

**376. —Executor a "licensed" person.**—The exor. of a deceased licensed person who continues to carry on the business under the provisions of Licensing Act, 1872 (c. 94), s. 3, until the next special sessions is himself a licensed person within the Act.—*M'DONALD v. HUGHES*, [1902] 1 K. B. 94; 71 L. J. K. B. 43; 85 L. T. 727; 66 J. P. 86; 50 W. R. 318; 18 T. L. R. 79; 46 Sol. Jo. 152; 20 Cox, C. C. 131, D. C. *Annotation*:—*Apld.* Cooke v. Cooper, [1912] 2 K. B. 248.

**377. Bankruptcy of licensee—To whom interest passes—Trustee in bankruptcy or owner of premises—Covenant in lease.**—A lease of a public-house, determinable on the bkpcy. of the lessee, contained a covenant by the lessee upon the determination of the term to assign the licenses to the lessor. The lessee having become bkpt. before the expiration of the term:—*Held*: his trustee in bkpcy. took no interest in the licenses, & the covenant was valid, entitling the lessor to have the licenses delivered up to him, though they were not assignable.—*Re BURNOR*, *Ex p. ROYLE* (1877), 46 L. J. Bcy. 85; 25 W. R. 560.

**378. Dissolution of partnership—Receiver appointed by court—Protection order pending transfer.**—*BUXTON v. KEMP* (1895), 30 Sol. Jo. 734.

## Part VII.—Compensation.

### SECT. 1.—THE COMPENSATION AUTHORITY.

#### SUB-SECT. 1.—CONSTITUTION.

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 2, 5, 6, 18, 47.

**379. Who must attend—Majority of body of justices qualified.**—Where the whole body of justices as the compensation authority for a county borough under the Licensing Act, 1904 (c. 23), do not delegate their powers to a committee, & where there are no rules fixing a quorum, at least a majority of the whole body of justices who are qualified must attend & act at the meetings of the compensation authority. *Qu.*: whether the whole body must not attend.—*R. v. LEEDS JJ.*, *Ex p. BINNS* (1906), 76 L. J. K. B. 111; 95 L. T. 916; 70 J. P. 517; 23 T. L. R. 48; 51 Sol. Jo. 50, D. C.

**380. Qualification—Licensing justice present at previous hearing—Member of compensation authority.**—A justice of a borough who has been appointed a member of the committee of quarter sessions under Licensing Act, 1904 (c. 23), s. 5 (5), is not disqualified from acting on the question of the refusal of the renewal of a license by the fact that he presided at the meeting of the licensing justices of the borough at which it was decided to refer the question of the renewal of that license to quarter sessions under Licensing Act, 1904 (c. 23), s. 1 (2).—*R. v. CHESHIRE LICENSING JJ.*, *Ex p. KAY'S ATLAS BREWERY, LTD.*, [1906] 1 K. B. 362; 75 L. J. K. B. 290; 94 L. T. 412; 70 J. P. 172; 54 W. R. 482; 22 T. L. R. 238; 50 Sol. Jo. 207, D. C.

*Annotations*:—*Apprvd.* *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685. *Reid.* *R. v. Southampton JJ.*, *Ex p. Fuller, Smith & Turner* (1906), 94 L. T. 442.

**381. —Instructing solicitor to oppose.**—*FROME UNITED BREWERIES CO., LTD. v. BATH COUNTY JJ.* (1926), 161 L. T. Jo. 387, H. L.; *revg.* S. C. *sub nom.* *R. v. BATH COMPENSATION AUTHORITY*, [1925] 1 K. B. 685, C. A.

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#### SUB-SECT. 2.—JURISDICTION.

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 19 (2), 23 (2) (c), 47 (a), (e).

**382. To consider report of justices.**—*R. v. SOMERSETSHIRE JJ.*, *Ex p. JOYCE* (1906), 50 Sol. Jo. 192, D. C.

*Annotations*:—*Distd.* *R. v. West Suffolk Compensation Authority*, *Ex p. Hudson's Cambridge & Pampisford Breweries*, [1919] 2 K. B. 374. *Reid.* *R. v. Chester Licensing JJ.*, *Ex p. Bennion*, [1914] 3 K. B. 349.

**383. —**Where licensing justices, acting under Licensing (Consolidation) Act, 1910 (c. 24), p. 19 (1), refer the question of the renewal of an old on license to the compensation authority together with their report thereon, the compensation authority are bound, under sect. 19, subsect. 2, to proceed with the consideration of the report, if it is good on its face, & a writ of prohibition will not lie prohibiting them from doing so on the ground that the licensing justices wrongly referred the question of the renewal of the license to them.—*R. v. CHESTER LICENSING JJ.*, *Ex p. BENNION*, [1914] 3 K. B. 349; 83 L. J. K. B. 1259; 111 L. T. 575; 78 J. P. 447, D. C.

**384. To grant or refuse renewal—No jurisdiction to consider annual value after refusal.**—The question of the renewal of an on beer license which had been continuously in force since a date before 1869 was referred by the licensing justices to the compensation authority, the ground of objection being that the license was not required, & a provisional renewal was granted. The compensation authority refused the renewal, & upon the question coming before the compensation authority whether they should approve the amount of compensation money agreed upon between the persons interested in the licensed premises it appeared that the annual value of the premises was less than that required by Beerhouse Act, 1840 (c. 61), s. 1. The compensation authority thereupon refused to approve the amount of compensation money agreed upon

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or to send the matter to be determined by the Comrs. of Inland Revenue. At the next general annual meeting the licensee applied for a further provisional renewal of the license under r. 43 of the Licensing Rules, 1904, the compensation money not having been paid & not being likely to be paid before Apr. 5 following, but the licensing justices, upon notice of objection duly given, refused to grant the renewal upon the ground that the annual value of the premises was less than that required by the Act:—**Held:** (1) the compensation authority, having refused the renewal of the license, were not entitled to entertain the question of the annual value of the premises, but were bound either to approve the amount of the compensation money agreed upon or to send the matter for determination to the Comrs. of Inland Revenue; (2) the licensing justices at the next general annual licensing meeting were not entitled to entertain the question of the annual value of the premises, but were bound under r. 43 of the Licensing Rules, 1904, inasmuch as the compensation money had not been paid & was not likely to be paid before Apr. 5 following, to grant a further provisional renewal of the license.—*R. v. WALSALL JJ.*, [1910] 2 K. B. 210; 79 L. J. K. B. 834; 102 L. T. 737; 74 J. P. 220, D. C.

*Annotation:—As to (2) Refd. R. v. Nowington Licensing JJ.*, *Ex p. Makomson*, [1914] 2 K. B. 710.

**385. — License suspended by Commissioners of Excise — Discontinuance of business through war restrictions.**—(1) Where under Finance Act, 1917 (c. 21), s. 8, a license is suspended by an order of the Comrs. of Customs & Excise in consequence of the discontinuance of the business by reason of any restriction imposed by or under the authority of any enactment or regulation in connection with the war, the compensation authority have no jurisdiction to refuse the renewal of the license subject to compensation.

(2) The restrictions referred to in above sect. are not limited to restrictions with regard to the particular licensed premises, but include general restrictions applicable to all such premises.—*R. v. WEST SUFFOLK COMPENSATION AUTHORITY, Ex p. HUDSON'S (CAMBRIDGE & PAMPISFORD BREWERIES, LTD.)*, [1919] 2 K. B. 374; 88 L. J. K. B. 1022; 121 L. T. 88; 83 J. P. 161; 35 T. L. R. 437; 63 Sol. Jo. 574, D. C.

**386. — No jurisdiction to renew.**—An appln. for the renewal of an existing on license was made at a general annual licensing meeting, & the justices being of opinion that the question of the renewal of the license required consideration on the ground, *inter alia*, that the license was unnecessary, granted a provisional renewal of the license in accordance with the Licensing Rules, 1910, r. 41, & under the Licensing (Consolidation) Act, 1910 (c. 24), s. 19, referred the matter to the compensation authority. At the meeting of the compensation authority the justices present were equally divided, three being in favour of & three against the renewal of the license, & in consequence no judgment of the compensation authority was recorded. A rule *nisi* for a *mandamus* to the compensation authority to hear & determine the application for the renewal of the license having been obtained:—**Held:** the compensation authority had jurisdiction only to decide whether or not the renewal of the license should be refused, & not to renew the license, & as the compensation authority

had not decided to refuse the renewal the license granted provisionally continued in operation until the next general annual licensing meeting, & the rule *nisi* for a *mandamus* must, therefore, be discharged.—*R. v. SURREY JJ.*, [1921] 1 K. B. 480; 90 L. J. K. B. 305; 124 L. T. 339; 85 J. P. 62; 37 T. L. R. 59, D. C.

**387. — Effect of no decision — License continues.**—*R. v. SURREY JJ.*, No. 386, *ante*.

**388. Right of applicant to be heard — & to call evidence.**—*R. v. SOMERSETSHIRE JJ., Ex p. JOYCE* (1906), 50 Sol. Jo. 192, D. C.

*Annotations:—Refd. R. v. Chester Licensing JJ., Ex p. Bennion*, [1914] 3 K. B. 349; *R. v. West Suffolk County Compensation Authority, Ex p. Hudson's Cambridge & Pampisford Breweries*, [1919] 2 K. B. 374.

**SUB-SECT. 3.—EVIDENCE AT HEARING.**

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 47 (f); Licensing Rules, 1910, r. 54.*

**389. Admissibility — Ordinance sheet.**—*RAVEN v. SOUTHAMPTON JJ.*, No. 487, *post*.

**390. — — —**—*COLCHESTER BREWING CO., LTD. v. TENDRING LICENSING JJ.*, No. 397, *post*.

**391. — Evidence of member of authority — Sitting as justices at former hearing.**—At the sitting of the compensation authority of the borough of C. as to the question of the renewal of the license of a certain public house which had been referred to the compensation authority by the licensing committee of the borough on the ground that the said public house was not required for the particular neighbourhood in which it was situated, a majority of the members of the compensation authority, who had also sat on the licensing committee, refused to grant a renewal of the license. At the same sitting, however, of the compensation authority, but some time later, the case was reopened, & one of the majority of the justices, who had sat at the first hearing, gave evidence, but took no part in the adjudication as to the question of the renewal of the license on this second hearing. The justices again refused so renew the license:—**Held:** however regrettable it might be for a justice to give evidence in the manner above stated, there was nothing in law to render such evidence inadmissible, & as there was evidence upon which the justices could legally arrive at their decision, whether the evidence of the justice was taken into consideration or not, there was nothing in Judicature Act, 1894 (c. 16), s. 2, which permitted the High Ct. to interfere with such decision.—*MITCHELL v. CROYDON JJ.* (1914), 111 L. T. 632; 78 J. P. 385; 30 T. L. R. 526, D. C.

*Annotation:—Consd. R. v. Bath Compensation Authority*, [1925] 1 K. B. 685.

**392. What justices may consider — In differentiating between redundant houses — Matters other than those stated as grounds of objection — At hearing before justices.**—The renewal of an "existing on license" was objected to on the grounds that a fully licensed house was not required at the place where the premises were situated; that, having regard to the character & necessities of the neighbourhood & number of licensed premises in the immediate vicinity, the license was unnecessary; & that in the interests of the public the renewal of the license was not desirable. The licensing justices referred the matter to the compensation authority under Licensing Act, 1904 (c. 23), s. 1 (2). The compensation authority, after hearing evidence as to the number of licensed houses in the neighbourhood, & also as to the structural condition of the

house in question, its convenience for police supervision, & the class of trade carried on there, refused to renew the license, subject to the payment of compensation under the Act:—*Held*: assuming the compensation authority were acting in a judicial capacity, there was evidence upon which they could come to the conclusion that there were too many licensed houses in the neighbourhood, & the license in question was the one that should be refused. For the purpose of deciding which of a number of licenses should be refused, the compensation authority are entitled to hear evidence upon matters other than those stated as the grounds of objection to the renewal of the license before the licensing justices.—*R. v. DRINK-WATER, ETC., COVENTRY JJ., Ex p. CONWAY* (1905), 70 J. P. 1; 22 T. L. R. 12, C. A.

*Annotations*:—*Folld. R. v. Johnson, etc., Leicester JJ., Ex p. Whitmore* (1906), 71 J. P. 59. *Appl. Colchester Brewing Co. v. Tendring Licensing JJ.*, [1915] 3 K. B. 48. *Refd. Dartford Brewery Co. v. County of London Quarter Sessions*, [1906] 1 K. B. 695.

**393.** ————*]*—On the hearing by a committee of quarter sessions of an application for the renewal of a license which has been referred to quarter sessions by the licensing justices under Licensing Act, 1904 (c. 23), s. 1 (2), evidence as to the structural condition & the state of repair of the premises in question is admissible for the purpose of differentiating from other licensed premises in the neighbourhood, although there is no mention of those subjects in the report of the licensing justices.—*Howe v. NEWINGTON LICENSING JJ.*, [1908] 1 K. B. 260; 77 L. J. K. B. 263; 98 L. T. 79; 72 J. P. 12; 24 T. L. R. 174; 52 Sol. Jo. 113, C. A.

*Annotation*:—*Consol. Colchester Brewing Co. v. Tendring Licensing JJ.*, [1916] 2 K. B. 126.

**394.** ———— **Number of other licenses held by applicant—Willingness to contribute to compensation fund.**—Where under the Licensing Act, 1904 (c. 23), the question of the renewal of two on licenses of ante-1869 beerhouses belonging to different owners was referred to the compensation authority & the compensation authority were satisfied that only one of them was required for the needs of the neighbourhood:—*Held*: for the purpose of differentiating between the two licensed houses & deciding which of the licenses should be renewed the compensation authority were not entitled to take into consideration what other licenses the owners of the respective licensed houses would be willing to surrender nor what contribution they would be willing to make to the compensation fund in consideration of the renewal of the license in respect of which the application was made.—*R. v. SHANN*, [1910] 2 K. B. 418; 79 L. J. K. B. 736; 102 L. T. 700; 74 J. P. 273; 26 T. L. R. 435; 54 Sol. Jo. 474, C. A.

*Annotation*:—*Folld. R. v. Wandsworth Licensing JJ., Ex p. Whitbread*, [1921] 3 K. B. 487.

**395. Right of applicant to cross-examine—As to other premises not included in justices' report.**—Where the question of the renewal of an existing on license is referred to quarter sessions by the renewal authority, with their report thereon, under Licensing Act, 1904 (c. 23), s. 1, the ct. of quarter sessions ought not, on the hearing of the matter, to refuse to allow a cross-examination on behalf of the license holder of the witnesses called by the renewal authority, if the ground of that refusal be merely that the questions sought to be put in cross-examination relate to other licensed houses in the neighbourhood which are not included in the report of the renewal authority.—*MORGAN v. AYLESFORD LICENSING JJ.*, [1906]

1 K. B. 437; 75 L. J. K. B. 266; 94 L. T. 485; 70 J. P. 155; 22 T. L. R. 229, D. C.

[, *Ex p.*

**396. Sufficiency—For refusal of licence for redundancy.**—*RAVEN v. SOUTHAMPTON JJ.*, No. 487, *post*.

**397.** ———— **Whether fact that house compares unfavourably with others must be proved.**—The question of a renewal of the license of an ante-1869 beerhouse was referred by the licensing justices to the compensation authority under Licensing (Consolidation) Act, 1910 (c. 24), s. 19, on the grounds that the house was unnecessary & that there was ample licensing accommodation in the district without it. Evidence was given before the compensation authority as to the situation, description, & trade of the house, & of other licensed houses in the district & their number, & an ordnance plan of the locality was put in. There was no evidence that the house compared unfavourably with the other houses in the district, & there was some evidence that it was in some respects a better house than the licensed house, a beerhouse situated next to it. The compensation authority refused the renewal of the license:—*Held*: (1) the compensation authority was acting in a judicial capacity when determining whether the license should be refused, & could therefore only act upon legal evidence; (2) although there was no evidence that the house compared unfavourably with the other houses in the district, there was evidence on which the compensation authority was entitled to refuse the renewal of the license.—*COLCHESTER BREWING CO., LTD. v. TENDRING LICENSING JJ.*, [1916] 2 K. B. 126; 85 L. J. K. B. 1001; 114 L. T. 1017; 80 J. P. 313; 32 T. L. R. 401, C. A.

*Annotation*:—*As to* (1) *Refd. R. v. Bath Compensation Authority*, [1925] 1 K. B. 685.

**398.** ———— **For purposes of differentiation—Evidence as to takings & number of other houses in district.**—The justices of a county borough referred the license of a beerhouse to the whole body of justices acting in & for the borough as the compensation authority. The compensation authority had before them evidence showing that the takings of the beerhouse were small, that the rooms of the beerhouse were small, that there were fifteen other licensed houses within a radius of 200 yards & that the ratable value was smaller than the ratable value of other houses in the neighbourhood:—*Held*: there was evidence before the compensation authority of differentiation from the other licensed houses in the neighbourhood & they were entitled to extinguish the license.—*R. v. JOHNSON, ETC., LEICESTER JJ., Ex p. WHITMORE* (1906), 71 J. P. 59; 51 Sol. Jo. 29, D. C.

**399.** ———— **Report of justices—Whether evidence as to particular house must be adduced.**—The question of the renewal of a license for a house, the property of applts. was referred by the licensing justices to quarter sessions. At the hearing before quarter sessions no evidence was given to distinguish such house from others in the neighbourhood, but quarter sessions had before them the report of the licensing justices, which stated the number & names of the licensed houses within 151 yards of the house in question; that the house was one of the smallest, & that the number of licensed houses in the area being excessive, it was recommended that the renewal of the appellants' license ought to be refused:—*Held*: the report not being on oath, there was no evidence distinguishing the house in question from the other houses, & the quarter sessions had no

*Sect. 1.—The compensation authority: Sub-sect. 3.*  
*Sect. 2: Sub-sects. 1, 2 & 3. Sect. 3.]*

jurisdiction to refuse the renewal.—**DARTFORD BREWERY Co. v. LONDON COUNTY QUARTER SESSIONS**, [1906] 1 K. B. 695; 75 L. J. K. B. 597; 94 L. T. 782; 70 J. P. 197; 22 T. L. R. 491; 50 Sol. Jo. 441, D. C.

*Annotations:—Apld. R. v. Jackson* (1906), 96 L. T. 77. *Consd. Howe v. Newington Licensing JJ.*, [1907] 2 K. B. 340. *Refd. R. v. Shann*, [1910] 2 K. B. 418; *Eccel. Comrs. for England v. Page*, [1911] 2 K. B. 946; *Colchester Brewing Co. v. Tendring Division of Essex Licensing JJ.*, [1916] 2 K. B. 126; *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685.

**400.** ————*—R. v. SOUTH SHIELDS JJ.* (1906), cited in *Paterson's Licensing Acts*, 35th ed., p. 544, D. C.

*Annotation:—Refd. R. v. Shann*, [1910] 2 K. B. 418.

## SECT. 2.—THE COMPENSATION FUND.

### SUB-SECT. 1.—IN GENERAL.

*Sec. generally, Licensing (Consolidation) Act*, 1910 (c. 24), ss. 21, 47; sched. III., Part I.

**401. Liability to contribute—Provisional license.]**

—Licensing justices having on Feb. 10, 1905, referred the renewal of an existing on license to quarter sessions under Licensing Act, 1904 (c. 23), s. 1 (2), granted the renewal of the license provisionally under r. 41 of the rules to the Act. The quarter sessions refused the renewal on May 8, subject to the payment of compensation. On Oct. 10 the excise duties in respect of the provisional license became due, but the Comrs. refused to accept them unless the amount due in respect of the contribution to the compensation fund were also paid:—*Held: a provisional license was not an "existing on license renewed" within Licensing Act, 1904 (c. 23), s. 3, & the holder of the provisional license was not, therefore, bound to pay any contribution to the compensation fund.*—**MALKIN v. R.**, [1906] 2 K. B. 886; 75 L. J. K. B. 884; 95 L. T. 448; 70 J. P. 506; 22 T. L. R. 807; 50 Sol. Jo. 683.

*Annotation:—Refd. R. v. Newington Licensing JJ.*, *Ex p. Makomson* (1914), 111 L. T. 72.

**402. —Renewal of old on license.]**

**WERNHAM v. R.**, No. 296, *ante*.

**Amount of contribution.]—See Licensing (Consolidation) Act**, 1910 (c. 24), s. 21 (1); Sched. III., Part I.

**403. —Hotel—Bar above annual value of twenty-five pounds.]**—Hotels with bars above the ratable value of £25 do not come within the exemption in Schedule I. of the Licensing Act, 1904 (c. 23), & are liable to be assessed on the full & not the reduced rate to the compensation fund.—**R. v. BEDFORD JJ.** (1906), 51 Sol. Jo. 28, D. C.

**404. ————]**—The holder of the license of a hotel of the annual value of £450, a portion of which, exceeding £25, in annual value, is set apart as a public bar & used as an ordinary public house, is not entitled to relief from the maximum charge to the compensation fund, as the holding of a license was not merely auxiliary to the business of such a hotel.—**R. v. CARTER**, [1907] 1 K. B. 298; 76 L. J. K. B. 137; 71 J. P. 60; 23 T. L. R. 25; *sub nom. R. v. CARTER, ETC. JJ.*, *Ex p. MARKS*, 95 L. T. 910, D. C.

**405. —How fixed—What evidence may be required by justices.]**—It is in the discretion of the licensing justices when fixing the amount of the

compensation levy on a restaurant to require that the figures of the trade done by the restaurant should be given to them, including the gross receipts from the sale of alcohol & all other goods, & they are not bound to be satisfied with a statement showing the proportion of the receipts for liquor to the gross receipts.—*Ex p. HOLBORN & FRASCATTI, LTD.* (1914), 30 T. L. R. 614; 78 J. P. Jo. 316, D. C.

**406. Period covered by charge.]**—The compensation charge imposed in each year in respect of a renewed license by quarter sessions under Licensing Act, 1904 (c. 23), s. 3 (1), is imposed in respect of the period from Apr. 5 of the year in which it is payable until Apr. 5 of the succeeding year.—**HORTON v. PENN.**, [1907] 1 K. B. 561; 76 L. J. K. B. 340; 96 L. T. 228; 71 J. P. 115; 23 T. L. R. 290; 51 Sol. Jo. 249, D. C.

### SUB-SECT. 2.—TO WHAT AUTHORITY CHARGES PAYABLE.

*See Licensing (Consolidation) Act*, 1910 (c. 24), ss. 21, 47; Sched. III., Part I.; Licensing Rules 1910, rr. 34–36, 55–71.

**407. Creation by county borough—After imposition of levy by county quarter sessions.]**—The quarter sessions for a county as the compensation authority imposed under Licensing Act, 1904 (c. 23), s. 3 (1), at the Epiphany sessions, 1908, charges for the ensuing year in respect of all existing on licenses renewed in respect of premises within their area. At that date a borough was within the area of the quarter sessions for the county, but is was constituted a county borough as from Apr. 1, 1908, & in July following a separate commission of the peace was granted to it. In Oct. 1908, the Comrs. of Inland Revenue, under sect. 3, sub-sect. 2, of the Act, collected the charges imposed by the quarter sessions for the county at the preceding Epiphany sessions, including the charges in respect of licensed premises within the borough, & paid over the amount produced by the charges within the borough to the compensation authority thereof, & the amount produced by the charges in respect of licensed premises in the rest of the county to the compensation authority for the county. The latter authority claimed to be entitled to the amount produced by the charges in respect of premises within the borough as being the authority which had imposed those charges:—*Held: by virtue of sect. 3, sub-sect. 2, & sect. 8 the compensation authority for the borough were entitled to be paid the amount produced by those charges notwithstanding that they had been imposed by the compensation authority for the county.*—**R. v. INLAND REVENUE COMRS.**, *R. v. GLAMORGAN JJ.*, *Ex p. DAVIES*, [1910] 1 K. B. 851; *sub nom. R. v. INLAND REVENUE COMRS.*, *Ex p. GLAMORGANSHIRE COMPENSATION AUTHORITY*, *R. v. GLAMORGANSHIRE COMPENSATION AUTHORITY*, *Ex p. DAVIES*, 79 L. J. K. B. 497; 102 L. T. 505; 74 J. P. 148, D. C.

**408. —Division of compensation fund.]**—A local Act creating a new county borough provided that the quarter sessions for the county in which the borough had previously been included should pay to the justices for the borough a certain proportion of the sum standing on a certain day to the credit of the compensation fund under the Licensing Act, 1904 (c. 23). By Licensing (Consolidation) Act, 1910 (c. 24), s. 21 (2), charges

## PART VII. SECT. 2, SUB-SECT. 1.

**p. Compensation for license taken away.]—R. v. LICENCES REDUCTION BOARD**, *Ex p. MARTIN & GODFREY*, [1908] V. L. R. 721.—**AUS.**

imposed for compensation purposes are to be paid together with the duties on the corresponding excise license, but a separate account is to be kept by the Comrs. of Customs & Excise of the amount produced by those charges in the area of any compensation authority, & that amount is in each year to be paid over to that authority. A certain amount of delay took place in the collection of the compensation levy for the year prior to the date prescribed by the local Act as the date on which the sum standing to the credit of the compensation fund for the county was to be ascertained, & a certain portion was not collected or paid over by the Comrs. of Customs & Excise to the quarter sessions for the county until after that date:—*Held*: the words of the local Act, "sum standing to the credit" of the compensation fund, meant the sum which ought to stand to the credit of the compensation fund on the prescribed day, & therefore in ascertaining the amount standing to the credit of the fund on that day it was necessary to include compensation charges which ought to have been collected & paid over before that day, but which were collected & paid over subsequently.—*R. v. SUSSEX JJ., Ex LANGHAM* (1912), 76 J. P. 576, D. C.

*See, further, LOCAL GOVERNMENT.*

#### SUB-SECT. 3.—WITH WHAT PAYMENTS FUND CHARGEABLE.

**409. Income tax—Fund deposited in bank—Customs & Inland Revenue Act, 1888 (c. 8), s. 24 (3).—**Quarter sessions, as the compensation authority under the Licensing Act, 1904 (c. 23), are assessable to income tax in respect of the interest payable upon so much of the compensation fund as is placed upon deposit in a bank.

Above sub-sect., which provides that upon payment of any interest of money charged with income tax under Sched. D & not payable out of profits or gains brought into charge to such tax, the person paying the interest shall deduct thereout the rate of income tax in force, & shall render an account to the Comrs. of Inland Revenue of the amount so deducted, & such amount shall be a debt from such person to the Crown—does not relieve the person to whom the interest is paid from liability to pay the income tax where the tax has not been deducted by the person who pays the interest, but merely gives an additional remedy to the Crown against the latter person.—*GLAMORGAN QUARTER SESSIONS v. WILSON*, [1910] 1 K. B. 725; 79 L. J. K. B. 454; 102 L. T. 500; 74 J. P. 299; 26 T. L. R. 351.

**410. Costs—Appeal—Discretion of court.]—**On an appeal to the High Ct. from the determination by the Comrs. of Inland Revenue of the compensation payable in respect of the refusal by quarter sessions to renew an on license under the Licensing Act, 1904 (c. 23), the costs of the appeal are, by virtue of sect. 2, sub-sect. 2, of the Act, which incorporates sect. 10, sub-sect. 3 of the Finance Act, 1894 (c. 30), in the discretion of the ct.; but the ct. does not exercise its discretion judicially by making the substantial success of the appeal alone a sufficient ground for ordering the Comrs. to pay the costs of appts.

The provision in sect. 2, sub-sect. 4 of the Licensing Act, 1904 (c. 23), that costs "incurred" by the Comrs. of Inland Revenue on an appeal under the sect. shall, unless the ct. otherwise order, be paid out of the amount of the compensation, applies only to costs incurred by the

Comrs. on their own behalf, & not to costs which they have been ordered to pay to the appts.—*Re HARDY'S CROWN BREWERY, LTD. & ST. PHILIP'S TAVERN, MANCHESTER*, [1910] 2 K. B. 257; 79 L. J. K. B. 806; 102 L. T. 799; 71 J. P. 393; 26 T. L. R. 404; 54 Sol. Jo. 457, C. A.; *subsequent proceedings* (1910), 103 L. T. 308, 520, C. A. *Innotation*:—*Reid*, *Dyson v. A.-G.*, [1911] 1 K. B. 410.

**411. Expenses incurred in defending writ of prohibition—Against enforcement of order of compensation authority—Compensation authority showing cause against mandamus.]—**The holder of the license of an hotel applied to the licensing justices for a renewal of his license. The application was referred by the licensing justices to the compensation authority. The compensation authority decided to refuse the renewal subject to the payment of compensation. Rules *nisi* for a writ of *mandamus* to the compensation authority to hear & determine the application according to law & for a writ of prohibition prohibiting them from acting upon their decision were obtained by the licensee on the ground that there was a probability of bias on the part of one member of the compensation authority. On the return of the rules the compensation authority appeared by counsel & showed cause. The rules were made absolute. A resolution was afterwards passed by the compensation authority that the costs incurred by the compensation authority in appearing to show cause against the rules should be paid out of the compensation fund. The costs were incurred in good faith & reasonably.

In an action brought by the A.-G. upon the relation of the owners of the premises against those members of the compensation authority who caused the payment to be made, for a declaration that the payment was not authorised by the Act of 1910 & was illegal, & claiming that defts. should repay the amount to the compensation fund:—*Held*: the payment was not *ultra vires*, inasmuch as Licensing (Consolidation) Act, 1910 (c. 24), s. 21 (5), authorised the payment out of the compensation fund of any expenses incurred by the compensation authority in the exercise of their powers or performance of their duties as compensation authority, & it was within their powers & duties to endeavour to support, although unsuccessfully, the validity of their decision as compensation authority.—*A.-G. v. THOMPSON*, [1913] 3 K. B. 198; 82 L. J. K. B. 673; 109 L. T. 234; 77 J. P. 287; 29 T. L. R. 510.

#### SECT. 3.—DEDUCTIONS FROM RENT.

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 21; Sched. III., Part II.

**412. "Unexpired term"—From what date to be computed.]—**The date at which the length of the "unexpired term" referred to in Sched. II. of the Licensing Act, 1904 (c. 23), is to be ascertained is Oct. 10, the date on which the compensation charge is payable by the license holder.—*LONDON COUNTY COUNCIL v. WATNEY, COMBE & CO.*, [1909] 1 K. B. 637; 78 L. J. K. B. 421; 100 L. T. 336; 73 J. P. 202; 53 Sol. Jo. 303, D. C.

*Innotation*:—*Mentid*, *Llangattock v. Watney, Combe*, *Held*, [1910] 1 K. B. 236.

**413. —Meaning of—Necessity for strict construction.]—**The expression "unexpired term" in Sched. II. of the Licensing Act, 1904 (c. 23), must be construed strictly & legal effect given to legal language. It does not include an interest in a reversionary lease which is a mere *interesse termini*.



**Sect. 3.—Deductions from rent. Sect. 4: Sub-sects. 1 & 2.]**

Resps. were lessees of a public-house under a lease expiring at Christmas, 1909, & were also grantees of a lease of the same public-house for a term beginning from the day next but one after the expiration or other sooner determination of the expiring lease. The license was renewed in Oct. 1908, & quarter sessions imposed a compensation charge under sect. 3, sub-sect. 1:—*Held*: the unexpired term did not include the lessees' interest in the reversionary lease, which was a mere *interesse termini*.—**LLANGATTOCK (LORD) v. WATNEY, COMBE, REID & Co., LTD.**, [1910] A. C. 394; 79 L. J. K. B. 559; 102 L. T. 548; 74 J. P. 194; 26 T. L. R. 418; 54 Sol. Jo. 456, H. L.

*Annotations*.—**Fold, Knight v. City of London Brewery Co.**, [1912] 1 K. B. 10. **Mentl. Mann, Crossman & Paulin v. Land Registry Registrar**, [1918] 1 Ch. 202.

**414. — Whether reversionary leases to be included.**—**LLANGATTOCK (LORD) v. WATNEY, COMBE, REID & Co., LTD.**, No. 413, *ante*.

**415. — Reversionary interest commencing immediately on expiration of original lease.**—In 1875 the owner of licensed premises let them to a tenant for a term of forty years. In 1888 by a deed which recited an agreement to grant an extension of the lease he demised the premises to the tenant for a term of twenty-one years to commence immediately on the expiration of the forty years term at the same rent & subject to the same covenants as specified in the original lease. In 1897 by a deed which recited an agreement to grant a further extension of the lease he demised the premises for a further term of fifteen years to commence immediately at the expiration of the twenty-one years term at the same rent & subject to the same covenants. Both these two last-mentioned leases contained a proviso that in the event of the forfeiture of the original lease they should be forfeited also. In 1910 the quarter sessions on the renewal of the tenant's license imposed a compensation charge in respect of the premises under Licensing Act, 1904 (c. 23), s. 3:—*Held*: for the purpose of determining the amount of the tenant's "unexpired term" in the premises on the basis of which he was entitled to deduct a percentage of the compensation charge from his rent under that Act, the original lease & the extensions could not be treated as one term, & the deduction must be regulated by the unexpired portion of the original lease alone.—**KNIGHT v. CITY OF LONDON BREWERY CO.**, [1912] 1 K. B. 10; 81 L. J. K. B. 194; 106 L. T. 564.

**416. "Notwithstanding any agreement to the contrary"—Agreement made after passing of Act.**—By Licensing Act, 1904 (c. 23), s. 3 (3), "Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any license holder who pays a charge under this sect.":—*Held*: the words "any agreement to the contrary" include agreements made after the passing of the Act.—**WOOLER v. NORTH EASTERN BREWERIES**, [1910] 1 K. B. 247; 79 L. J. K. B. 138; 101 L. T. 909; 74 J. P. 118; 26 T. L. R. 129, D. C.

**417. — Agreement to pay charges formerly deducted.**—By Licensing Act, 1904 (c. 23), s. 3 (3), & Licensing (Consolidation) Act, 1910 (c. 24), s. 21 (3), it was provided that deductions from rent in respect of compensation fund charges imposed upon licensed premises "may, notwithstanding any agreement to the contrary," be made by an license holder paying a charge under those sects.

In 1905 defts., a brewery co., who were lessees of licensed premises at a yearly rent of £150 under a lease for fourteen years from June 24, 1902, granted under the Settled Land Act, 1882 (c. 38), by a previous tenant for life, deducted from their rent the compensation fund charges levied under the provisions of the Licensing Act, 1904 (c. 23). The tenant for life, who was an illiterate man, complained of the deductions & defts. subsequently agreed that if he granted them a new lease for twenty-one years at the same rent of £150, they would pay the charges themselves. Accordingly, the tenant for life, without having any legal assistance or consulting the solr. to the settled trust estate, in exercise of his statutory powers granted defts. a new lease of the licensed premises for twenty-one years at a yearly rent of £150, & defts. covenanted to pay the rent without deduction, & also to pay all rates, taxes, assessments & charges, including all payments to the compensation fund under the Licensing Act, 1904 (c. 23), which then were or during the term should be charged on the demised premises without making any deduction from rent in respect thereof. Defts. had paid the charges under the Licensing Act in fulfilment of their promise.

In an action by the remaindermen against defts. for declaration that the lease did not reserve the best rent that could reasonably be obtained, & was not binding upon them:—*Held*: there was no valid reservation in the lease of the real amount which was to be paid for the use of the premises; the rent which was really reserved was £150, subject to the deductions, & no more, & was obviously in the circumstances, not the best rent that could be obtained; & therefore the new lease was not a valid lease under Settled Land Act, 1882 (c. 38), so as to be binding upon the remaindermen.—**PUMFORD v. BUTLER (W.) & Co., LTD.**, [1914] 2 Ch. 353; 83 L. J. Ch. 858; 111 L. T. 408; 78 J. P. 457; 30 T. L. R. 556; 58 Sol. Jo. 655.

**418. Settled reversion—Rights of tenant for life—Out of what fund deductions payable.**—The deductions which, under the Licensing Act, 1904 (c. 23), a license holder is allowed to make from his rent in respect of charges imposed by quarter sessions to form a compensation fund for non-renewal of licenses under that Act are a charge upon the rent. In cases where the reversion is settled, a tenant for life has no right, in the absence of special directions in the will or settlement, to have any part of these deductions paid out of capital.—*Re SMITH, SMITH v. DODSWORTH*, [1906] 1 Ch. 799; 75 L. J. Ch. 442; 94 L. T. 643; 70 J. P. 169; 54 W. R. 449; 22 T. L. R. 412; 50 Sol. Jo. 376.

**419. — Reimbursement out of compensation for compulsory surrender.**—*Re Fox, Fox v. MOORE* (1911), 130 L. T. Jo. 484.

**420. Effect of ratable value—Whether to be taken into consideration.**—In estimating the ratable value of fully licensed premises the amount of the annual charge imposed in respect of the premises under Licensing Act, 1904 (c. 23), s. 3, cannot be deducted, the charge not being an expense necessary to maintain the premises in a state to command the rent thereof within Parochial Assessment Act, 1836 (c. 96), s. 1.—**WADDLE v. SUNDERLAND UNION**, [1908] 1 K. B. 642; 77 L. J. K. B. 509; 98 L. T. 260; 72 J. P. 99; 24 T. L. R. 259; 52 Sol. Jo. 223; 6 L. G. R. 415; 2 Konst. Rat. App. 506, C. A.; *affg.*, [1906] 2 K. B. 899, D. C.

*Annotations*.—**Consd. White v. South Stoneham Assessment**





—*Payment of compensation: Sub-sects. 2 & 3.*

which resp. were copyhold tenants holding the same by copy of ct. roll. Appls. were registered as owners of the beerhouse. The renewal of the license of the beerhouse having been refused:—*Held*: applts. were persons interested in the licensed premises as owners, & were, therefore, entitled to share in the compensation money.—*ECCLESIASTICAL COMRS. FOR ENGLAND v. PAGE*, [1911] 2 K. B. 946; 80 L. J. K. B. 1346; 105 L. T. 827; 75 J. P. 548, D. C.

**428. — Trustees for debenture-holders—Interest payable to mortgagor in possession.**—Where a co. has specifically mortgaged leaseholds to trustees to secure debenture stock, the trustees will be entitled to receive the compensation money awarded to the co. under Licensing Act, 1904 (c. 23), in respect of the refusal of the licensing authority to renew the license of a leasehold beerhouse included in the security; but the mtgors., being in possession, will be entitled to the interest received in respect of the investment of such compensation money until the security becomes enforceable.—*LAW GUARANTEE & TRUST SOCIETY, LTD. v. MITCHAM & CHEAM BREWERY CO., LTD.*, [1906] 2 Ch. 98; 75 L. J. Ch. 556; 94 L. T. 809; 54 W. R. 551; 22 T. L. R. 499.

*Annotations*:—*Expld.* Dawson v. Braine's Tadcaster Breweries, [1907] 2 Ch. 359. *Foll.* Noakes v. Noakes, [1907] 1 Ch. 64. *Appl.* Bent's Brewery Co. v. Dykes (1909), 100 L. T. 476. *Refd.* Birkin v. Smith, [1909] 2 K. B. 112.

**429. —**—A brewery co. by deed conveyed all its licensed premises to trustees to secure an issue of debenture stock. The deed empowered the trustees to permit the co. to hold & enjoy the mtgd. premises until the security became enforceable, which event had not happened, & provided, clause 20, that at any time before the security became enforceable the trustees might with the concurrence of the co. sell, lease & exchange any of the mtgd. premises & also "settle, adjust, refer to arbn., compromise & arrange all . . . controversies, questions, claims & demands whatsoever, open, unsettled or pending with any person or persons in relation to the mtgd. premises," & also generally might "act in relation to the mtgd. premises in such manner as the trustees might think expedient in the interests of the stock-holders," & declared, clause 21, "that the trustees should hold all capital moneys arising under clause 20," upon trust for investment in (*inter alia*) other licensed premises. The deed also contained the usual trust investment clause. The licensing authority having refused under the powers of Licensing Act, 1904 (c. 23), to renew the license of one of the licensed premises comprised in the trust deed compensation was awarded under the Act to the co. in respect thereof. The trustees were not parties to the compensation proceedings:—*Held*: (1) the compensation money must be paid to the trustees of the debenture deed; (2) the compensation proceedings were a "controversy in relation to the mtgd. premises" within the meaning of clause 20, & therefore the compensation moneys were "capital moneys arising under clause 20" which the trustees could in the exercise of their discretion apply under clause 21 in the purchase of other licensed premises.—*NOAKES v. NOAKES & CO., LTD.*, [1907] 1 Ch. 64; 76 L. J. Ch. 151; 95 L. T. 606; 71 J. P. 130; 23 T. L. R. 16; 14 Mans. 28.

*Annotations*:—*As to* (1) *Appl.* Dawson v. Braine's Tadcaster Breweries, [1907] 2 Ch. 359; Bent's Brewery Co. v. Dykes (1909), 100 L. T. 476; *Re* Bladon, Dando v. Porter, [1911] 2 Ch. 350. (*See* [1912] 1 Ch. 45.) *Refd.* Birkin v. Smith, [1909] 2 K. B. 112.

**430. — Compensation part of capital moneys—Power of trustees to invest.**—A brewery co. assured all its licensed premises to trustees upon the trusts of a debenture trust deed, which was in the usual form, for securing an issue of debenture stock, the premises being held by the trustees on trust to permit the co. to hold & enjoy the same & to carry on thereon the business of the co. until the security thereby constituted became enforceable, which event had not happened, & then upon the usual trust for sale & conversion. The deed provided by clause 17 that at any time before the security thereby constituted became enforceable the trustees might (*inter alia*) sell & convert or concur in selling & converting, all or any of the mtgd. premises in the same manner as they could do if the primary trust for conversion had then arisen; & by clause 18, that the trustees should hold the capital moneys arising under clause 17 upon trust to lay out the same in (*inter alia*) the purchase of the licensed premises suitable to be held for the purposes of the co.:—*Held*: moneys paid under Licensing Act, 1904 (c. 23), for compensation for the licence of one of the mtgd. premises comprised in the trust deed were capital moneys arising under clause 17 as above set out, & were applicable under the provisions of clause 18.—*DAWSON v. BRAINE'S TADCASTER BREWERIES, LTD.*, [1907] 2 Ch. 359; 76 L. J. Ch. 588; 97 L. T. 83; 14 Mans. 254.

*Annotations*:—*Foll.* *Re* Bentley's Yorkshire Breweries, [1909] 2 Ch. 609. *Appl.* *Re* Bladon, Dando v. Porter, [1911] 2 Ch. 350. (*See* [1912] 1 Ch. 45.)

**431. —**—Where a brewery co. has executed a trust deed to secure debentures with the usual clause providing that the trustees shall on the co.'s application sell or concur in selling any part of the mtgd. premises & hold the proceeds on trust for reinvestment, & the licenses of part of the mtgd. premises have been taken away under Licensing Act, 1904 (c. 23), such a proceeding is a sale & the compensation moneys awarded under the Act are "purchase-moneys" or "capital moneys" within the meaning of the trust deed.

The trustees in such a case, if possessed of the requisite powers, may invest the "purchase" or "capital moneys" in the purchase or on mtge. of licensed properties, & if so advised, in the purchase or on mtge. of licensed premises of the co.—*Re BENTLEY'S YORKSHIRE BREWERIES, LTD.*, [1909] 2 Ch. 609; *sub nom.* *Re BENTLEY (H.) & CO.'S TRUST DEED, CHARLESWORTH v. BENTLEY'S YORKSHIRE BREWERIES, LTD.*, *Re BENTLEY'S YORKSHIRE BREWERIES TRUST DEED, DAY v. BENTLEY'S YORKSHIRE BREWERIES, LTD.*, *CHARLESWORTH v. BENTLEY'S YORKSHIRE BREWERIES, LTD.*, 78 L. J. Ch. 704; 101 L. T. 488; 53 Sol. Jo. 715; 16 Mans. 296.

**432. — Equitable mortgagees—Mortgage to lessees to secure payment of costs of improvements.**—A lessor, the owner in fee of a licensed public-house property, gave the lessees an equitable mtge. of the premises to secure the payment by the lessor to the lessees at the end of the term, which expired in 1911, of the cost of certain improvements made by the lessees. The cost of the improvements was agreed to be whatever might be the excess in value of the premises at the end of the term over £910. The renewal of the license was refused in 1907, & the lessor was awarded by quarter sessions £1,000 as compensation in respect of his interest in the premises under Licensing Act, 1904 (c. 23). The present value of the premises without the license was alleged to be over £910:—*Held*: the £1,000 was subject to the mtge., as it formed part

of the premises, but that the lessor need not account to the lessees for it.

The ct. directed the £1,000 to be invested in the joint names of the lessor & the lessees until the end of the term & the interest thereon to be paid to the lessor.—*BENT'S BREWERY CO., LTD. v. DYKES* (1909), 100 L. T. 476; 73 J. P. 227; 25 T. L. R. 347; 53 Sol. Jo. 302.

*Annotation* :—*Reid, Birkin v. Smith*, [1909] 2 K. B. 112.

**433. — Co-owners—Of leasehold interest.**—*Pltfs.*, who claimed that they & others being the children of one R., deceased, were interested as tenants in common with deft. in a lease of certain licensed premises, of which deft. was in possession through his tenant, brought an action in the Ct. of Ch. of the County Palatine of Durham, asking for a sale of the property in lieu of partition. In that action deft. consented to judgment for an inquiry as to who were the persons interested in the property, & for an account of the rents & profits received by him; & by this judgment by consent it was further ordered that, if it were certified by the registrar of the ct. that all persons interested in the property who were necessary parties were before the ct., the property should be sold with the approbation of the registrar, & the money to arise by the sale should be paid into ct. to the credit of the action, subject to further order. By the certificate of the registrar made in pursuance of the judgment, it appeared that *pltfs.* & the other children of R. were entitled to one moiety, & deft. was entitled to the other moiety, of the leasehold interest. Before any sale of the property was effected, the renewal of the license in respect of the premises was refused by the compensation authority under the Licensing Act, 1904 (c. 23), ss. 1, 2, & the amount to be paid as compensation to the persons interested in the premises was determined by the Inland Revenue Comrs. under sect. 2, sub-sect. 2, of that Act to be £900. A supplemental meeting of the compensation authority was subsequently held under Licensing Rules, 1904, to determine the shares in which the compensation money should be divided amongst the persons interested in the premises. The Eccles. Comrs., who were the owners of the reversion on the lease, made no claim to any portion of the amount. A claim was made at the supplemental meeting on behalf of the children of R., who had not sent to the compensation authority any notice of claim as required by Licensing Rules, 1904, r. 21, to be treated as interested in the licensed premises, but the compensation authority refused to entertain their claim, or to hear them, on the ground that they had not complied with the provisions of r. 21, & proceeded to apportion the amount of the compensation as follows, namely £835 to deft., who had been registered as the owner of the premises in the register of licenses, & £65 to the holder of the license, his tenant. Dft. having received the £835 so apportioned, an application was made on behalf of the children of R. for an order that he should bring that sum into ct., & the Chancellor of the County Palatine granted that application :—*Held* : the determination of the compensation authority with regard to the shares in which the compensation was to be divided between the various interests in the premises did not determine the rights of the co-owners of the leasehold interest in the licensed premises *inter se*, & deft. was bound to bring the amount paid to him into ct. to the credit of the action.—*BIRKIN v. SMITH*, [1909] 2 K. B. 112; 78 L. J. K. B. 739; 100 L. T. 835; 73 J. P. 306; 25 T. L. R. 499, C. A.

**434. — Legatee of business—Licensed premises devised apart from business—Business discontinued before compensation awarded.**—Where a lease of licensed premises, the premises having been devised separately from the business of beer retailer, has been granted by the tenant for life & is subsisting when the compensation on refusal to renew the license is granted, a legatee of the business has no interest in the premises or reversionary goodwill of the business carried on upon them, entitling him to participate in the compensation fund apportioned to the owner of the premises.—*Re SPURGE, CULVER v. COLLETT* (1911), 104 L. T. 609; 75 J. P. 410; 55 Sol. Jo. 499.

**435. — Tenant for life & remainderman—Premises part of settled estate.**—Where licensed premises form part of a settled estate, & the license is extinguished under the provisions of Licensing Act, 1904 (c. 23), the proportion of the compensation allocated to the freeholder of the premises represents capital money of the estate.—*Re BLADON, DANDO v. PORTER*, [1912] 1 Ch. 45; 81 L. J. Ch. 117; 105 L. T. 729; 28 T. L. R. 57, C. A.  
*Annotation* :—*Distd. Re Williams' Settlement, Williams v. Williams*, [1922] 2 Ch. 750.

#### SUB-SECT. 3.—APPORTIONMENT.

**436. By compensation authority—Power to state case for opinion of King's Bench Division.**—*ECCLESIASTICAL COMRS. FOR ENGLAND v. PAGE*, No. 427, *ante*.

**437. — Re-hearing — By certiorari or mandamus.**—The renewal of the license of a public-house was refused in June, 1911, subject to compensation, & the lessees of the premises, who were brewers, claimed to be entitled to a share in the compensation money. Their lease was for fourteen years from Michaelmas, 1904, & it contained, amongst others, a proviso that if the renewal of the license was refused the lease should cease & determine on Sept. 29 next after such refusal, & the lease therefore came to an end on Sept. 29, 1911, seven years before its ordinary expiration. It having been determined by the High Ct. that the lessees were entitled to be treated as persons interested in the premises, the compensation authority in dividing the agreed compensation money of £670, gave £750 to the owner, £90 to the licensee, & £10 to the lessees. The lessees having complained that they had not been awarded any compensation in respect of the seven years after Michaelmas, 1911, which alone they claimed, obtained rules for *certiorari* & *mandamus* :—*Held* : as to the *certiorari*, as the order made by the compensation authority was good on the face of it there was no ground for granting the writ; (2) as to the *mandamus*, whether they were right or wrong in their decision upon the question of law arising on the construction of the proviso in the lease or upon the facts, the ct. could not interfere by *mandamus*, as at the utmost it would be an erroneous decision on matters within their jurisdiction.—*R. v. CHESHIRE JJ., Ex p. HEAVER* (1912), 108 L. T. 374; 77 J. P. 33; 29 T. L. R. 23, D. C.

**438. — — — — —**—*Ex p. RISING SUN BEER-HOUSE, CWMILLERY, MONMOUTH, FREEHOLDERS* (1912), 76 J. P. Jo. 495, D. C.

**439. — — — — —**—Where a compensation authority in dividing amongst the persons interested the compensation money agreed upon or awarded to be paid in respect of the refusal to renew an old on license have not taken into consideration any extraneous matters which by law ought not to

**Sect. 4.—Payment of compensation: Sub-sect. 3. Part VIII. Sect. 1: Sub-sects. 1, 2 & 3, A. & B.; sub-sect. 4.]**

have been taken into consideration or matters which are altogether outside the ambit of their jurisdiction, their decision is final, &, however erroneous it may be either in law or in fact, the ct. will not grant a *mandamus* for the purpose of reviewing it.—*R. v. MONMOUTHSHIRE JJ., Ex p. NEVILL* (1913), 109 L. T. 788; 78 J. P. 9; 30 T. L. R. 26, C. A.

**440. By county court—Appeals from.]—**Where, under Licensing Act, 1904 (c. 23), s. 2 (3), quarter sessions having referred the division of the sum fixed as compensation to be paid for the extinction of a license among the persons interested in the licensed premises to the county ct. & the amount to be received thereout by the license holder having been settled by agreement between the parties, the residue had to be apportioned between the lessees of the premises for a term of years, who

were brewers, & the freeholders, which apportionment the county ct. judge made on the basis of the 8 per cent. interest table:—*Held*: (1) there was no rule or presumption of law, either general or applicable to the circumstances of the particular case, by which the county ct. judge was bound to treat the respective interests of the parties as 4 per cent. investments, or to adopt the 4 per cent. interest table for the purpose of making the division; (2) the valuation of the respective interests in the compensation money was entirely a question of fact to be determined by him upon the circumstances of the particular case; (3) his determination of that question was not subject to review by the High Ct.:—*Qu.*: whether in such a case there is any right of appeal from the county ct. judge.—*LIVERPOOL CORPN. v. WALKER (PETER) & SON, LTD.,* [1908] 2 K. B. 33; 77 L. J. K. B. 700; 99 L. T. 231; 72 J. P. 233; 24 T. L. R. 443, C. A.

*Annotations*:—*Consad. R. v. Monmouthshire JJ., Ex p. Nevill* (1913), 109 L. T. 788. *Refd. R. v. Cheshire JJ., Ex p. Heaver* (1912), 108 L. T. 374.

## Part VIII.—Decisions of Licensing Justices.

### SECT. 1.—APPEAL TO QUARTER SESSIONS.

#### SUB-SECT. 1.—NATURE OF APPEAL.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 29.

**441. Amounts to a rehearing.]—***WHIFFEN v. MALLING (OR MAIDSTONE) JJ.,* No. 478, *post*.

#### SUB-SECT. 2.—WHO MAY APPEAL—"PERSONS AGGRIEVED."

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 29 (1), 99 (2).

**442. Who are "persons aggrieved"—Persons immediately aggrieved.]—**The statute 9 Geo. 4, c. 61, for regulating the granting of licenses to innkeepers, etc., by sect. 27 enacts "That any person who shall think himself aggrieved by any act of any justice done in execution of that Act may appeal against such act to the quarter sessions," etc.:—*Held*: the words "persons who shall think himself aggrieved" mean a person immediately aggrieved as by refusal of a license to himself by fine, etc., & not one who is only consequently aggrieved; &, therefore, where magistrates had granted a license to a party to open a public-house not before licensed, within a very short distance of a licensed public-house the occupier of the latter house could not appeal against such grant.—*R. v. MIDDLESEX JJ.* (1832), 3 B. & Ad. 938; 1 L. J. M. C. 68; 110 E. R. 345. *Annotations*:—*Appl. Garrett v. Middlesex JJ.* (1884), 12 Q. B. D. 620. *Refd. R. v. Surrey JJ.* (1888), 52 J. P. 423. *Ment. Drapers' Co. v. Hadder* (1892), 57 J. P. 200.

**443. — Trade rival.]—***R. v. MIDDLESEX JJ.,* No. 442, *ante*.

### PART VIII. SECT. 1, SUB-SECT. 1.

**441 i. Amounts to a rehearing.]—**An appeal to quarter sessions from an order made by a licensing ct. should be by way of a rehearing.—*SWEENEY v. AUS.* (1904), 4 C. L. R. 716.—

### PART VIII. SECT. 1, SUB-SECT. 2.

**g. Who are "persons aggrieved"—Resident of licensing district.]—**On the hearing of an application to the

licensing ct. for a publican's license, W., a resident of the licensing district, appeared & gave evidence in opposition to the application:—*Held*: W. was a "person aggrieved" within Liquor Act, 1898, s. 108, & could appeal to quarter sessions.—*Ex p. CANN* (1901), 1 S. R. N. S. W. 262; 18 N. S. W. N. 186.—*AUS.*

**r. — — —.]—**To entitle a resident of a licensing district to appeal from an order granting a license he must become an objector by presenting

**444. — Person to whom license refused.]—***R. v. DEANE, No. 450, post.*

**445. — Owner of premises.]—**The appeal clauses of 9 Geo. 4, c. 61, are incorporated in Licensing Act, 1874 (c. 49), s. 15, & therefore when the license of a public-house keeper is forfeited by conviction under Licensing Act, 1872 (c. 94), s. 9, & the owner of the premises duly applies under Licensing Act, 1874 (c. 49), s. 15, to special sessions for a license & it is refused, he has a right of appeal to quarter sessions.—*R. v. WEST RIDING JJ.* (1883), 11 Q. B. D. 417; 48 J. P. 149; *sub nom. NEWTON v. WEST RIDING YORKSHIRE JJ.,* 52 L. J. M. C. 90, D. C.

*Annotation*:—*Distd. R. v. Andover JJ.* (1886), 16 Q. B. D. 711.

**446. — Conviction of licensee—License forfeited.]—**Where a licensed person is convicted of an offence under Licensing Acts, 1872, 1874, & the justices direct the conviction to be recorded on his license, the owner of the licensed premises, who was not & could not have been a party to the proceedings before the justices, is not a "person aggrieved" within Licensing Act, 1872, s. 52, & has no right of appeal against the order.—*R. v. ANDOVER JJ.* (1886), 16 Q. B. D. 711; 55 L. J. M. C. 143; 55 L. T. 23; 50 J. P. 549; 34 W. R. 456; 2 T. L. R. 546, D. C.

**447. — Death of licensee—Refusal to renew.]—**Justices at a general annual licensing meeting refused to renew a license to sell intoxicating liquors at a certain house on the grounds that the house had not been well conducted & that the fitness of the license holder was unsatisfactory. The license holder appealed to the quarter sessions. The owners of the house

a petition under Liquor Act, s. 30, state his objection in open ct., & formally make himself a party to the proceedings.—*Ex p. ROSE* (1902), 2 S. R. N. S. W. 268; 19 N. S. W. N. 202.—*AUS.*

**t. — — —.]—***Ex p. THOMAS* (1903), 3 S. R. N. S. W. 488; 20 N. S. W. N. 184.—*AUS.*

**445 i. — Owner of premises.]—***CULLINGWORTH ESTATE v. HAMILTON* (1923), 44 N. L. R. 89.—*S. AF.*

also appealed as being persons thinking themselves aggrieved by the refusal within Licensing (Consolidation) Act, 1910 (c. 24), s. 29. Before the hearing of the appeal the license holder died, & letters of administration were granted to his widow:—*Held*: (1) the widow of the license holder was entitled to maintain the appeal; (2) the owners of the house were "persons thinking themselves aggrieved by the refusal" within the above Act.—*COOKE v. COOPER*, [1912] 2 K. B. 248; 105 L. T. 818; 76 J. P. 67; *sub nom.* *COOKE v. BOLTON JJ.*, 81 L. J. K. B. 648, D. C.

*Annotation*:—*Generally*, *Reid. R. v. Salford Hundred JJ.* [1912] 2 K. B. 567.

**448. — Mortgagee with power of attorney to procure transfer.**—The tenant & occupier of a house, licensed for the sale of beer on the premises, in 1876 assigned all his interest in the premises for the residue of his term of years, & the benefit of the license, to appts. by way of first mtge. to secure the repayment of moneys advanced by them; & by the mtge. deed irrevocably constituted appts. his attorneys, in his name, & as his act & deed, to do all acts necessary to procure a transfer of the license. In 1883, the moneys secured by the mtge. being still unpaid, the occupier sent a written application for a renewal of his license to the justices at their annual licensing meeting, & they adjourned the hearing of the application. At the adjourned hearing appts. applied, as mtgees. & under their power of attorney, for a renewal of the license to the occupier, who appeared, but stated that he did not wish for a renewal. No objection was made to the renewal on any of the grounds specified in 32 & 33 Vict. c. 27, which Act applied to the occupier's license. The justices refused the application, & appts. appealed to quarter sessions in their own names as mtgees., & also as attorneys of the occupier, & in his name, & for & on his behalf. At the hearing the occupier again appeared, & stated that he did not wish the license to be renewed, & the quarter sessions thereupon affirmed the order of the licensing justices:—*Held*: appts. were persons aggrieved, within 9 Geo. 4, c. 61, s. 27, by the refusal of the licensing justices to renew the occupier's license; & were therefore entitled to appeal to quarter sessions: upon the facts stated the licensing justices & the ct. of quarter sessions were bound to grant the application of the appts. for a renewal of the license to the occupier.—*GARRETT v. MIDDLESEX JJ.* (1884), 12 Q. B. D. 620; 32 W. R. 646; *sub nom.* *GARRETT v. ST. MARYLEONE LICENSING JJ.*, 53 L. J. M. C. 81; *sub nom.* *R. v. GARRETT*, 48 J. P. 357, D. C.

*Annotation*:—*Distd. R. v. Andover JJ.* (1886), 16 Q. B. D. 711.

**449. — Incoming tenant.**—By Licensing Act, 1872 (c. 94), s. 75, & sched. II., & 9 Geo. 4, c. 61, ss. 27–29, which gave a right of appeal to quarter sessions to any person aggrieved by any act of justices done in the execution of that Act, are repealed, except so far as they relate to "the renewal of licenses or to the transfer of licenses under sects. 4 & 14 of the same Act." The outgoing tenant of a licensed house wilfully refused or neglected to apply for a renewal of the license, & left the house on the day of the last adjournment of the general annual licensing meeting. The new tenant applied at a special sessions for the grant to himself of a license under 9 Geo. 4, c. 61, s. 14, but his application was refused. An

appeal to quarter sessions was dismissed upon the ground that the application to justices was not an application for the renewal or transfer of a license under 9 Geo. 4, c. 61, ss. 4 & 14, & that the right of appeal had, therefore, been taken away by Licensing Act, 1872 (c. 94), s. 75, & sched. II.:—*Held*: the quarter sessions were wrong; the application was one for a renewal or transfer of a license under 9 Geo. 4, c. 61, ss. 4 & 14, & the right of appeal was, therefore, preserved by the exception contained in Licensing Act, 1872 (c. 94), sched. II.—*THORNTON v. CLEGG* (1889), 24 Q. B. D. 132; 59 L. J. M. C. 6; 61 L. T. 562; 53 J. P. 742; 38 W. R. 160, D. C.

### SUB-SECT. 3.—IN WHAT CASES APPEAL LIES.

#### A. Renewal.

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 29.

**Renewal of licenses.**—*See* Part IV., Sect. 2, sub-sect. 7, B., *ante*.

**450. Where license forfeited—Previous refusal to renew.**—*R. v. HEREFORDSHIRE JJ.* (1874), 38 J. P. Jo. 758.

**451. Justices acting on unsworn evidence—Fact taken as admitted at hearing.**—*R. v. KENT JJ.*, No. 348, *ante*.

**452. Beer retail off license—Beer Dealers Retail Licenses Act, 1882 (c. 34), s. 1.**—The right of appeal to quarter sessions, from a refusal of licensing justices to renew a certificate for a license to sell beer not to be consumed on the premises, has not been taken away by the above sect.—*R. v. SCHNEIDER* (1883), 11 Q. B. D. 66; 47 J. P. 376; *sub nom.* *DOWNING v. SCHNEIDER*, 52 L. J. M. C. 51; 48 L. T. 482, D. C.

*Annotation*:—*Reid. R. v. Wakefield, etc., Westmoreland JJ.* (1888), 58 L. T. 494.

**453. Provisional license—Licensing Act, 1874 (c. 49), s. 22.**—*It. v. LONDON COUNTY JJ.*, No. 323, *ante*.

**454. Refusal subject to compensation—By whole body of county borough justices.**—Where the whole body of justices of a county borough acting as the compensation authority under the Licensing Act, 1904 (c. 23), refuse to renew an on license subject to compensation, no appeal lies from their decision to the quarter sessions of the county under 9 Geo. 4, c. 61, s. 27.—*R. v. SOUTHAMPTON JJ.*, [1906] 1 K. B. 505; *sub nom.* *R. v. SOUTHAMPTON JJ., Ex p. FULLER, SMITH & TURNER*, 75 L. J. K. B. 322; 94 L. T. 442; 70 J. P. 137; 54 W. R. 530; 22 T. L. It. 345, D. C.

#### B. Transfer.

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 29.

**Transfer of licenses.**—*See* Part IV., Sect. 2, sub-sect. 7, B., *ante*.

**455. Provisional license—Licensing Act, 1874, (c. 49), s. 22.**—*R. v. WEST RIDING JJ.*, No. 445, *ante*.

### SUB SECT. 4.—TO WHAT COURT.

*See* Licensing (Consolidation) Act, 1910 (c. 24), ss. 29 (1), (2), 72 (2).

**456. Borough with separate court of quarter sessions—Whether to recorder.**—Under 9 Geo. 4,

**PART VIII. SECT. 1, SUB-SECT. 3.—A.**  
a. *Where premises rebuilt—During currency of license—Identity not lost.*  
—Where the identity of demolished

premises was not changed by their reconstruction, or the existing license brought to an end:—*Held*: the tenant's application was not for a new

license, & quarter sessions had jurisdiction to entertain an appeal.—*STEVENSON v. HUNTER* (1903), 5 F. (Ct. of Sess.) 761.—*SCOT.*

**Sect. 1.—Appeal to quarter sessions: Sub-sects. 4, 5, 6, 7, 8 & 9, A.]**

c. 61, s. 27, an appeal lies to the county quarter sessions against the refusal of justices in special sessions to grant an alehouse license. In a borough having a separate ct. of quarter sessions under 5 & 6 Will. 4, c. 76, s. 103, the recorder cannot try an appeal against such refusal, that power being withheld from him by sect. 105. But an appeal against refusal of a license by justices of such borough may still be tried at the county sessions. 5 & 6 Will. 4, c. 76, s. 111, excluding the county justices from jurisdiction in any part of such borough, relates only to jurisdiction exercised out of sessions.—*R. v. DEANE* (1841), 2 Q. B. 96; 1 Gal. & Dav. 292; 10 L. J. M. C. 126; 5 Jur. 1131; 114 E. R. 39.

**Annotation:—***Fold. R. v. Cockburn* (1854), 4 E. & B. 265.

**457. ———.]**—By 5 & 6 Will. 4, c. 76, s. 105, the recorder of a municipal borough has no power in quarter sessions to hear an appeal against a refusal to grant a license for keeping an inn.—*R. v. COCKBURN* (1854), 4 E. & B. 265; 119 E. R. 102; *sub nom. R. v. BRISTOL RECORDER*, 24 L. J. M. C. 43; 24 L. T. O. S. 156; 19 J. P. 342; 1 Jur. N. S. 373; 3 W. R. 69.

**Annotation:—***Reid. Brown v. Nicholson* (1858), 5 C. B. N. S. 408.

**458. ———.]**—**Order for structural alterations on renewal.**—An appeal from an order of licensing justices for a city or borough having a separate ct. of quarter sessions made under Licensing Act, 1902 (c. 28), s. 11 (4), by which, on renewing a license, the licensing justices direct certain structural alterations to be made in that part of the premises where intoxicating liquor is sold or consumed, lies to the recorder of the city or borough.—*R. v. BATH RECORDER*, [1904] 2 K. B. 570; 73 L. J. K. B. 848; 91 L. T. 383; 68 J. P. 438; 53 W. R. 252; 20 T. L. R. 526; 18 Sol. Jo. 493, D. C.

**Annotation:—***Reid. R. v. Shann*, [1910] 2 K. B. 418.

#### SUB-SECT. 5.—NOTICE OF APPEAL.

**See Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (3).**

**Time within which notice must be given.]—***See Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (3).*

**Appeals by "persons aggrieved."—***See Sub-sect. 2, ante.*

**459. Contents of—Statement that appellant party aggrieved.]—***R. v. ESSEX JJ.* (1847), 10 L. T. O. S. 87; 11 J. P. Jo. 854.

**460. Service—Summary Jurisdiction Act, 1879 (c. 49), ss. 31, 33—On magistrates' clerk.]—***R. v. GLAMORGANSHIRE JJ., R. v. PONTYPOOL JJ.*, No. 547, *post*.

**461. ———.]**—**On superintendent of police.]**—The above Act provides by sect. 31 that where any person is authorised to appeal from the conviction or order of a ct. of summary jurisdiction to a ct. of general or quarter sessions he may appeal to such ct. subject to the conditions & regulations following. Applt. shall within the prescribed time or, if no time is prescribed, within 7 days after the day on which the said decision of the ct. was given, give notice of appeal by serving on the other party & on the clerk of the ct. of summary jurisdiction, notice in writing of his intention to appeal

& of the grounds of such appeal. An application having been made to licensing justices for the renewal of the license of an old beerhouse the superintendent of police for the district opposed the application & the renewal was refused this refusal appcts. appealed to ct. of quarter sessions & served the notice of appeal upon the licensing justices but not upon the superintendent of police:—*Held*: the superintendent of police was "the other party" within the above sect. & should therefore have been served with the notice of appeal & further that as appcts. had availed themselves of their right to appeal to quarter sessions they could not now ask that the licensing justices should be ordered to rehear the application.—*R. v. BRISTOL LICENSING JJ., R. v. GLOUCESTERSHIRE JJ.* (1893), 68 L. T. 225; 57 J. P. 486; 41 W. R. 379; 9 T. L. R. 273; 37 Sol. Jo. 269; 5 R. 276, D. C.

**Annotation:—***Apprvd. R. v. Kent JJ.*, [1896] 2 Q. B. 306.

**462. ———.]**—**Time of service.]**—Notice of appeal from the licensing justices at quarter sessions under 9 Geo. 4, c. 61, s. 57, should now be given in accordance with the provisions of Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2), within seven days after the day on which judgment was given.—*R. v. WEST RIDING OF YORKSHIRE JJ., Ex p. HAWKINS* (1895), 64 L. J. M. C. 192, D. C.

**463. Effect—Whether application for mandamus barred—Failure of application.]**—The licensing justices of P. gave notice that they intended to object to the renewal of certain licenses, having themselves previously taken steps to get information as to the requirements of the division & the number of licensed houses, & on that information they considered there were too many licensed houses for the population.

The applications were made & refused. The license holders thereupon entered an appeal to quarter sessions, & also moved & obtained a rule nisi for a *mandamus* directed to the justices on the following grounds that the justices were not entitled to be objectors to the granting of the licenses; if they were so entitled, & if in fact they did object, they were not entitled to sit & adjudicate on the applications; in these particular cases the justices were disqualified by reason of the steps they had taken to get information concerning the houses, & had prejudiced the case; & one of the justices was a member of the authority actively engaged in opposing the renewal of these licenses, & had been party to a resolution in opposing them:—*Held*: (1) discharging the rules, the justices could raise these objections under Licensing Act, 1872 (c. 94), s. 42, & the proceedings were not invalid, because the notice of objection had been given by the justices; (2) the notices of appeal to the quarter sessions were no bar to proceedings for *mandamus*, & conversely the failure of the application for a *mandamus* did not invalidate the notice of appeal.—*R. v. HOWARD, ETC., FARNHAM LICENSING JJ.* (1902), 71 L. J. K. B. 754; *sub nom. R. v. FARNHAM LICENSING JJ., Ex p. SMITH*, 66 J. P. 579; 50 W. R. 573; 18 T. L. R. 614; 46 Sol. Jo. 486, D. C.; *on appeal, sub nom. R. v. HOWARD, ETC. FARNHAM LICENSING JJ.*, [1902] 2 K. B. 363, C. A.

**Annotations:—***As to (1) Consd. Raven v. Southampton JJ.*, [1904] 1 K. B. 430; *R. v. Tolhurst, Ex p. Farrell, R. v. Cox, Ex p. West*, [1905] 2 K. B. 478; *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685. *Reid. Morgan v. Aylesford Licensing JJ.* (1906), 94 L. T. 483; *R. v. Woodhouse*, [1906] 2 K. B. 501; *Attwood v. Chapman*,

**PART VIII. SECT. 1, SUB-SECT. 5.** decision of comrs. under Liquor License Act, 1900, it is not necessary that the notice of appeal be signed by the party or parties affected by the

decision.—*HUREL v. HANDLEY* (1907). 13 B. C. R. 278; 6 W. L. R. 765.—**CAN.**

**b. Necessity for signatures of parties.]**—In an appeal from the



[1914] 3 K. B. 275. *Generally, Reff. R. v. Dodds, [1905] 2 K. B. 40. Montd. R. v. Russell, Ex p. Morris (1905), 93 L. T. 407.*

**Mandamus generally.**—See CROWN PRACTICE, Vol. XVI., pp. 276 *et seq.*

#### SUB-SECT. 6.—RECOGNISANCES.

See, now, Licensing (Consolidation) Act, 1910 (c. 24), ss. 29 (3), 30.

**464. Estreat — Jurisdiction of sessions.**—A party who had applied for a beer license, under 9 Geo. 4, c. 61, which was refused, appealed against the refusal to the Oct. quarter sessions, & entered into a recognisance to try the appeal, abide the judgment of the ct., & pay such costs as the ct. might award. The appeal was dismissed; & the ct. ordered applt. to pay costs to resp., "forthwith." A blank was left in the order, as to the sums, which the clerk of the peace had not time to fix before the sessions adjourned. The sessions adjourned to the next Nov. Before the adjournment day, the clerk of the peace fixed the costs, & filled up the order. After the adjourned sessions had terminated, but before the next sessions, which were held on the next Jan., payment was demanded of applt., who did not pay. On affidavit of this, the sessions holden in Jan. estreated the recognisance:—*Held*: (1) the sessions had power to estreat the recognisance, & process might be taken upon it under 3 Geo. 4, c. 46; & (2) it was not necessary that the order should direct the costs to be paid to the clerk of the peace, under Summary Jurisdiction Act, 1848 (c. 43), s. 27.—*R. v. ELY JJ.* (1855), 5 E. & B. 489; 25 L. J. M. C. 1; 20 J. P. 116; 1 Jur. N. S. 1017; 4 W. R. 5; 119 E. R. 563.

*Annotation*:—As to (2) *Reff. Rawnsley v. Hutchinson (1871), L. R. 6 Q. B. 305.*

#### SUB-SECT. 7.—ENTRY OF APPEAL.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (3).

**465. Rule of sessions as to time of entry—Imposing additional condition—Alehouse Act, 1828 (c. 61), s. 27.**—A certificate for a license having been refused at licensing sessions, all the preliminaries to an appeal to the next quarter sessions required by the above Act, were duly observed; but at the sitting of the ct. the quarter sessions refused to allow the appeal to be entered on the ground that by a rule of the sessions an appeal must be entered & grounds of appeal deposited with the clerk of the peace three clear days before the first day of sessions; & the sessions made an order for £10 costs to resps. under Quarter Sessions Act, 1849 (c. 45), s. 6, as on an appeal which had not been entered or prosecuted. This order having been brought up & a rule to quash it obtained:—*Held*: the rule of sessions amounted to imposing an additional condition to the appeal which the statute had not imposed, & was more than a mere rule of practice which it was competent to the sessions to make; & the order for costs must be quashed.—*R. v. PAWLETT* (1873), L. R. 8 Q. B. 491; 42 L. J. M. C. 157; 29 L. T. 390; 37 J. P. 775.

*Annotation*:—*Reff. R. v. Bird, Ex p. Needes, [1898] 2 Q. B. 340.*

#### SUB-SECT. 8.—JUSTICES DISQUALIFIED ON APPEALS.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (7).

**466. Justices hearing original application—**

**Present at appeal.**—Upon an appeal against a refusal of justices to license an alehouse under 9 Geo. 4, c. 61, one of the justices whose decision was appealed against was upon the bench, & remained there at the time of the decision of the ct. dismissing the appeal, which decision the chairman declared was unanimous. Upon a motion for a *certiorari* to remove the order of sessions into this ct., that the same might be quashed on the above ground, the justice deposed that he had no recollection of being present: but, if so, he took no part in the decision, which latter fact was also deposed to by the chairman:—*Held*: as it was distinctly sworn that he was so present, the ct. was improperly constituted, & the rule was made absolute.—*R. v. SURREY JJ.* (1855), 26 L. T. O. S. 89; 1 Jur. N. S. 1138; 4 W. R. 86.

**467. — — —**—On the hearing of a licensing appeal at quarter sessions two of the justices whose order was appealed against were present on the bench during the argument, accompanied the other justices on their adjourning to consider their decision, & had resumed their places on the bench when the decision was pronounced. The chairman & several of the other justices, including the two justices in question, stated on affidavit that the latter had taken no part in the hearing of the appeal or in influencing or arriving at the decision:—*Held*: the mere presence on the bench of the two disqualified justices rendered the constitution of the ct. of quarter sessions irregular, & its order must be set aside.—*R. v. LANCASHIRE JJ.* (1906), 75 L. J. K. B. 198; 94 L. T. 481; 70 J. P. 337, D. C.

*Annotation*:—*Consd. R. v. Byles, Ex p. Hollidge (1912), 108 L. T. 270.*

**468. — — — Present at compensation committee.**—*R. v. CHESHIRE LICENSING JJ., Ex p. KAY'S ATLAS BREWERY, LTD., No. 380, ante.*

#### SUB-SECT. 9.—HEARING OF A. In General.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (4).

**469. Hearing case on merits—Where reversing decision on preliminary objection.**—*R. v. KENT JJ., No. 348, ante.*

**470. — — — No notice of opposition—Notice given before appeal—Jurisdiction of sessions.**—II., the holder of an indoor beer license existing before 1869, not having been served with notice of opposition, applied for renewal at the general annual meeting on Aug. 30, when the justices said he had been convicted, & his house was not properly conducted & was structurally unfit; & then & there without adjourning refused his license. II. appealed to quarter sessions, & seven days before the hearing of the appeal, which was on Oct. 14, the superintendent of police served notice of opposition on the same grounds as those decided on by the licensing justices, & the appeal was dismissed:—*Held*: the quarter sessions acted without jurisdiction, & had no authority to enter on the question of the fitness of II. to hold the license.—*HOCKINGS v. POWELL* (1891), 55 J. P. 358, D. C.

**471. — — — Where no grounds of refusal stated by justices.**—Licensing Act, 1872 (c. 94), s. 42, enacts that where a licensed person applies for the renewal of his license the licensing justices shall not entertain any objection to the renewal, unless written notice of an intention to oppose the renewal has been served on the holder not less

*Sect. 1.—Appeal to quarter sessions: Sub-sect. 9, A., B., C., D.*

than seven days before the commencement of the general annual licensing meeting provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made adjourn the granting any license to a future day. By Licensing Act, 1874 (c. 49), s. 26, a notice served under Licensing Act, 1872 (c. 94), s. 26, shall not be valid unless it states in general terms the grounds on which the renewal is to be opposed. Where notice of an objection to the renewal of a license has been served on the holder not less than seven days before the commencement of the general annual licensing meeting & the renewal is refused, & the holder appeals to quarter sessions, all the objections which were open before the licensing justices are open before the quarter sessions.

Under 32 & 33 Vict. c. 27, ss. 8, 19, read together with 33 & 34 Vict. c. 29, s. 7, where an application is made to licensing justices for the renewal of certain beer licenses, it shall not be lawful for the justices to refuse the renewal except upon one or more of four specified grounds, of which the fourth is that appt. or the house in respect of which he applies is not duly qualified as by law is required, & where the application is refused on the ground that the house is not qualified, the justices shall specify in writing to appt. the grounds of their decision. The holder of one of such licenses applied to the licensing justices for a renewal, having been served with a notice of objection not less than seven days before the commencement of the general annual licensing meeting. The justices refused the renewal but omitted to state the grounds of their decision. The holder appealed to quarter sessions, & was not served with any fresh notice of objection. When the appeal came on to be heard applt. contended that as the justices had stated no grounds for their decision it ought to be reversed & the license granted. The ct. overruled this contention & proceeded to hear the case on the merits, whereupon applt. withdrew declining to take any further part in the proceedings; the ct. heard the appeal & dismissed it:—*Held*: the appeal had been heard & determined & applt. was not entitled to a *mandamus* to the quarter sessions to hear & determine it.—*Ex p. GORMAN*, [1894] A. C. 23; 63 L. J. M. C. 84; 70 L. T. 46; 58 J. P. 316; 10 T. L. R. 128; 6 R. 89, II. L.; *affg. S. C. sub nom. Re GLAMORGANSHIRE SESSIONS LICENSING CASE APPEAL*, *Ex p. GORMAN* (1892), 8 T. L. R. 642, C. A.

**472. Notice of objection to renewal—Whether fresh notice necessary on appeal.**—*Ex p. GORMAN*, No. 471, *ante*.

#### B. Parties.

**473. Licensing justices—To support their decision.**—*TYNEMOUTH CORPN. v. A.-G.*, No. 503, *post*.

**474. — When a "party"—Cannot be respondents against their will.**—*R. v. LONDON JJ.*, No. 518, *post*.

**475. Objectors—Whether parties.**—*BOULTER v. KENT JJ.*, No. 548, *post*.

**476. — Whether right to be heard.**—(1) The mere fact that the tenant in occupation of a beer-house carries on the sale of beer therein as the salaried employee of his landlords, a brewery co., to whom he is accountable for the profits, does not involve as a conclusion of law that he is not the real resident holder & occupier of the house within Beerhouse Act, 1840 (c. 61), s. 1.

(2) Objectors to the renewal of a license have no right to be heard on an appeal to quarter sessions or in the High Ct. on a case stated by the quarter sessions.—*NIX v. NOTTINGHAM JJ.*, [1899] 2 Q. B. 294; 68 L. J. Q. B. 854; 81 L. T. 41; 63 J. P. 628, 676; 47 W. R. 628; 15 T. L. R. 413, 463; 43 Sol. Jo. 641, C. A.

**477. —**—*TYNEMOUTH CORPN. v. A.-G.*, No. 503, *post*.

#### C. Scope of Inquiry.

**478. Limited to grounds of objection—Stated in notice.**—At an annual licensing meeting an objection was raised to the renewal of the license of applt., the tenant of a beerhouse licensed prior to May 1, 1869, & the justices directed that notice of objection should be given to him, under Licensing Act, 1872 (c. 94), s. 42, & adjourned the meeting. This notice was given by the superintendent of police, & did not express on the face of it that it was given by direction of the justices. The grounds stated in the notice were that persons had been found drunk & disorderly on the premises, & that persons of bad character frequented the premises. Applt. attended at the adjourned meeting, & the justices refused to renew the license on the ground that he had not produced satisfactory evidence of good character. On appeal to quarter sessions the ct. refused to renew the license on the ground that the house was frequented by bad characters. On a case stated:—*Held*: the absence of intimation that the notice was given by direction of the justices was an irregularity which was waived by the appearance of applt.; & the appeal to quarter sessions being in the nature of a rehearing, the ct. could entertain & decide the case on any objection raised by the notice.

The justices had a right, when applt. appeared, to consider the question before them, which was whether they would renew the license; but they could only properly entertain the objections taken, & those objections must be some or all of those which are given in 32 & 33 Vict. c. 27, s. 8. The objections there enumerated are quite distinct from one another, & are in different subjects. The justices, therefore, had no right to consider the question of the character of applt., which was not raised by the notice. Then the question came before the ct. of quarter sessions, & I agree with the ct. below that the matter of appeal was whether the justices ought to have renewed the license. Such an appeal to quarter sessions amounts to a rehearing & not to a simple appeal, & the ct. of quarter sessions had a right to hear fresh evidence, though they would be confined to the same objections of which notice was given originally (*LORD ESHER, M.R.*).

I may add that we are of opinion that the notice would have been good if it had stated that it was given by the superintendent of police "by direction of the justices sitting at the general annual licensing meeting," giving the date, or if it had been given by the clerk to the justices with a similar statement. This latter course would perhaps have been more regular; but we by no means treat the superintendent of police as a mere intruder, for we have assumed that in fact he was acting by direction of the magistrates (*LORD ESHER, M.R.*).—*WHIFFEN v. MALLING (OR MAIDSTONE) JJ.*, [1892] 1 Q. B. 362; 61 L. J. M. C. 82; 66 L. T. 333; 50 J. P. 325; 40 W. R. 293; 8 T. L. R. 155, C. A.

*Annotations*:—*Consd. Baxter v. Leche* (1898), 79 L. T. 138. *Refd. Daykin v. Parker*, [1894] 2 Q. B. 273; *Evans v. Conway JJ.*, [1900] 2 Q. B. 224.

**479. —**—*Ex p. GORMAN*, No. 471, *ante*.



**480.** ———.]—Where an objection is taken to the renewal of a license, & notice is served on the licensee as required by Licensing Act, 1872 (c. 94), s. 42, & Licensing Act, 1874 (c. 49), s. 26, the ct. cannot inquire into any grounds for the refusal of the license other than the grounds stated in such notice.—*RUSSELL v. BLACKHEATH JJ.* (1897), 61 J. P. 696.

**481.** ———.]—The tenant of a public house omitted, upon giving up possession, to pay the quarter's rate then due. A new tenant went into occupation of the premises, & at the following adjourned general annual licensing meeting, the renewal of his license was objected to by the borough council on the ground that he had neglected or omitted to pay or cause to be paid the aforesaid rate due to the borough council. The justices refused to renew the license:—*Held*: the ct. of quarter sessions were bound by the notice of objection, & could not hear any evidence against the renewal, not coming within the grounds of objection stated in such notice; & the non-payment of the rate due from a previous tenant was no sufficient reason for the refusal of the license.—*FEIST v. TOWER JJ.* (1901), 68 J. P. 264.

#### D. Adjournments.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (2), (4).

**482.** Whether appeal may be adjourned to next sessions.]—Under 9 Geo. 4, c. 61, the sessions hearing an appeal against the refusal of justices to grant a license cannot adjourn such appeal to a subsequent session for the purpose of awarding costs there after a taxation in the interval. So held on the construction of 9 Geo. 4, c. 61, ss. 27, 29, but without impeaching the authority of ctts. of general or quarter session to adjourn a case from one session to another when no statute interferes.—*R. v. BELTON* (1848), 11 Q. B. 379; 3 New Sess. Cas. 77; 17 L. J. M. C. 70; 10 L. T. O. S. 324; 12 J. P. 232; 12 Jur. 392; 110 E. R. 518.

*Annotations*:—*Consd.* *Bowman v. Blyth* (1856), 7 E. & B. 26. *Expld.* *R. v. Cambridge Union* (1861), 1 B. & S. 61. *Consd.* *Ex p. Evans*, [1894] A. C. 16. *Expld.* *Redhough Colliery v. Gateshead Union Assmt. Com.* (1923), 130 L. T. 366. *Refd.* *R. v. Surrey JJ., Re Abinger* (1852), 16 J. P. 407; *Rawnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305.

**483.** Justices equally divided.]—Where justices at quarter sessions are equally divided with respect to an appeal from licensing justices there is no power to adjourn the appeal to the next sessions. Where one of the justices in favour of allowing the appeal withdraws, & the appeal is dismissed, there is no power in the Ct. of Appeal or the House of Lords to go behind the record; the decision is not a nullity, & no *mandamus* can issue to quarter sessions to hear & determine the appeal, which in fact has been heard & determined.

9 Geo. 4, c. 61, s. 9, does not apply to ctts. of quarter sessions sitting on appeal, but only to justices at petty sessions.—*Ex p. EVANS*, [1894] A. C. 16; 63 L. J. M. C. 81; 70 L. T. 45; 58 J. P. 260; 10 T. L. R. 118; 6 R. 82, H. L.; *affg.* S. C. *sub nom.* *Re GLAMORGANSHIRE SESSIONS BEER LICENSING CASE APPEAL, Ex p. EVANS* (1892), 8 T. L. R. 641, C. A.

*Annotations*:—*Expld.* *R. v. Hertfordshire JJ., Ex p. Larsen* (1925), 89 J. P. 205. *Refd.* *Klincks v. Graves* (1898), 67 L. J. Q. B. 583; *R. v. Wardle, etc. JJ. & Harton Coal Co., Ex p. Burrows* (1898), 14 T. L. R. 424; *R. v. Leeds JJ., Ex p. Binns* (1906), 95 L. T. 916.

See, *now*, Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (4).

#### E. Evidence.

**484.** Necessity for—Of grounds of objection.]—On an appeal to quarter sessions against the refusal of licensing justices to renew a license, the quarter sessions are not entitled to refuse to renew the license without evidence of any ground of objection to its renewal.—*EVANS v. CONWAY JJ.*, [1900] 2 Q. B. 224; 69 L. J. Q. B. 636; 82 L. T. 704; 64 J. P. 467; 48 W. R. 577; 16 T. L. R. 425, C. A.

*Annotations*:—*Expld.* *Raven v. Southampton JJ.*, [1904] 1 K. B. 430. *Refd.* *R. v. Howard*, [1902] 2 K. B. 363; *R. v. Kingston JJ., Ex p. Davey* (1902), 86 L. T. 589.

**485.** Admissibility of fresh evidence.]—The provisions of 9 Geo. 4, c. 61, as to granting licenses & as to appeal, shall, so far as may be, have effect as to granting certificates under this Act, subject to this qualification that no certificate in respect of a license to sell beer, etc., not to be consumed on the premises shall be refused except on one of the grounds following: that appct. has failed to produce satisfactory evidence of good character. By sect. 19, where, on May 1, 1869, a license is in force with respect to any house for the sale of beer, etc., to be consumed on the premises, a certificate in respect of such house shall not be refused except on one of the grounds mentioned in sect. 8. 9 Geo. 4, c. 61, s. 27, gives an appeal, in general terms, to any person aggrieved by any act of a justice acting under the statute. Justices in licensing sessions refused a certificate for the renewal of a license, under sect. 19, on the ground that appct. had failed to produce satisfactory evidence of good character. Appct. then appealed to quarter sessions:—*Held*: fresh evidence of character was admissible before the quarter sessions, & if that was satisfactory appct. was entitled to a certificate.—*R. v. PHILIM* (1870), L. R. 6 Q. B. 89; 40 L. J. M. C. 3; 23 L. T. 410; 35 J. P. 169; *sub nom.* *PHILIM v. WINDSOR DIVISION OF BEKESHAM JJ.*, 19 W. R. 99.

*Annotations*:—*Refd.* *Whiffen v. Bligh, etc., Malling Licensing JJ.* (1891), 61 L. J. M. C. 82. *Mentd.* *R. v. Smith* (1873), L. R. 8 Q. B. 146.

**486.** ———.]—*WHIFFEN v. MALLING (OR MAIDSTONE) JJ.*, No. 478, *ante*.

**487.** Sufficiency—Many other public houses in district.]—On appeal to quarter sessions against the refusal of a license, a map of the locality was produced, & it was proved that within a short distance of the house in question there were a very large number of licensed houses. No notice of objection had been served on any of these houses; but notice of objection had been served on the house in question by the direction of the borough justices, the ground of objection being that the license was not required in the locality. The house had been a fully licensed house for ten years, & the character of the locality had not altered except that the population had increased. No further evidence was adduced by resps.:—*Held*: this evidence did not entitle the quarter sessions to refuse to renew the license.—*RAVEN v. SOUTHAMPTON JJ.*, [1904] 1 K. B. 430; 73 L. J. K. B. 282; 90 L. T. 91; 68 J. P. 68; 52 W. R. 574; 20 T. L. R. 146; 48 Sol. Jo. 143, D. C.

*Annotations*:—*Consd.* *R. v. Drinkwater, etc. Coventry JJ., Ex p. Conway* (1905), 70 J. P. 1. *Expld.* *R. v. Tolhurst, Ex p. Farrell, R. v. Cox, Ex p. West*, [1905] 2 K. B. 478. *Dartford Brewery Co. v. County of London Quarter Sessions*, [1906] 1 K. B. 695. *Consd.* *Colchester Co. v. Tendring Licensing JJ.*, [1916] 2 K. B. 126. *Morgan v. Aylesford Licensing JJ.* (1906), 94 L. T. 483; *R. v. Johnson, etc. Leicester JJ., Ex p. Whitmore* (1906), 71 J. P. 59.

*HARDINGE* (1906), 4 C. L. R. 716.—**AUS.**

**485 H.** ———.]—*R. v. TYRONE CHAIRMAN & JJ.*, [1908] 2 I. R. 124.—**IR.**

#### PART VIII. SECT. 1, SUB-SECT. 9.—E.

**485 I.** Admissibility of fresh evidence.]—The reception of fresh evi-

dence by the ct. of quarter session is not objectionable provided that it is restricted to the issues raised before the Licensing Ct.—*SWEENEY v. FITZ-*

*Sect. 1.—Appeal to quarter sessions: Sub-sect. 9 F. & G.; sub-sect. 10, A. & B. (a), (b), & C.]*

*F. Power to State Case.*

*See Sect. 5, sub-sect. 2, post.*

#### *G. Orders Made.*

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (4), (5).*

**488. Power to grant renewal.—To person not applying to licensing justices.]—**An application to justices for the transfer of an old on license was adjourned by the justices to the next annual general licensing meeting. Notices of objection to the renewal of the license were served on the license holder & on the proposed transferee. The grounds of objection did not relate to the character of the license holder. At the annual general licensing meeting the justices refused to transfer & renew the license to the proposed transferee on the ground that the house had been ill-conducted. No application was made by the license holder for a renewal of the license to himself. The license holder, the proposed transferee, & the brewers appealed to quarter sessions. That ct., being of opinion that the house had not been ill-conducted but that the justices had rightly refused to grant a renewal of the license to the proposed transferee, granted a renewal of the license to the existing license holder:—*Held*: under Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (4), quarter sessions had power to do so.—*PARKES v. DUDLEY JJ.*, [1913] 1 K. B. 1; 82 L. J. K. B. 337; 107 L. T. 855; 77 J. P. 51; 29 T. L. R. 31, D. C.

**Order final.]—***See Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (5).*

#### **SUB-SECT. 10.—COSTS.**

##### *A. Who may be Ordered to pay.*

*See Licensing (Consolidation) Act, 1910 (c. 24), ss. 29, 31 (1).*

**489. Objector.]—***BOULTER v. KENT JJ.*, No. 548, *post*.

**490. —.]—***R. v. STAFFORDSHIRE JJ.*, No. 494, *post*.

**491. —.]—***TYNEMOUTH CORPN. v. A.-G.*, No. 503, *post*.

**492. Justices—Constituting themselves parties.]—***R. v. LONDON JJ.*, No. 518, *post*.

**493. —.]—**On the licensing justices refusing to transfer a license there was an appeal to quarter sessions which was allowed. The quarter sessions further ordered the justices to pay applts.' costs & the treasurer of the County Council of London to refund such funds to the justices, & also the solr. & client costs of the justices themselves:—*Held*: there was no jurisdiction under 9 Geo. 4, c. 61, ss. 27, 29, to make the order.—*R. v. LONDON & STRAND DIVISION JJ. & DALTON, Ex p. LONDON COUNTY COUNCIL* (1898), 78 L. T. 559; 62 J. P. 517; 46 W. R. 558; 42 Sol. Jo. 558, D. C.

—*Reid. It. v. Salford Hundred JJ.*, [1912] 2 K. B. 567.

—*The ct. of quarter sessions, on an appeal from the refusal of licensing justices to renew a license, have no power under 9 Geo. 4, c. 61, s. 27, or otherwise, to order the licensing justices who appear before them & oppose the renewal, to pay applt.'s costs when the appeal is allowed, as in such a case the licensing justices are not "litigant parties" to the appeal against whom an order for costs can be made.*

Where the quarter sessions have ordered the licensing justices to pay the costs of the appeal,

& have refused an application for an indemnity order under sect. 29 of the Act, & the licensing justices have obtained writs of *certiorari* to quash the order & *mandamus* to hear the application for an indemnity order, the licensing justices are entitled to have the costs of the *certiorari* & *mandamus* included in the indemnity order.

The power given by 9 Geo. 4, c. 61, s. 27, to award costs is one which can only be exercised where there is a party to the litigation against whom costs can be awarded. There is no ground for saying that in every appeal there must be a party against whom an order to pay costs may be made. The case of *Boulter v. Kent Justices*, No. 548, *post*, seems to me to decide that a person who appears & objects to a license being renewed does not thereby make himself a party; from which it follows that if the licensing justices appear on the appeal to support their decision, no order for costs can be made against them in the event of the appeal being allowed (*CHANNELL, J.*).—*R. v. STAFFORDSHIRE JJ.*, [1898] 2 Q. B. 231; 67 L. J. Q. B. 931; 79 L. T. 142; 62 J. P. 741; *sub nom.* *R. v. STAFFORDSHIRE JJ., Ex p. FIELD*, 14 T. L. R. 450; 42 Sol. Jo. 540, D. C.

*Annotations:—Consd. R. v. Salford Hundred JJ.*, [1912] 2 K. B. 567. *Distd. R. v. West Riding of Yorkshire JJ.* (1917), 87 L. J. K. B. 443. *Reid. R. v. Ashton, Ex p. Walker* (1915), 85 L. J. K. B. 27. *Mentd. Allsop v. Preston JJ.* (1899), 64 J. P. 25; *Evans v. Conway JJ.* (1900), 16 T. L. R. 425.

*See, now, Licensing (Consolidation) Act, 1910 (c. 24), s. 29.*

**495. — Decision of quarter sessions restored by court of appeal—On special case.]—***JONES v. HATHERTON*, No. 88, *ante*.

#### *B. Justices' Costs.*

##### *(a) Appeal Dismissed or Abandoned.*

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 31.*

**496. Right of justices to order for costs.]—**Where licensing justices, who had been served with notice of appeal against their refusal to renew a license, had appeared at quarter sessions & acted as resps. to the appeal:—*Held*: 9 Geo. 4, c. 61, s. 29, made it imperative, upon the dismissal of the appeal, for the ct. of quarter sessions to entertain an application by the licensing justices for an order upon applts. to pay them such sum by way of costs as should in the opinion of the ct. of quarter sessions be sufficient to indemnify them from all costs and charges to which they might have been put in consequence of their having had notice of the appeal served upon them.—*R. v. WORCESTER-SHIRE JJ.*, [1900] 2 Q. B. 576; 69 L. J. Q. B. 826; 83 L. T. 272; 64 J. P. 707; 49 W. R. 89, C. A.

##### *(b) Payment out of Local Funds.*

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 32.*

**497. Right to indemnity order—Whether appeal successful or not.]—**Upon the hearing of an appeal to quarter sessions from licensing justices, the licensing justices are entitled in the case of an unsuccessful appeal to an order under 9 Geo. 4, c. 61, s. 29, upon applt. for payment of such sum by way of costs as in the opinion of the ct. will indemnify them from all costs & charges to which they may have been put; in the case of a successful appeal to a like order under Licensing Act, 1902 (c. 28), s. 20, upon the treasurer of the county or place for which the licensing justices acted. Upon any such appeal the licensing justices are entitled to retain any solr. whom they select to act

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*Annotations*:—**Consd.** Evans v. Conway JJ., [1900] 2 Q. B. 224. **Reid.** R. v. Woodhouse, [1908] 2 K. B. 501. **Mentd.** A.-G. v. De Winton, [1906] 2 Ch. 106; Attwood v. Chapman, [1914] 3 K. B. 275.

1.—*Appeal to quarter sessions: Sub-sect. 10, D. & E. Sect. 2: Sub-sect. 1, A.]*

#### D. The Order.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 31 (2).

504. Form of—Blank left for amount of costs—Filled up at adjourned session.]—*R. v. ELY JJ.*, No. 464, *ante*.

505. — Whether to clerk of peace as payee.]—*R. v. ELY JJ.*, No. 464, *ante*.

506. — — — — —]—Upon an appeal against a refusal of justices at petty sessions to grant an alehouse license, the quarter sessions reversed such refusal, & ordered the license to be granted, & the quarter sessions further ordered the justices to pay applt. on demand £35 19s. 10d. for his costs:—*Held*: that part of the order awarding costs was bad inasmuch as it did not follow the directions as to the payment of costs contained in Quarter Sessions Act, 1848 (c. 45), s. 5, & the Summary Jurisdiction Act, 1848 (c. 43), s. 27, which require the costs in the first instance to be paid to the clerk of the peace.—*R. v. PEEK, ETC. DEVONPORT JJ.* (1869), 20 L. T. 393; *sub nom. R. v. DEVONPORT JJ.*, 33 J. P. 614.

507. — — — — — Clerk appointed to receive amount—Amount sufficient to indemnify justices.]—*R. v. WINDER*, No. 510, *post*.

508. Enforcement of—*Estrat* of recognisances—Time for.]—*R. v. ELY JJ.*, No. 464, *ante*.

#### E. Taxation.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 32 (2).

509. Time for—At adjourned sessions.]—Applt. appealed to the quarter sessions held in Oct. against the refusal of a beerhouse certificate. The appeal was dismissed with costs. The sessions were afterwards adjourned to Nov., & the costs of the appeal were taxed at the adjourned sessions:—*Held*: the costs were rightly taxed at the adjourned sessions.—*RAWNSLEY v. HUTCHINSON* (1871), L. R. 6 Q. B. 305; 40 L. J. M. C. 97; 23 L. T. 843; 35 J. P. 501; 19 W. R. 430.

*Annotation*:—*Reid. R. v. General Assessment Sessions* (1887), Ryds. Rat. App. (1890), 268.

510. — Out of sessions—By consent.]—(1) By 9 Geo. 4, c. 61, s. 29, power is given to a ct. of quarter sessions, where a judgment of licensing justices is reversed upon appeal, to order "that the treasurer of the county or place in & for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment shall pay to such justice or to whomsoever he shall appoint such sum as shall in the opinion of such ct. be sufficient to indemnify such justice from all costs & charges whatsoever to which such justice may have been put" in consequence of his having had served upon him notice of the intention of the party to appeal. An order of quarter sessions, made upon the allowance of an appeal from the licensing justices of a borough, & directing the borough treasurer to pay to the clerk of the borough justices a certain sum of money for the reasonable costs, charges, & expenses to which he has been put in supporting the order of the licensing justices is bad, it not being an order for payment of a sum which in the opinion of the ct. will "indemnify the justices" from the costs to which they have been put.

(2) Where an order is made under the above section, the amount of the costs, if not ascertained

by the ct. itself, should be ascertained by the taxation of the clerk of the peace, & his taxation should be adopted by the ct. during the currency of the sessions; the costs can only be taxed out of sessions by consent.—*R. v. WINDER*, [1900] 2 Q. B. 666; 69 L. J. Q. B. 729; 64 J. P. 741; 48 W. R. 605; 44 Sol. Jo. 486; *sub nom. R. v. WINDER, Ex p. BOLTON CORPN.*, 83 L. T. 171; 16 T. L. R. 400, D. C.

*Annotation*:—*As to* (1) *Reid. R. v. West Riding JJ.*, [1904] 1 K. B. 545.

511. — — — — — What amounts to consent.]

—Five licensing appeals from the same licensing division were heard at the same quarter sessions & were dismissed. No express consent was given to tax resp. justices' costs out of sessions. Subsequently the solrs. for the several applt. & resp. justices met at the office of the clerk of the peace for the purpose of proceeding to the taxation of the several bills of costs. Before the taxation began it was agreed by all the parties present, including the clerk of the peace, that the items which were common to all resp.' bills should be apportioned against the several applt. One bill was taxed on this basis. It was then objected on behalf of W., one of applt., that there was no consent to tax out of sessions the bill against W.:—*Held*: there was evidence of conduct from which consent to tax out of sessions might be implied:—*Qu.*: whether Licensing Act, 1902 (c. 28), s. 20, applies to the taxation of costs between an unsuccessful applt. & resp. justices.—*R. v. CUMBERLAND JJ.* (1903), 68 J. P. 153, D. C.

512. Taxation by clerk of peace—Presumption of validity.]—On an appeal to quarter sessions, under 9 Geo. 4, c. 61, s. 27, the sessions in Oct. last dismissed the appeal with costs. After the ct. had risen a clerk in the office of the clerk of the peace taxed the costs under protest of the applt.'s attorney. The sessions had been adjourned, & before the day of adjournment the costs were certified, & the amount was inserted in the order of sessions. The order was removed into this ct. in Mar. for the purpose of enforcing it:—*Held*: the order of sessions purporting on the face of it to be drawn up by the ct. in the absence of any direct statement that it was not so drawn, will be presumed to have been rightly made; & there had been a sufficient adoption of the taxation by the adjourned sessions, although no mention of the amount was made in ct.—*Re PHILLIPS & FARQUHAR, ETC. JJ.*, *R. v. PHILLIPS* (1873), 29 L. T. 100; 37 J. P. 824.

513. — — — — —]—*R. v. WINDER*, No. 510, *ante*.

514. Between unsuccessful appellant & respondent justices—Licensing Act, 1902 (c. 28), s. 20.]—*R. v. CUMBERLAND JJ.*, No. 511, *ante*.

#### SECT. 2.—MANDAMUS.

##### SUB-SECT. 1.—TO JUSTICES.

##### A. In What Cases.

Mandamus generally.]—See CROWN PRACTICE, Vol. XVI., pp. 276 *et seq.*

515. Where license refused—Previous determination not to grant to certain persons.]—*GILE'S CASE* (1730), 2 Stra. 881; 93 E. R. 914; *sub nom. ANON.*, 1 Barn. K. B. 402.

*Annotation*:—*Reid. Leicester Corpn. v. Burgess* (1833), 2 Nev. & M. K. B. 131.

**516. — Mistake as to jurisdiction.] —***Mandamus* refused, to command justices to rehear an application for an ale house license, which they had refused, though it was suggested that their refusal proceeded from a mistaken view of their jurisdiction.—*R. v. FARRINGTON WITHOUT, LICENSING JJ.* (1824), 4 Dow. & Ry. K. B. 735; 2 Dow. & Ry. M. C. 365.

**517. — —.] —***R. v. WEM LICENSING JJ.* (1883), 47 J. P. Jo. 820, D. C.

**518. — —.] —**As regards an appeal against the refusal to renew a license, 9 Geo. 4, c. 61, s. 29, has not been repealed; but it does not apply to the costs of justices who make themselves "parties" to an appeal within the Summary Jurisdiction Act, 1879 (c. 49), s. 31 (5), by taking an active part in opposing the appeal. When an appeal is dismissed the ct. of quarter sessions has a discretion as to the costs of justices who thus make themselves "parties" to the appeal, & if they have exercised their discretion by refusing to give the costs of the appeal to licensing justices, the High Ct. cannot interfere by *mandamus*.—*R. v. LONDON JJ.*, [1895] 1 Q. B. 616; 64 L. J. M. C. 100; 72 L. T. 211; 59 J. P. 820; 43 W. R. 387; 11 T. L. R. 193; 39 Sol. Jo. 231; 14 R. 216, (C. A.).

*Annotations:—**Refd.* *R. v. Kent JJ.*, [1896] 2 Q. B. 306; *R. v. London & Strand Division JJ. & Dalton, Ex p. L. C. C.* (1898), 78 L. T. 559; *R. v. Staffordshire JJ.*, [1898] 2 Q. B. 231; *R. v. Customs & Excise Comrs.*, [1913] 3 K. B. 483; *R. v. Sunderland Customs & Excise Comrs.* (1914), 12 L. G. R. 580; *R. v. Ashton, Ex p. Walker* (1915), 85 L. J. K. B. 27.

**519. — Where justices decline to hear—On previous determination not to grant.] —***R. v. WALLSALL JJ.*, No. 204, *ante*.

**520. — Mistake as to law.] —**M., who held a strong beer license, applied to licensing justices for a certificate to take out a retail license to sell beer, etc., not to be consumed on the premises. The justices refused the license under 32 & 33 Vict. c. 27, s. 8 (4), on the ground that appct. was not qualified as by law is required by reason of his intention not to reside on the premises:—*Held*: as the holder of a strong beer license was entitled under Revenue Act, 1863 (c. 33), s. 1, to the retail

license without any other qualification, residence was not required; & as the justices had not determined according to law a *mandamus* must be granted to them to hear & determine the application according to the statutes in that behalf.—*R. v. DE RUTZEN* (1875), 1 Q. B. D. 55; 45 L. J. M. C. 57; 24 W. R. 343; *sub nom.* *R. v. GLAMORGANSHIRE JJ.*, 33 L. T. 726; 40 J. P. 150, D. C.

*Annotations:—**Distd.* *R. v. Kent JJ.* (1880), 44 J. P. 298. *Appld.* *R. v. Cotham*, [1898] 1 Q. B. 802. *Consd.* *R. v. Nicholson*, [1899] 2 Q. B. 455. *Refd.* *R. v. Manchester JJ.*, [1899] 1 Q. B. 571.

**521. — Grounds of refusal not stated.] —***R. v. SYKES*, No. 260, *ante*.

**522. — Refusal to hear evidence not on oath.] —***R. v. SHARMAN, Ex p. DENTON*, No. 352, *ante*.

**523. — Condition annexed to grant—Payment of money—Decision influenced by extraneous considerations.] —***R. v. BOWMAN*, No. 267, *ante*.

**524. Where renewal refused—No previous notice of objection.] —***R. v. FARQUHAR*, No. 117, *ante*.

**525. — —.] —***R. v. REDDITCH JJ.*, No. 354, *ante*.

**526. — Mandamus to hear—Though justices no power to grant.] —***R. v. MISKIN HIGHER LICENSING JJ.*, No. 130, *ante*.

**527. — Grounds of refusal not stated.] —***Ex p. GORMAN*, No. 471, *ante*.

**528. — To grant at adjourned sittings.] —***R. v. KINGSTON JJ.*, *Ex p. DAVEY*, No. 103, *ante*.

**529. Where transfer granted—Rejection of evidence in opposition.] —***R. v. HULL LICENSING JJ.* (1883), 47 J. P. Jo. 820, D. C.

**530. — Extraneous matter considered by justices.] —***R. v. COTHAM*, No. 303, *ante*.

**531. Where new license granted—Notices out of order—Jurisdiction of justices.] —**The holder of a license in respect of a house about to be pulled down for a public purpose gave the notices required by 9 Geo. 4, c. 61, s. 14, of his intention to apply for a license in respect of another house not then licensed. The notices given did not comply with the provisions of Licensing Act, 1872 (c. 94),

#### PART VIII. SECT. 2, SUB-SECT. 1.—A.

**5161. Where license refused—Mistake as to jurisdiction.] —***R. v. ANTRIM JJ.*, [1901] 2 I. R. 133.—*IR.*

**c. — Where justices decline to hear.] —***Mandamus* will lie against a magistrate where he refuses to entertain an application for a license.—*MORISON v. MCKAY* (1882), 6 Nfld. L. R. 372.—*NFLD.*

**d. — —.] —***Ex p. FOLEY* (1889), 29 N. B. R. 113.—*CAN.*

**e. — Under dominion statute.] —***Ex p. GRIEVES* (1879), 19 N. B. R. 4.—*CAN.*

**f. — —.] —***R. v. FREDERICTON (MAYOR)* (1880), 3 S. C. R. 505.—*CAN.*

**g. — Under provincial statute.] —***INGLIS v. MORRIS* (1887), 19 N. S. R. (7 R. & G.) 531; 8 C. L. T. 63.—*CAN.*

**h. — To convene meeting of inhabitants.] —***PHILAN v. ROSS* (1875), 2 P. E. I. 28.—*CAN.*

**k. Where renewal refused—No previous notice of objection.] —**Where on an application for a renewal of a license no objection is made, & no notice given to appct., but the licensing committee adjourns its meeting without stating any objection, or giving notice to appct., & at such adjourned meeting takes no evidence, but refuses the renewal without stating any valid objection, the ct. will grant a *mandamus* to issue a certificate of renewal.—*BIRLEY v. McDONALD* (1886), 4 N. Z. L. R. 437 (S. C.).—*N.Z.*

**l. — Mandamus to hear—After time limit for renewals.] —**Where the licensing committee refuses a renewal without hearing the merits of the case the ct. will by *mandamus* compel the committee to hold an adjourned meeting to hear the application, although the time within which under Licensing Act, 1881, renewals can be applied for has gone by.—*R. v. HURSE* (1883), 2 N. Z. L. R. 94 (S. C.).—*N.Z.*

**m. — —.] —***OTTRED v. KEDDELL* (1906), 26 N. Z. L. R. 201.—*N.Z.*

**n. — Mistake as to law.] —***Mandamus* granted against the mayor & inspector of licenses, requiring them to sign a license, in respect to premises licensed at the time of the passing of N. S. Act, 1890 (c. 18), the intention of the legislature being to except from the operation of the Act those premises in which liquor had formerly been sold & where licenses were then in force.—*R. v. McPHERSON* (1892), 24 N. S. R. (12 R. & G.) 378.—*CAN.*

**o. — —.] —**Where under Licensing Acts, 1893 & 1895, the plain intention of the legislature appeared to be that existing licenses should continue until a determination had been made by the electors that effect must be given thereto, *mandamus* was directed to resps. to hear & determine appct.'s application for a renewal.—*SMITH v. McARTHUR*, [1904] A. C. 389.—*N.Z.*

**p. Where new license granted—In**

*contravention of bye-law.] —**Mandamus* refused to a magistrate to revoke a certificate granted by him authorising the issue of a tavern license for keeping a tavern in contravention of a bye-law of the municipal council.—*R. v. BURNSIDE* (1831), 8 U. C. R. 263.—*CAN.*

**q. — License granted but not issued.] —***Mandamus* will not be granted to compel license comrs. to issue a license to a person to whom one has been granted, but not issued, by the rating comrs. where they have not completed their functions, their acts having been reversed by their successors in office.—*LEKSON v. DUKEHIN COUNTY BOARD OF LICENSE COMRS.* (1889), 19 O. R. 67.—*CAN.*

**r. Where transfer refused—Mistake as to jurisdiction.] —**Appct., applied for the removal of his license to other premises. The licensing ct. was willing to grant the application, but decided it had no power to do so.—*Held*: *mandamus* should issue to compel the licensing ct. to consider the matter according to law, the ct. having jurisdiction.—*WORNER v. NORTHAM LICENSING MAGISTRATES* (1914), 17 W. A. L. R. 14.—*AUS.*

**t. — Application out of order.] —**Where a licensing committee wrongly dismissed an application for the removal of a license on the ground that it was not accompanied by a certificate of the fitness of appct., *mandamus* was granted in order that it should deal



**Sect. 2.—Mandamus: Sub-sect. 1, A. & B.; sub-sect. 2, A. & B. Sect. 3: Sub-sect. 1, A., B. & C.; sub-sect. 2. Sects. 4 & 5: Sub-sect. 1.]**

s. 40. The licensing justices at a special session granted the application upon information that the notices were in order. A rule *nisi* having been obtained for a writ of *mandamus* to the justices to hear & determine the application according to law:—*Held*: the notices were good, as the specific provisions with regard to them in 9 Geo. 4, c. 81, s. 14, had not been expressly or impliedly repealed by Licensing Act, 1872 (c. 94), s. 40.—*R. v. NICHOLSON*, [1899] 2 Q. B. 455; 68 L. J. Q. B. 1034; 64 J. P. 388; 48 W. R. 52; 15 T. L. R. 509; 43 Sol. Jo. 744; *sub nom.* *R. v. NICHOLSON, ETC.*, *BOLTON, JJ.*, *R. v. GREENHALGH, ETC.*, *BOLTON, JJ.*, *Ex p. BAMBER*, 81 L. T. 257, C. A.

*Annotation*:—*Appl. R. v. Richmond Confirming Authority, Ex p. Howitt*, [1921] 1 K. B. 248.

**532. Where license renewed—Subject to ultra vires condition.]—R. v. DODDS**, No. 273, *ante*.

**Alternative remedies.]—See CROWN PRACTICE**, Vol. XVI., pp. 295, 296, Nos. 1085–1092.

#### B. Practice.

**533. Costs—Justices' reasons not stated in writing.]—R. v. ASHTON-UNDER-LYNE JJ.** (1873), 37 J. P. Jo. 85.

**534. — Party opposing successful.]—R. v. WEST RIDING OF YORKSHIRE JJ.**, *Ex p. SHAW*, No. 46, *ante*.

**Time for making application.]—See CROWN PRACTICE**, Vol. XVI., p. 326, Nos. 1387, 1388.

**Filing affidavit in answer to rule.]—See CROWN PRACTICE**, Vol. XVI., p. 331, No. 1466.

**Proceedings on the return.]—See CROWN PRACTICE**, Vol. XVI., p. 344, No. 1673.

#### SUB-SECT. 2.—TO QUARTER SESSIONS.

##### A. In What Cases.

**535. When appeal dismissed—Not heard on merits.]—Ex p. MARTIN** (1876), 40 J. P. Jo. 133.

*Annotation*:—*Reid. Sharp v. Wakefield* (1888), 53 J. P. 20.

**536. — Justices equally divided—One justice withdrawing.]—Ex p. EVANS**, No. 483, *ante*.

**537. When jurisdiction exceeded.]—R. v. LANCASTER JJ.**, No. 98, *ante*.

with the case on its merits.—*FALCONER v. WILLIAMS* (1896), 11 N. Z. L. R. 502.—N.Z.

**a. Where meeting not held—On or before specified date.]—Held**: *mandamus* would lie to compel the mayor to hold a meeting to consider applications for licenses after Apr. 1, where he neglected to do so on or before that day.—*Ex p. DANAHY* (1888), 27 N. B. R. 554; *affd. on appeal*, 17 S. C. R. 41.—CAN.

#### PART VIII. SECT. 2, SUB-SECT. 2.—A.

**b. When appeal dismissed—Justices equally divided.]—Where the justices, being equally divided, had not adjudicated on the question before them:—Held**: *mandamus* should issue to the justices to hear & determine the application.—*R. v. WEST CORK JJ.*, *R. v. DONEGAL JJ.*, [1902] 2 I. R. 352.—IR.

#### PART VIII. SECT. 3, SUB-SECT. 1.—A.

**542 i. To quash order granting license—Irregularity in proceedings.]—R. v. LOGAN & DENNY LICENSING AUTHORITY, Ex p. BAHR**, [1910] 8 R. Q. 391.—AUS.

**542 ii. — — — — —.]—Re ROCHE** (1888), 7 N. Z. L. R. 206.—N.Z.

**542 iii. — — — — —.]—A. G. v. PALMERSTON NORTH LICENSING COMMITTEE** (1889), 8 N. Z. L. R. 399.—N.Z.

**542 iv. — — — — —.]—On motion for certiorari to quash a decision on the ground that the majority of the committee were interested & biased, being under a pledge to close a certain number of houses:—Held**: the majority of the committee had not, either as candidates or members, gone beyond what the legislature must have contemplated as likely to take place, & the writ must be refused.—*Re WANGANUI LICENSING COMMITTEE* (1892), 10 N. Z. L. R. 383.—N.Z.

**542 v. — — — — —.]—Where the Supreme Ct. is satisfied that, in refusing the renewal of a license, the majority of the committee have acted from bias & predetermination to give effect to "prohibition" views, & have not considered the matter honestly in a judicial spirit, it will grant certiorari to bring up a decision refusing such license for the purpose of quashing it.—*QUILL v. LEIT* (1892), 10 N. Z. L. R. 663.—N.Z.**

#### B. Practice.

**538. Affidavits of proceedings at sessions—Showing improper refusal to hear.]—9 Geo. 4, c. 61, s. 34, enacts** "that no conviction under this Act, nor any adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by writ of *certiorari* or otherwise, into any of His Majesty's superior cts. of record":—*Held*: on an application for a *mandamus* this provision did not prevent the ct. from hearing by affidavits the proceedings that took place on an appeal to the sessions, & granting a *mandamus* to compel an adjudication by the sessions, if the affidavits showed that the justices had improperly refused to hear the appeal.—*R. v. SUFFOLK JJ.* (1843), 11 L. T. O. S. 144; 7 J. P. 590.

**539. Delay in making application—Crown Office Rules, 1886, r. 79.]—A transfer license being refused, on appeal the quarter sessions on Oct. 16 refused to hear the appeal on the ground that applt. was not aggrieved. A rule *nisi* for *mandamus* was moved for & obtained on Feb. 20, no special circumstances being stated for the delay:—*Held*: the application was too late, being contrary to above rule.—*R. v. GLOUCESTERSHIRE JJ.* (1890), 54 J. P. 519, D. C.**

**540. Costs of justices—Indemnity order.]—R. v. STAFFORDSHIRE JJ.**, No. 494, *ante*.

**541. — — — — —.]—R. v. WEST RIDING OF YORKSHIRE JJ.**, No. 499, *ante*.

#### SECT. 3.—CERTIORARI.

##### SUB-SECT. 1.—TO JUSTICES.

##### A. In What Cases.

**Certiorari generally.]—See CROWN PRACTICE**, Vol. XVI., pp. 398 *et seq.*

**542. To quash order granting license—Irregularity in proceedings.]—R. v. LEEDS JJ.**, *Ex p. JAMES* (1847), 11 J. P. Jo. 837, 870.

*See, also*, CROWN PRACTICE, Vol. XVI., pp. 411, 415, Nos. 2729–2735.

**As to discretion to grant.]—See CROWN PRACTICE**, Vol. XVI., p. 403, No. 2486.

##### B. Who is Entitled.

**543. Trade rival.]—A confectioner who has hold a wine license for consumption on the premises, & who supplies luncheons, is suffi-**

**542 vi. — — — — —.]—PENNEY v. WATRAU LICENSING COMMITTEE** (1902), 22 N. Z. L. R. 602.—N.Z.

**a. — — — — —.]—Certiorari lies to remove & quash as well an order of justices granting such certificate as an order refusing the same.—R. v. ARMAUGH JJ.**, [1897] 2 I. R. 57; 30 I. L. T. 47.—IR.

**d. To quash conviction.]—R. v. ARMAUGH COUNTY JJ.** (1922), 56 I. L. T. 46.—IR.

**e. Not necessary—Where application for renewal pending.]—A certificate may be quashed on certiorari but certiorari is not necessary when there is a pending application for renewal.—*OUTRED v. KEDDELL* (1906), 26 N. Z. L. R. 201.—N.Z.**

#### PART VIII. SECT. 3, SUB-SECT. 1.—B.

**1. Person with special locus standi.]—The ct. has no discretion to refuse certiorari to quash a license granted against a statutory prohibition, where applt. for the writ has a special locus standi otherwise than as a member of the general public.—*Re ADDINGTON, NEWTOWN, & SYDENHAM EAST LICENSING COMMITTEES* (1893), 19 N. Z. L. R. 70.—N.Z.**

ciently within the description of persons entitled to apply for & hold a publican's license within 9 Geo. 4, c. 61, s. 1, being a person about to keep an inn, alehouse, or victualling house:—*Semble*: a rival publican has no *locus standi* to apply for a *certiorari* to quash a publican's license granted to another person.—*R. v. SURREY JJ.* (1888), 52 J. P. 423, D. C.

*See, also*, CROWN PRACTICE, Vol. XVI., pp. 403, 459, Nos. 2493, 3336–3340.

#### C. Practice.

**544. Costs of justices—Indemnity order.]**—*R. v. STAFFORDSHIRE JJ.*, No. 494, *ante*.

**Disqualification of justices—What affidavit must contain.]**—*See* CROWN PRACTICE, Vol. XVI., p. 465, No. 3416.

**Costs.]**—*See* CROWN PRACTICE, Vol. XVI., p. 398, No. 2421.

#### SUB-SECT. 2.—TO QUARTER SESSIONS.

**545. To quash order.]**—(1) Where on an application for renewal of an alehouse license the justices started an objection without notice, & then, without adjournment or giving time to answer the objection, at once refused the renewal, & *appet.* then appealed to quarter sessions & the quarter sessions, after hearing him, dismissed the appeal:—*Held*: *appet.* was not prevented from applying for a *certiorari* to quash the order of quarter sessions, for that *ct.* has no greater jurisdiction to dispense with, Licensing Act, 1872 (c. 49), s. 42 (2), than the licensing justices had.

Facts might be proved which would establish that the right to the adjournment had been waived by the party, but there is no evidence of any such waiver on this occasion . . . consequently it was the duty of the magistrates, on the objection being taken, to adjourn the granting of the license to a future day (*HANNEN, J.*).

(2) No notice is to be given where the objection has been taken by the magistrates themselves (*HANNEN, J.*).—*RUDDICK v. LIVERPOOL JJ.* (1876), 42 J. P. 406.

*Annotations*:—*As to* (1) *Appld.* *Gascoyne v. Risley* (1888), 36 W. R. 605; *Evans v. Conway JJ.*, [1900] 2 Q. B. 221. *Refd.* *R. v. Anglesey JJ.*, [1892] 1 Q. B. 850; *Ex p. Gorman*, [1894] A. C. 23. *Generally*, *Mentd.* *Sharp v. Wakefield* (1888), 53 J. P. 20.

*See* CROWN PRACTICE, Vol. XVI., p. 479, No. 3007.

#### SECT. 4.—PROHIBITION.

**Prohibition, generally.]**—*See* CROWN PRACTICE, Vol. XVI., pp. 372 *et seq.*

**To compensation authority.]**—*See* CROWN PRACTICE, Vol. XVI., p. 377, No. 2149.

**Appeals.]**—*See* CROWN PRACTICE, Vol. XVI., p. 396, No. 2401.

#### SECT. 5.—SPECIAL CASE.

##### SUB-SECT. 1.—BY LICENSING JUSTICES.

**546. In what cases—Refusal to grant certificate.]**—No case can be stated under Summary Jurisdiction Act, 1857 (c. 43), for the opinion of one of the superior *cts.* unless the determination of the

parties was upon an information or complaint. Where therefore an application was made to justices for a certificate for a license to keep a beerhouse, & upon their refusal a case was demanded & stated under Summary Jurisdiction Act, 1857 (c. 43):—*Held*: no such case could be stated.—*GARATTY v. POTTS* (1870), 23 L. T. 410; *sub nom.* *WEST v. POTTS*, 34 J. P. 760; *previous proceedings*, *sub nom.* *GARETTY v. POTTS*, L. R. 6 Q. B. 86.

**547. Whether justices can state case—As court of summary jurisdiction—Summary Jurisdiction Act, 1879 (c. 49), ss. 31 & 33.]**—By Interpretation Act, 1889 (c. 63), s. 13 (1), it is provided that "the expression 'ct. of summary jurisdiction' shall mean any justice or justices of the peace . . . whether acting under Summary Jurisdiction Acts or any of them or under any other Act, or by virtue of his commission, or under the common law":—*Held*: justices acting as licensing justices, under 9 Geo. 4, c. 61, are, by virtue of the above definition, a "ct. of summary jurisdiction," within Summary Jurisdiction Act, 1879 (c. 49), ss. 31, 33, which provide respectively for service of notice of appeal from the decision of such a *ct.* upon their clerk, & for statement of a case by them on a question of law.—*R. v. GLAMORGANSHIRE JJ.*, *R. v. PONTYPOL JJ.*, [1892] 1 Q. B. 621; 61 L. J. M. C. 169; 56 J. P. 437; 40 W. R. 436; *sub nom.* *R. v. GLAMORGANSHIRE JJ.*, *APPELATE'S CASE*, *R. v. GLAMORGANSHIRE JJ.*, *EVANS'S CASE*, *R. v. BYRDE, ETC.*, *PONTYPOL, MONMOUTH LICENSING JJ.*, 66 L. T. 144; 8 T. L. R. 439, C. A.

*Annotations*:—*Appld.* *R. v. Bristol Licensing JJ.*, *R. v. Gloucestershire JJ.* (1893), 68 L. T. 225. *Consd.* *R. v. Kent JJ.*, [1896] 2 Q. B. 306. *Overd.* *Boulter v. Kent JJ.*, [1897] A. C. 556. *Refd.* *Leicester Deputies of Freeman v. Hewitt* (1893), 62 L. J. M. C. 51; *R. v. London JJ.*, [1895] 1 Q. B. 616; *R. v. West Riding of Yorkshire JJ.*, [1897] 42 Sol. Jo. 135; *R. v. Southampton JJ.*, *Ex p. Cardy* (1906), 94 L. T. 437.

**548.** — — — — — Justices at a licensing meeting are not a *ct.* of summary jurisdiction; a refusal of licensing justices to renew a license is not "a conviction or order"; & appeals to quarter sessions against the refusal to grant a license are not regulated by Summary Jurisdiction Act, 1879 (c. 49), s. 31. At a licensing meeting a person objected to the renewal of a license, & it was refused. On appeal to quarter sessions the objector did not appear, & the renewal was granted:—*Held*: that the *ct.* of quarter sessions had no power to make an order for costs against the objector.

*R. v. Glamorganshire JJ.*, No. 547, *ante*, *overd.*

Persons objecting to the grant of a license are not parties to the proceedings on the application in any proper sense of the term.

Every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own (*LORD HERSHELL*).—*BOULTER v. KENT JJ.*, [1897] A. C. 556; 60 L. J. Q. B. 787; 77 L. T. 288; 61 J. P. 532; 46 W. R. 114; 13 T. L. R. 538, H. L.; *reversg.* *S. C.* *sub nom.* *R. v. KENT JJ.*, [1896] 2 Q. B. 306, C. A.

*Annotations*:—*Expld.* *R. v. London & Strand Division JJ. & Dalton*, *Ex p. L. C. C.* (1898), 78 L. T. 559. *Folld.* *R. v. Staffordshire JJ.*, [1898] 2 Q. B. 231. *Expld.* *R. v. West Riding of Yorkshire JJ.*, *Ex p. Shaw*, [1898] 1 Q. B. 503; *R. v. Manchester JJ.*, [1899] 1 Q. B. 571; *Tynemouth Corp. v. A. G.*, [1899] A. C. 293; *Evans v. Conway JJ.*, [1900] 2 Q. B. 224; *R. v. Howard*, [1902] 2 K. B. 363. *Consd.* *Hulsh v. Liverpool JJ.*, [1914] 1 K. B. 109. *Expld.* *R. v. Ashton*, *Ex p. Walker* (1915), 85 L. J. K. B. 27. *Refd.*

#### PART VIII. SECT. 3, SUB-SECT. 2.

**545 i. To quash order.]**—An order made by quarter sessions, granting a certificate for renewal of a license may be quashed on *certiorari*.—*Il. v. ROSSCOMMON JJ.*, [1905] 2 I. R. 101; 37 I. L. T. 252.—*IR.*



**Sect. 5.—Special case: Sub-sects. 1, 2 & 3. Part IX. Sects. 1, 2, 3, 4 & 5.]**

*R. v. Sharman, Ex p. Denton*, [1898] 1 Q. B. 578; *R. v. Sunderland JJ.*, [1901] 2 K. B. 367; *R. v. Woodhouse*, [1906] 2 K. B. 501; *Whittuck v. Witty*, [1907] 2 K. B. 526; *R. v. Lincolnshire JJ.*, [1912] 2 K. B. 413; *Attwood v. Chapman*, [1914] 3 K. B. 275. *Mentd. Allsop v. Preston JJ.*, [1899], 64 J. P. 25; *Re Bethel* (1899), 63 J. P. 453; *Hodson v. Pare* (1899), 68 L. J. Q. B. 300; *R. v. Nicholson*, [1899] 2 Q. B. 455; *R. v. Worcestershire JJ.*, [1900] 2 Q. B. 576; *Hogmaler v. Willowden Overseers* (1904), 52 W. R. 654; *R. v. Johnson*, [1905] 2 K. B. 59; *R. v. Russell, Ex p. Morris* (1905), 93 L. T. 407; *R. v. Southampton Licensing JJ., Ex p. Cardy*, [1906] 1 K. B. 446; *R. v. Allen* (1911), 81 L. J. K. B. 258; *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685.

**549. — Ground for refusing—Frivolous point.]—***R. v. BELL, ETC., JJ., Ex p. FLINN & SONS* (1899), 15 T. L. R. 487, D. C.

**550. Parties—Superintendent of police opposing grant.]—***PRICE v. JAMES*, No. 86, *ante*.

**SUB-SECT. 2.—BY QUARTER SESSIONS.**

**551. Whether power to state.]—***Ex p. MARTIN* (1876), 40 J. P. Jo. 133.

*Annotation:—Reid. Sharp v. Wakefield* (1888), 53 J. P. 20.

**552. — Confirming authority—Licensing Act, 1904 (c. 23)—In judicial capacity.]—**Where the question of the renewal of an existing on-license is referred to quarter sessions by the licensing justices under Licensing Act, 1904 (c. 23), s. 1 (2), & is dealt with by a committee of the quarter sessions appointed under Licensing Act, 1904 (c. 23), s. 5 (2), the proceedings before the committee are judicial proceedings, & the committee have power to state a case for the opinion of the High Ct.—*R. v. SOUTHAMPTON LICENSING JJ., Ex p. CARDY*, [1906] 1 K. B. 416; 75 L. J. K. B. 295; 94 L. T. 437; 70 J. P. 175; 54 W. R. 484; 22 T. L. R. 236; 50 Sol. Jo. 206, D. C.

*Annotations:—Extd. Dartford Brewery Co. v. County of London Quarter Sessions*, [1906] 1 K. B. 695. *Apld. Eccl. Comrs. for England v. Page*, [1911] 2 K. B. 946; *Nicholas v. Davies*, [1914] 2 K. B. 705. *Consd. Colchester Brewing Co. v. Tending Licensing JJ.*, [1916] 2 K. B. 126. *Reid. R. v. Jackson* (1906), 71 J. P. 25; *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685.

**553. — Acting in administrative capacity.]—**Licensing (Consolidation) Act, 1910 (c. 24), sched. 6, provides that licensed premises in a populous place in Wales may remain open until 11 p.m. but in districts other than a populous place not later than 10 p.m. By special provision 2 of the Schedule "populous place" means any area

with a population of not less than 1,000 which by reason of the density of its population the confirming authority of the city, by order, determine to be a populous place. It provides that an order restrictive of a previous order shall not be made except on a revision after the publication of a census, & that as soon as may be after the publication of each census the confirming authority of the city, shall, at a meeting to be specially convened for the purpose, revise orders then in force within their jurisdiction, & may alter or cancel any of those orders, or may make such further orders, if any, as they shall deem necessary to give effect to the provisions of the Act. A licensing district in Wales was some years ago declared to be a "populous place," & its population had, subsequent to such declaration, increased, but other adjacent districts had, owing to the opening of new collieries therein, increased in population to a still greater extent. In 1913 the confirming authority held that it was no longer a "populous place," & cancelled the previous order. An appeal from their decision by way of a case stated by the confirming authority for the opinion of the High Ct. was made & a preliminary objection taken that quarter sessions had no power to state the same:—*Held*: (1) quarter sessions were not dependent for their power to state a case on the Summary Jurisdiction Acts, & although acting in an administrative capacity, could state the case submitted. (2) It was open to the confirming authority to raise the standard of a "populous place," & the ct. would not consider whether their reasons for so doing were or were not adequate.—*NICHOLAS v. DAVIES*, [1914] 2 K. B. 705; 83 L. J. K. B. 1137; 111 L. T. 56; 78 J. P. 207; 30 T. L. R. 388, D. C.

**554. Nature of the case—Jurisdiction of High Court to decide on facts—Not appeal on facts & law—Judicature Act, 1894 (c. 16), s. 2.]—***HICKTON v. HODGSON*, No. 233, *ante*.

**555. — Evidence by one of justices.]—***MITCHELL v. CROYDON JJ.*, No. 391, *ante*.

**SUB-SECT. 3.—BY COMPENSATION AUTHORITY.**

**556. On refusing renewal.]—***R. v. SOUTHAMPTON JJ.*, No. 454, *ante*.

**557. —]—***COLCHESTER BREWING CO., LTD. v. TENDRING LICENSING JJ.*, No. 397, *ante*.

## Part IX.—Hours of Sale.

### SECT. 1.—IN GENERAL.

*See, now*, Licensing Act, 1921 (c. 42), ss. 1–5.

**558. Effect of Licensing Act, 1921 (c. 42)—Substitution of "permitted" for "closing" hours.]—***SMITH v. FENNELL*, No. 566, *post*.

**559. Sale under ex-cise license.]—**By Licensing Act, 1874 (c. 49), s. 3, "All premises in which intoxicating liquors are sold by retail" are to be

closed during certain hours:—*Held*: this enactment was not confined to premises licensed by the justices to sell intoxicating liquors, but included premises in which intoxicating liquors were sold in pursuance of an excise license granted under 24 & 25 Vict. c. 21.—*MARTIN v. BARKER* (1881), 50 L. J. M. C. 109; 45 L. T. 214; 45 J. P. 749; 29 W. R. 789, D. C.

*Annotation:—Reid. R. v. Jenkins* (1891), 55 J. P. 824.

### PART IX. SECT. 1.

*g. Authority to fix—License commissioners.]—*License comrs. appointed under R. S. O., 1887, c. 194, passed a resolution that, in all places where intoxicating liquors are sold, no sale shall take place between 11 p.m. &

5 a.m.:—*Held*: the license comrs. had power to pass the resolution.—*McGILL v. BRANTFORD CITY LICENSE COMRS.* (1892), 21 O. R. 665.—*CAN.*

*h. — Municipal council.]—*Under Vancouver Incorporation Act, 1900, the council passed a bye-law preventing the sale of liquor between

11 p.m. on Saturday & six a.m. on Monday:—*Held*: the council had gone beyond the powers conferred by s. 125 (19).—*R. v. ROBERTS* (1908), 9 W. L. R. 421.—*CAN.*

*k. — Magistrates.]—**MACBETH v. ASHLEY* (1874), L. R. 2 Sc. & Div. 352.—*SCOT.*

## SECT. 2.—WHOLESALE LICENSE.

**560. Sales during prohibited hours—Not within Licensing Acts.]**—A grocer, holding a wholesale but not a retail beer dealer's license, sold during prohibited hours beer in casks containing 4½ gallons each. He was convicted by the magistrates of unlawfully selling beer during such hours contrary to the Licensing Acts:—*Held*: as he was entitled to sell such quantity by wholesale, he did not come within the operation of the Licensing Acts, & the conviction was wrong.

I read the statutes thus: that a wholesale dealer might sell, as a minimum limit, as little as 4½ gallons, & a retail dealer might sell as a maximum limit any quantity less than 4½ gallons, or, in other words, that a wholesale dealer could not sell under 4½ gallons, & that a retail dealer could not sell as much as 4½ gallons (SMITH, J.).—*R. v. JENKINS, ETC., GLAMORGANSHIRE JJ.* (1891), 61 L. J. M. C. 57; 65 L. T. 857; 55 J. P. 824; 40 W. R. 318; 8 T. L. R. 163; 36 Sol. Jo. 126, D. C.

*Annotation*:—*Reid. Gallagher v. Rudd* (1897), 67 L. J. Q. B. 65.

## SECT. 3.—SIX-DAY LICENSE.

*See Licensing (Consolidation) Act, 1910 (c. 24), ss. 58, 60, as modified by Licensing Act, 1921 (c. 42), s. 6 (1), & sched. I., Part II.*

**561. Granted at instance of applicant only.]**—The condition under the Licensing Act, 1872 (c. 94), s. 49, requiring the licensed premises therein mentioned to be closed during the whole of Sunday, can only be inserted in a new license if appt. for it himself applies to the licensing justices to insert such condition.—*R. v. KIRKDALE JJ.* (1886), 18 Q. B. D. 248; 56 L. J. M. C. 24; 51 J. P. 214, D. C.

*Annotation*:—*Apprvd. R. v. Crewkerne Licensing JJ.* (1889), 58 L. T. 450.

**562. Whether renewable as ordinary seven-day license.]**—Where a license was originally granted subject to the condition under Licensing Act, 1872 (c. 94), s. 49, requiring the licensed premises to be closed during the whole of Sunday, it can only be renewed subject to that condition, & cannot be renewed as an ordinary seven-day license.—*R. v. CREWKERNE LICENSING JJ.* (1888), 21 Q. B. D. 85; 57 L. J. M. C. 127; 60 L. T. 84; 52 J. P. 372; 36 W. R. 629; 4 T. L. R. 528, C. A.

*Annotations*:—*Folld. R. v. Liverpool Licensing JJ.* (1888), 52 J. P. 376. *Apld. R. v. Corfield* (1922), 128 L. T. 305.

**563. —.]**—*ELLIS v. LINCOLN LICENSING JJ.* (1888), 52 J. P. 88, D. C.

**564. —.]**—T., a publican, held a six-day license which had existed as a six-day license for three years only, a former holder thereof having held the ordinary license for many years before that date. T. applied for a renewal without the six-day condition being inserted:—*Held*: the justices were not bound to renew such license as a seven-day licence.—*R. v. LIVERPOOL LICENSING JJ.* (1888), 52 J. P. 376, D. C.

Renewal of early closing licenses as ordinary licenses, *see* No. 565, *post*.

**Sundays, Christmas Day & Good Friday.]**—*See* Sect. 7, *post*.

## SECT. 4.—EARLY CLOSING LICENSE.

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 59, as modified by Licensing Act, 1921 (c. 42), sched. I., Part II.*

**565. Whether renewable free from condition.]**—By Licensing (Consolidation) Act, 1910 (c. 24), s. 12 (1), for the purposes of this Act, a new justices' license is a justices' license granted at a general annual licensing meeting otherwise than by way of renewal or transfer as defined by this Act. By sect. 16 (1) for the purposes of this Act, the renewal of a justices' license means the grant of a justices' license at a general annual licensing meeting by way of renewal of a similar license which is in force in respect of the premises at the date of the application. . . . By sect. 59 (1), where, on the occasion of any application for a new justices' on license, or the ordinary removal or renewal of a justices' on license, appt. applies to the licensing justices to insert in his license a condition that he shall close the premises in respect of which the license is or is to be granted one hour earlier at night than that at which those premises would otherwise have to be closed, the justices shall insert that condition in the license:—*Held*: the holder of a license subject to an early closing condition under sect. 59 (1) cannot obtain by way of renewal a license free from the condition but can only obtain a license free therefrom as a new license.—*R. v. CORFIELD* (1922), 128 L. T. 305; 86 J. P. 216, D. C.

Renewal of six-day licenses as ordinary seven-day licenses, *see* Sect. 3, *ante*.

## SECT. 5.—REFRESHMENT HOUSES NOT LICENSED TO SELL INTOXICATING LIQUORS.

As to what is a "Refreshment House," *see* Part II., Sect. 2, sub-sect. 4, *ante*.

**566. Effect of Licensing Act, 1921 (c. 42) —On Public House Closing Act, 1864 (c. 64), s. 5 Substitution of "permitted" for "closing" hours.]**—Licensing Act, 1921 (c. 42), ss. 1, 2, introduced a system of "permitted hours" for the sale of intoxicating liquors in licensed premises, & by sect. 4 prohibited persons selling intoxicating liquors except during those hours.

Appt. was convicted under Public House Closing Act, 1864 (c. 64), s. 5, of keeping open a refreshment house for the sale of refreshments during part of the time the premises were required to be closed:—*Held*: since the passing of Licensing Act, 1921 (c. 42), there are now no hours during which "premises licensed for the sale of intoxicating liquors" are "required to be closed," & therefore Public House Closing Act, 1864 (c. 64), s. 5, as amended by Licensing Act, 1874 (c. 49), s. 11, has become inoperative.—*SMITH v. FENNELL*, [1924] 1 K. B. 550; 93 L. J. K. B. 311; 130 L. T. 732; 88 J. P. 74; 40 T. L. R. 301; 68 Sol. Jo. 520; 22 L. G. R. 192; 27 Cox, C. C. 601, D. C.

**567. Sunday trading.]**—A licensed refreshment house keeper, although he does not hold a wine license, may not sell articles for consumption off the premises on Sundays.—*DUFFELL v. CURTIS* (1877), 35 L. T. 853, D. C.

*Annotation*:—*Expld. Amorette v. James*, [1915] 1 K. B. 124.

**568. —.]**—The hours at which refreshment houses in Wales must be closed are regulated by

## PART IX. SECT. 3.

**562 I. Whether renewable as ordinary seven-day licenses.]**—The holder of a six-

day license, under Licensing Act, 1872 (c. 94), s. 49, is not entitled on the renewal of his license to exchange it

for an ordinary or seven-day license.—*R. v. CATHART* (1880), 44 J. P. 718. —*IR.*

**Sect. 5.—Refreshment houses not licensed to sell intoxicating liquors.** Sects. 6, 7 & 8: *Sub-sects. 1, 2 & 3.* Sect. 9. Part X. Sect. 1.]

Licensing Act, 1874 (c. 49), s. 11. Sunday Closing (Wales) Act, 1881 (c. 61), s. 1, does not apply to such houses.—*BERNI v. THORNEY* (1895), 64 L. J. M. C. 271; 72 L. T. 630; 43 W. R. 411; 59 J. P. Jo. 228, D. C.

*Annotations:—Reid. Parker v. Harris* (1909), 100 L. T. 408; *Amorette v. James* (1914), 84 L. J. K. B. 563.

**569.** —[No offence is committed against Licensing Act, 1874 (c. 49), by opening, between the hours of 5 & 6 p.m. on Sundays, an unlicensed refreshment house in Wales where no intoxicating liquors are sold.—*PARKER v. HARRIS* (1909), 100 L. T. 408; 73 J. P. 183; 22 Cox, C. C. 19, D. C.

*Annotation:—Reid. Amorette v. James* (1914), 84 L. J. K. B. 563.

**570.** —[The mere fact that a person is the holder of a refreshment house license does not exempt him from the operation of the Sunday Observance Act, 1677 (c. 7).—*AMORETTE v. JAMES*, [1915] 1 K. B. 124; 84 L. J. K. B. 563; 112 L. T. 167; 79 J. P. 116; 31 T. L. R. 22; 59 Sol. Jo. 162; 13 L. G. R. 598; 24 Cox, C. C. 510, D. C.

*Annotation:—Reid. Slater v. Evans*, [1916] 2 K. B. 403.

*See, generally, TIME.*

## SECT. 6.—THEATRES.

*See, now, Licensing Act, 1921 (c. 42), s. 18.*

Sales in theatres generally, *see* Part XI., Sect. 1, *post*.

**571. Sales during prohibited hours.**—[Licensing Act, 1872 (c. 94), does not apply to exempt the proprietor of a theatre, who holds an excise license to sell intoxicating liquors by retail at his theatre, from the provisions, with respect to closing, contained in Licensing Act, 1874 (c. 49).—*GALLAGHER v. RUDD*, [1898] 1 Q. B. 114; 67 L. J. Q. B. 65; 77 L. T. 367; 61 J. P. 789; 40 W. R. 108; 14 T. L. R. 105; 42 Sol. Jo. 15; 18 Cox, C. C. 654, D. C.

## SECT. 7.—SUNDAYS, CHRISTMAS DAY AND GOOD FRIDAY.

**572. Sundays—Sunday of Mid-Lent—Local custom.**—[In the borough of B. it had always been the custom to keep open the public-houses on Mid-Lent Sunday, that day being a day for friends visiting the town. S., the keeper of an alehouse, allowed men of the borough to sit & drink during prohibited hours on that Sunday in his house along with others, who were travellers. There was no evidence that S. knew any guests to belong to the borough, & he swore that he *bonâ fide* believed they were all travellers:—*Held*: the justices were right in convicting S. under Licensing Act, 1874 (c. 49), s. 9, of unlawfully keeping open his house on Sunday.—*STACEY v. MILNE* (1875), 39 J. P. 103.

**573.** —[Meaning of "Sunday"—Sunday Closing (Wales) Act, 1881 (c. 61).—Licensing Act, 1874 (c. 49), "all premises in which intoxicating liquors are sold by retail, wherever situate, shall be closed on Christmas Day & Good Friday, as if Christmas Day & Good Friday were respectively Sunday." By Sunday Closing (Wales) Act, 1881 (c. 61), s. 1, all such premises are to be closed "during the whole of Sunday":—*Held*: the word "Sunday" in Sunday Closing (Wales) Act, 1881 (c. 61), only has its ordinary meaning, & a conviction under that Act for unlawfully keeping

open premises for the sale of intoxicating liquors on Christmas Day was bad.—*FORSDIKE v. COLQUHOUN* (1883), 11 Q. B. D. 71; 49 L. T. 136; 47 J. P. 303, D. C.

*Annotation:—Apld. Davies v. Harrison*, [1909] 2 K. B. 104.

**Application to six-day licenses.**—*See* Sect. 3, *ante*.

**Refreshment houses not licensed to sell intoxicating liquors.**—*See* Sect. 5, *ante*.

**574. Christmas Day—Falling on week day—Application of Sunday hours—In Wales & Monmouthshire.**—*FORSDIKE v. COLQUHOUN*, No. 573, *ante*.

**575.** —[Six-day license.]—By Licensing Act, 1872 (c. 94), the holder of a six-day license "shall keep his premises closed during the whole of Sunday." By Licensing Act, 1874 (c. 49), s. 3, which regulates the hours of closing of licensed premises generally, "such premises wherever situate shall be closed on Christmas Day & Good Friday . . . as if Christmas Day & Good Friday were respectively Sunday":—*Held*: the holder of a six-day license is not bound to close his licensed premises during the whole of Christmas Day when it falls on a day other than a Sunday, but is only bound to close on that day during the hours of closing applicable to licensed premises generally.—*DAVIES v. HARRISON*, [1909] 2 K. B. 104; 78 L. J. K. B. 626; 100 L. T. 899; 73 J. P. 268; 25 T. L. R. 449, D. C.

## SECT. 8.—EXEMPTION FROM CLOSING.

### SUB-SECT. 1.—IN GENERAL.

**Consumption of liquor with meals—Extension of permitted hours in evening for certain premises.**—*See* Licensing Act, 1921 (c. 42), s. 3.

**575a.** —[Discretion of justices.]—*R. v. SPELTHORNE, JJ., Ex p. TURPIN* (1920), 135 L. T. 111; 42 T. L. R. 569; 70 J. P. Jo. 322, D. C.

—[Within half an hour after permitted hours—Liquor supplied during permitted hours & served with meal.]—*See* Licensing Act, 1921 (c. 42), s. 5 (d).

**Persons resident in licensed premises or clubs.**—*See* Licensing Act, 1921 (c. 42), s. 5 (a).

**Ordering or despatch of liquor for consumption off premises.**—*See* Licensing Act, 1921 (c. 42), s. 5 (b).

**Supply to or consumption by friends at licensee's own expense.**—*See* Licensing Act, 1921 (c. 42), s. 5 (c).

**Sale to trader or club for purposes of trade or club.**—*See* Licensing Act, 1921 (c. 42), s. 5 (e).

**Sale in or supply to canteens—Or to authorised officers' mess.**—*See* Licensing Act, 1921 (c. 42), s. 5 (f).

**Sale during prohibited hours in theatres.**—*See* Sect. 6, *ante*.

### SUB-SECT. 2.—GENERAL ORDER OF EXEMPTION.

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 55, as modified by Licensing Act, 1921 (c. 42), sched. I., Part II.

**576. Nature of—Judicial orders—Subject to certiorari.**—[An order of justices under Licensing Act, 1872 (c. 94), s. 26, extending the hours during which a licensed house may be kept open for the sale of intoxicating liquors is a judicial order, & may be brought up on *certiorari*.—*R. v. JOHNSON*, [1905] 2 K. B. 59; 74 L. J. K. B. 585; 69 J. P. 236; 53 W. R. 655; 21 T. L. R. 423; 49 Sol. Jo.

460; *sub nom.* R. v. JOHNSON, *Ex p.* THORNELY. 92 L. T. 654, D. C.

**Certiorari to quash orders of licensing justices.]—**  
See CROWN PRACTICE, Vol. XVI., p. 414, No. 2729

#### SUB-SECT. 3.—SPECIAL ORDER OF EXEMPTION.

See Licensing (Consolidation) Act, 1910 (c. 24) s. 57, as modified by Licensing Act, 1921 (c. 42) sched. I., Part II.

**577. Discretion of justices to grant.]—**Under Licensing Act, 1872 (c. 94), s. 29, the local authority granted a license to a publican exempting him from the closing hours on Christmas & New Year's Eve between 11 & 12 p.m., as being special occasions:—*Held*: as it was entirely for the discretion of the local authority in each case the decision could not be interfered with.—DEVINE v. KEELING (1886), 50 J. P. 551; 34 W. R. 718; 2 T. L. R. 692, D. C. *Annotation*:—*Distd.* R. v. Butt, *Ex p.* Brooke (1922), 38 T. L. R. 537.

**578. — Must be exercised judicially.]—**R. v. BUTT, *Ex p.* BROOKE (1922), 38 T. L. R. 537, D. C.

**579. Power to grant—Where license conditional—Opening during specific hours.]—**Resp. was granted in 1906, under Licensing Act, 1904 (c. 23), s. 4, a license in respect of certain premises for the period of two years, upon the condition that the premises should only be open for the sale of intoxicating liquors between the hours of noon & 2 p.m. During the currency of the license resp. applied to justices in petty sessions, under Licensing Act, 1872 (c. 94), s. 29, for an occasional license exempting him from closing the premises on Dec. 17, 1906, between the hours of 7 p.m. & 11 p.m. The justices granted the occasional license asked for:—*Held*: they had power to do so.—GROH v. HESKETH, [1908] 1 K. B. 654; 77 L. J. K. B. 481; 98 L. T. 263; 72 J. P. 114; 24 T. L. R. 269; 52 Sol. Jo. 239, C. A.

**580. What are "special occasions"—Christmas & New Year's Eve.]—**DEVINE v. KEELING, No. 577, *ante*.

**581. — Market & fair days.]—**On the application to the justices of B. on behalf of a large number of licensed victuallers for special orders exempting each of them from closing their licensed premises for the sale & supply of intoxicating liquor for consumption on the premises between 10 a.m. & 12 noon & between 2.30 p.m. & 4 p.m. on nineteen market & fair days between

Sept. 6 & Dec. 27, 1920, on the ground that these were days of public ceremony or gathering or the like special occasions, involving the assembly of, & necessitating the provision of accommodation for, a considerable number of persons, the only evidence was that the days in question were market or fair days, & the justices made the orders that the licensees might be able to sell intoxicating liquors during the additional hours on the occasion of fairs & markets. The Defence of the Realm (Liquor Control) Regulations, 1915, had been applied to the area, & by an order of the Central Control Board (Liquor Traffic) the hours for opening were restricted to 12 noon to 2.30 p.m. & 6 p.m. to 10 p.m. on week days, but the order of the board provided that liquor might be sold & supplied for consumption on the premises "during any specified hours between the hours of 10 a.m. & 6 p.m. on week days under a special order of exemption . . . granted in pursuance of Licensing (Consolidation) Act, 1910 (c. 24), s. 57, for any public ceremony or gathering or like special occasion involving the assembly of, & necessitating the provision of accommodation for, considerable numbers of persons." By sect. 57 (1): "If the holder of a justices' on license applies to the local authority for an order . . . exempting him from the provisions of this Act relating to general closing hours on any special occasion or occasions, the local authority may . . . grant to apppt. such a special order so exempting him during the hours & on the special occasion or occasions specified in the order." The chief constable, who by his deputy had opposed the making of the orders, obtained rules *nisi* for writs of *certiorari* to quash them on the grounds that market & fair days were not special occasions within the order of the board, & that the justices had no power to include in one order a long series of occasions:—*Held*: market & fair days were not special occasions within the above provisions & the rules must be made absolute.—R. v. INGLIS, *Ex p.* COLE-HAMILTON (1921), 90 L. J. K. B. 770; 121 L. T. 704; 85 J. P. 114; 37 T. L. R. 359, D. C. *Annotation*:—*Consd.* R. v. Butt, *Ex p.* Brooke (1922), 38 T. L. R. 537.

**582. — Every Saturday.]—**R. v. BUTT, *Ex p.* BROOKE (1922), 38 T. L. R. 537, D. C.

#### SECT. 9.—OFFENCES.

See Part XII., Sect. 3, *post*.

## Part X.—Occasional Excise Licenses.

#### SECT. 1.—IN GENERAL.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 64.

**583. Irregularity in obtaining license—Effect of—Whether licensee subject to penalties.]—**By Revenue Act, 1862 (c. 22), s. 13, & Revenue Act, 1863 (c. 33), s. 20 (1), an occasional license for the sale of intoxicating liquors is to be granted by an officer of excise upon the written consent of a justice "usually acting at the petty sessions for the petty sessional division within which the place of sale is situate."

Applt. obtained from a duly authorised officer of

excise an occasional license for the sale of intoxicating liquors; the justice who signed the written consent did not usually act for the petty sessional division within which the place of sale was situate. Applt. having sold intoxicating liquors at the time & place mentioned in the occasional license, was convicted by justices of selling intoxicating liquors without a license. It was not proved that applt. had acted otherwise than *bona fide*:—*Held*: although an irregularity had been committed in obtaining the license, yet it protected applt. from penal consequences, & the conviction was wrong.—STEVENS v. EMSON (1876), 1 Ex. D. 100; 45 L. J. M. C. 63; 33 L. T. 821; 40 J. P. 484.

## SECT. 2.—FAIRS AND RACES.

**584. Sale at fairs—Whether occasional license necessary—Abrogation of customary right.]—**Beerhouse Act, 1830 (c. 64), s. 29, by which the selling of beer at any lawful fair was excepted out of the general operation of the Act, is repealed by Revenue Act, 1862 (c. 22), s. 12, & therefore the sale of beer without an excise license at a lawful fair in exercise of a right by grant which had existed since the reign of Edward III. is no longer lawful, nor is such sale any longer exempted from the operation of the Excise Licensing Acts.—*HUXHAM v. WHEELER* (1864), 3 H. & C. 75; 4 New Rep. 114; 33 L. J. M. C. 153; 10 L. T. 342; 28 J. P. 345; 10 Jur. N. S. 545; 12 W. R. 713; 159 E. R. 454.

**585. ——— Sale by person duly licensed.]—**An alehouse keeper, who has obtained an ordinary justices' & excise license, may, by virtue of such license, sell beer in booths at any lawful fair. It is not necessary to get a special license for that purpose.—*HAYWOOD v. HOLLAND* (1873), 28 L. T. 702; 37 J. P. 376; 21 W. R. 920.

**586. ——— Whether justices' license necessary.]—**The jurisdiction of justices under Sale of Beer Act, 1795 (c. 113), upon an information for selling ale, etc., by retail without a license, is not taken away by 48 Geo. 3, c. 143.—*R. v. DRAKE* (1817), 6 M. & S. 116; 105 E. R. 1186.

*Annotation:—Reid. Ash v. Lynn* (1866), 7 B. & S. 255.

**587. ——— Fair held in different licensing district.]—***ASH v. LYNN*, No. 630, *post*.

**588. Public races—Whether occasional license necessary—Sale by person duly licensed.]—**Races held in a private field hired by the race committee for the occasion, to which all persons had entrance on paying a small sum at the gate of the field, are "public races" within the exemption in Excise Licenses Act, 1825 (c. 81), s. 11, & a licensed victualler is not liable to any penalty for selling beer by retail in a booth in such field during such races by virtue of his ordinary license & without having an occasional excise license for that purpose.—*BOUGHEY v. ROWBOTHAM* (1866), 4 H. & C. 711; 15 L. T. 222; 30 J. P. 777; 15 W. R. 75.

## Part XI.—Sales in Passenger Ships, Railway Cars, Canteens, Theatres and Clubs.

## SECT. 1.—PASSENGER SHIPS.

*See Finance* (1909–1910) Act, 1910 (c. 8), s. 52, & sched. 1, D.; *Licensing* (Consolidation) Act, 1910 (c. 24), s. 111 (2) (f).

*See cases infra.*

## SECT. 2.—RAILWAY CARS.

*See Finance* (1909–1910) Act, 1910 (c. 8), sched. 1, E.; *Licensing* (Consolidation) Act, 1910 (c. 24), s. 111 (2) (m).

*See, generally, RAILWAYS.*

## SECT. 3.—CANTEENS.

*See Licensing* (Consolidation) Act, 1910 (c. 24), s. 111 (2) (l).

*See, generally, ROYAL FORCES.*

**589. Canteen authorised by Secretary of State—Holder obtaining excise license—Right to sell beer to civilian.]—**A person who holds a canteen, under the authority of a Secretary of State, & who obtains an excise license for the sale of beer in the canteen does not commit an offence under Licensing Act, 1872 (c. 94), s. 3, if he sells beer in the canteen to a civilian.—*DICKESON & Co. v. MAYES*, [1910] 1 K. B. 452; 79 L. J. K. B. 253; 102 L. T. 287; 74 J. P. 139; 26 T. L. R. 236, D. C.

**590. Control during war time—When not licensed or registered under Licensing** (Consolidation) Act, 1910 (c. 24).—The Central Liquor Control Board, by orders made under Defence of the

Realm (Amendment) (No. 3) Act, 1915 (c. 42), & Regulations 2 of the Defence of the Realm (Liquor Control) Regulations, 1915, ordered that no person should introduce or cause to be introduced into a certain area in Wilts any intoxicating liquor unless it were paid for before it was so introduced, & that no person should solicit or canvass for orders for intoxicating liquors, except at licensed premises, but that sales either to a registered club or to a canteen carried on under the authority of a Secretary of State were not to be effected.—*Held: the orders were not ultra vires, & the exception as to "registered clubs" & "canteens" did not except from the operation of the orders officers' & sergeants' messes carried on under the King's Regulations & not licensed as canteens under Licensing* (Consolidation) Act, 1910 (c. 24), or registered as clubs under that Act.—*EHLMANN v. SCOTT* (1917), 82 J. P. 48; *sub nom. BARKER v. SCOTT, EHLMANN v. SCOTT*, 34 T. L. R. 22; 15 L. G. R. 916, D. C.

## SECT. 4.—THEATRES.

*See Licensing* (Consolidation) Act, 1910 (c. 24), s. 111 (2) (e) & *generally, THEATRES.*

Hours of sale, *see* Part IX., Sect. 6, *ante*.

**591. Power of commissioners of excise to issue license—Where justices' license not obtained—Theatre.]—**The proprietors of a music hall, having duly obtained a music & dancing license, applied, as being the proprietors of a place of public entertainment licensed by justices of the peace, to the

## PART XI. SECT. 1.

1. *Sale on Sunday—Effect of Finance Act, 1910.]—GUTHRIE v. WILSON* (1910), 6 Adam. 386; 48 So. L. R. 106; [1911] 1 S. L. T. 30.—*SCOT.*

m. ———.—*REIND v. WIMPRESS*, [1914] S. C. (J.) 31; 51 So. L. R. 79.—*SCOT.*

n. ——— *Contrary to terms of*

*licenser—License in name of steward—Liability of owners.]—*A license was taken out in the name of the steward of a passenger vessel for the sale of liquor on board, endorsed with a condition prohibiting sale on Sunday. On a Sunday, when the steward was not on board, sales of liquor were made by waiters employed on the vessel.—*Held: the sales were sales without a*

license by the owners, & not sales in breach of his license by the steward.—*LORD ADVOCATE v. NICOL*, [1915] S. C. 735.—*SCOT.*

## PART XI. SECT. 3.

c. *Canteens authorised by King's Regulations.]—Ex p. PATCHELL* (1897), 54 N. B. R. 258; 3 Can. Crim. Cas. 75.—*CAN.*



**Comrs. of Inland Revenue for an excise license to sell by retail beer, spirits, & wine on the premises under Excise Act, 1835 (c. 39), s. 7:—***Held:* the Comrs. had properly refused to grant an excise license until a license of justices had first been obtained under Licensing Act, 1872 (c. 94); Excise Act, 1835 (c. 39), s. 7, had been repealed by Licensing Act, 1872 (c. 94), except so far as the rights of proprietors of theatres were concerned; & a music hall was not a theatre.—*R. v. INLAND REVENUE COMRS.* (1888), 21 Q. B. D. 569; 52 J. P. 390; 36 W. R. 696; *sub nom. R. v. INLAND REVENUE COMRS., Re EMPIRE THEATRE*, 57 L. J. M. C. 92; 59 L. T. 378; 4 T. L. R. 519, D. C.

**592. ——— Music hall.]—***R. v. INLAND REVENUE COMRS.*, No. 591, *ante*.

**593. Condition against sale of intoxicating liquors—On grant of theatrical license.]—**A county council acting as the licensing authority for the performance of stage plays may in the exercise of their discretion attach to the grant of a license for such performance a condition that the grantee shall undertake not to apply to the excise authorities under Excise Act, 1835 (c. 39), s. 7, for an excise license to sell intoxicating liquors in his theatre.—*R. v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL*, [1896] 2 Q. B. 386; 65 L. J. M. C. 136; 75 L. T. 252; 60 J. P. 550; 44 W. R. 650; 12 T. L. R. 454; 40 Sol. Jo. 568, D. C.  
*Annotations:—Folld. Manchester Palace of Varieties v.*

*Manchester Corpn.* (1898), 62 J. P. 425. *Reid. R. v. Sheerness U. D. C.* (1898), 62 J. P. 563. *Mentd. L. C. C. v. Bermondsey Bioscope Co.*, [1911] 1 K. B. 445.

**594. ——— Licensee covenanting not to apply for such license.]—**A county council acting as the licensing authority for the performance of stage plays may, in the exercise of their discretion, attach to the grant of a license for such performances a condition that the licensee would not apply for a license to sell beer, spirits, or wine on the premises of the theatre.

Where the licensee bound himself by a deed of covenant not to apply for a license for the sale of intoxicating liquor, a memorandum of which deed was attached to the theatre license, the ct. refused to set the deed aside.—*MANCHESTER PALACE OF VARIETIES, LTD. v. MANCHESTER CORPN.* (1898), 62 J. P. 425.

**595. ———.]—***R. v. SHEERNESS URBAN DISTRICT COUNCIL* (1898), 62 J. P. 563; 14 T. L. R. 533, C. A.; *previous proceedings, sub nom. Re SHEERNESS URBAN DISTRICT COUNCIL, Ex p. SMITH & DORING*, 42 Sol. Jo. 612, D. C.  
*Annotation:—Mentd. L. C. C. v. Bermondsey Bioscope Co.*, [1911] 1 K. B. 445.

#### SECT. 5.—CLUBS.

*See CLUBS*, Vol. VIII., pp. 522–525.

## Part XII.—Offences.

### SECT. 1.—RELATING TO SALE.

#### SUB-SECT. 1.—SALE WITHOUT LICENSE.

##### A. Without Justices' License.

###### (a) In General.

*See* Licensing (Consolidation) Act, 1910 (c. 24), ss. 65, 85; Licensing Act, 1921 (c. 42), s. 7.

**596. Sale under excise license.]—**(1) A person who sells spirituous liquors, by retail without a license from two justices of the peace, is liable to the penalties of 5 Geo. 3, c. 46, though he has a license from the Comrs. of the Excise to retail spirituous liquors.

(2) The exception in 26 Geo. 2, c. 28, that nothing in that Act shall extend to alter the time of granting licenses in cities & towns corporate does not exempt such places from the operation of the other parts of that Act; but magistrates in such districts must give the same notice of their meeting to grant licenses as justices for a county give.

(3) This license having been granted at a private meeting of two justices, which was held, too, after the general meeting was passed, I am of opinion that the license is illegal & that it cannot protect the person to whom it was granted from the penalties of 5 Geo. 3, c. 46 (KENYON, C.J.).—*R. v. DOWNS* (1790), 3 Term Rep. 560; 100 E. R. 733.

*Annotations:—As to (1) Folld. R. v. Drake* (1817), 6 M. & S. 116. *As to (3) Consd. Boulter v. Kent JJ.*, [1897] A. C. 556. *Reid. R. v. Howard*, [1902] 2 K. B. 363. *Generally, Reid. Brown v. Nicholson* (1858), 5 Jur. N. S. 99.

**597. Sale under void license—Grant after general meeting.]—***R. v. DOWNS*, No. 596, *ante*.

**598. ——— Grant under repealed statute.]—**The justices acting under a repealed sect. of 32 & 33 Vict. c. 27, granted a certificate to B., for a bottled beer license, which license the excise granted in ignorance of the repeal of the enact-

ment. B. having been proceeded against under Beerhouse Act, 1810 (c. 61), s. 13, for selling bottled beer without a license:—*Held:* the justices ought to have convicted B.—*PEARSON v. BROADBENT* (1871), 36 J. P. 485.

**599. License obtained by fraud—Innocent licensee.]—***Semble:* a license to sell beer, although obtained by fraud, is valid, unless the fraud be practised by the party to whom the license is granted.

There is no evidence to charge W. personally with having fraudulently obtained the license, & therefore he cannot be fined for having acted *bona fide* under it (*per Cur.*).—*R. v. MINSHULL* (1833), 1 Nev. & M. K. B. 277; 1 Nev. & M. M. C. 71.

**600. Licensee remaining in possession After temporary grant to other party.]** Resp., being the duly licensed keeper of a beerhouse, remained in possession of the premises & sold beer thereon after a temporary authority to carry on the business on the same premises had been granted, under Licensing Act, 1842 (c. 41), s. 1, to another person in contemplation of the transfer of the license & the possession of the premises to him:—*Held:* resp. was not liable to be convicted under Licensing Act, 1872 (c. 94), s. 3, of the offence of selling intoxicating liquors without a license.—*ANDREWS v. DENTON*, [1897] 2 Q. B. 37; 66 L. J. Q. B. 520; 76 L. T. 423; 61 J. P. 326; 45 W. R. 500; 41 Sol. Jo. 469, D. C.

**601. Unlicensed owner of licensed premises—Licensee abandoning premises.]—**Applt. was the license holder of the Royal Hotel, Ince-in-Makerfield, the property being owned by his father. From Aug. 23 to Nov. 4, 1901, applt. resided at the Royal Hotel, & carried on the licensed business there. On the latter date, he had a quarrel with his father; left the district. The father, with the assistance of a manager, carried on the business



**Sect. 1.—Relating to sale: Sub-sect. 1, A. (a) & (b).]**

till Apr. 25, 1902, when he was summoned & convicted of selling intoxicating liquors by retail without being duly licensed thereto. On May 30, 1902, applt. gave notice that he desired to transfer the license to one C., the manager. The justices refused to grant a transfer, & applt. thereupon retook possession of the premises, & on June 8 applt. was summoned for selling intoxicating liquor without being duly licensed thereto & convicted, the justices being of opinion that he had abandoned his license:—*Held*: the conviction could not stand, as applt. was a person duly licensed under Licensing Act, 1872 (c. 94).—*LAWRENCE v. O'HARA* (1903), 67 J. P. 369; 47 Sol. Jo. 639, D. C.

**602. Licensee retaking possession—After temporary abandonment.]—***LAWRENCE v. O'HARA*, No. 601, *ante*.

**603. Incoming tenant—Carrying on business pending grant—No sessions in interim.]—**For an incoming tenant of a public-house to carry on the business of the house for a period of nine days without a license is a serious offence; & the facts that the outgoing tenant had been duly licensed, & that for nine days after his departure, the period in question, no sessions sat at which a temporary transfer of his license could be applied for, do not warrant a court of summary jurisdiction in treating the offence as one of a trifling nature within Summary Jurisdiction Act, 1879 (c. 49), s. 16.—*BAIRD v. BARTON*, [1906] 1 K. B. 357; 75 L. J. K. B. 326; 92 L. T. 859; 69 J. P. 281; 20 Cox, C. C. 870, D. C.

**604. Person selling under cover of license—Licensed person on premises—Liability of licensee.]—**The mere fact of there being an existing license & an existing licensee living in the licensed house does not authorise any person other than the licensee, his agent or servant, to sell intoxicating liquor in that house under cover of the license; & if a person, who is neither the licensee nor the agent or servant of the licensee under cover of the license sells in the licensed house liquor, which is his own & which he is selling for his own benefit, he may be convicted under Licensing Act, 1872 (c. 94), s. 3, of selling without a license, notwithstanding that there is an existing license & an existing licensee living in the licensed premises

& the licensee may also be convicted of aiding & abetting such sale.—*PECKOVER v. DEFRIES* (1906), 95 L. T. 883; 71 J. P. 38; 23 T. L. R. 20; 21 Cox, C. C. 323, D. C.

*Annotations:—Consd.* *Dunning v. Owen*, [1907] 2 K. B. 237. *Distd.* *Mellor v. Lydiate*, [1914] 3 K. B. 1141.

**605. Raffle at private house.]—**Applt., Mrs. S., a married woman who had a license to sell intoxicating liquor, was convicted under Licensing Act, 1872 (c. 94), s. 3, of selling intoxicating liquor at a place where she was not authorised by her license to sell same. The husband of applt. was about to be called as a witness for resp., but it was objected that he was not a competent, or if competent, not a compellable witness, & the objection was allowed. Evidence, however, was given by a constable of a statement made to him by the husband, in the wife's presence to the effect that "on Dec. 24, 1883, he took spirits from the licensed house of applt. to the house of one B.; the drink was then raffled for, & he was present during the raffle; the money was put in a basin on the table, & it was afterwards brought to the inn & put on a table there; one or other of them, the landlady or the husband himself, took it from the table; during the time of the raffle he took some spirits up to B.'s house; he took it all." Other witnesses proved that the liquor brought from applt.'s house by her husband was raffled for at B.'s house the husband himself being present at the time. The justices convicted applt. of selling the liquor at B.'s house:—*Held*: what took place at B.'s house was a transaction in the nature of a sale within Licensing Act, 1872 (c. 94), s. 62, & as applt. was a competent witness & did not contradict the statement made by her husband, there was sufficient evidence to support the conviction.—*SEAGER v. WHITE* (1884), 51 L. T. 261; 48 J. P. 136, D. C.

**606. Executory agreement to sell.]—**By Licensing (Consolidation) Act, 1910 (c. 24), s. 65 (1), a person shall not "sell" any intoxicating liquor at any place except that for which he holds a license "for the sale" of that liquor, & by sub-sect. 2 if he acts in contravention of the sect. he is made liable to penalties:—*Held*: the words "sell" & "sale" refer to a completed sale, & a person who, on unlicensed premises, merely enters into an executory agreement for the sale of intoxicating liquor is not liable to the penalties

**PART XII. SECT. 1, SUB-SECT. 1.—A. (a).**

**6021. Licensee retaking possession—After temporary abandonment.]—***DUMIGAN v. WALSH*, [1904] 2 I. R. 298.—*IR*.

**p. Person selling under cover of license—Licensed person on premises—Purchase by stranger of day's receipts.]—**Deft. purchased for \$25, from a duly licensed hotel-keeper, the day's receipts of the bar, & at the close of the day had paid over to him such receipts:—*Held*: a conviction against deft. for selling liquor without a license could not be maintained.—*R. v. WESTLAKE* (1892), 21 O. R. 619.—*CAN.*

**q. ———.]—***R. v. THEBEN* (1888), 6 S. C. 68.—*S. AF.*

**r. License granted under bye-law—Bye-law quashed.]—**The quashing of a bye-law under which a certificate has been granted & license issued for the sale of spirituous liquors does not nullify the license; & a conviction for selling without license cannot in these circumstances be supported.—*It. v. STAFFORD* (1872), 22 C. P. 177.—*CAN.*

**s. Sale under expired license—Mistake.]—***O'HARA v. CAMERON* (1920), 58 So. L. R. 103.—*SCOT.*

**a. Sale between expiry & renewal—Days of grace.]—**When a man commits an offence as a licensed holder, between the expiration of his old license & its renewal, he cannot be legally prosecuted till the completion of the days of grace; after which date, if the license be renewed, it becomes retrospective, if not, the holder may then be prosecuted for having sold liquor without a license within the period of grace.—*R. v. MACKINTOSH*, [1908] O. R. C. 8.—*S. AF.*

**b. License to one partner—Conduct of business by other.]—**A. & B. being in partnership, a license to sell liquor was issued to B. B. left, but A. continued to carry on the business & engaged C. as barman. C. sold liquor to a customer & was convicted of selling liquor without a license:—*Held*: he was entitled to do so under the license issued in B.'s name.—*R. v. WARE* (1895), 12 S. C. 4.—*S. AF.*

**c. ——— After dissolution.]—**A license to sell liquor was granted to G., then in partnership with applt. The partnership was dissolved, & applt. continued to carry on the business on his own behalf, although no transfer of the license had been granted to him:—*Held*: applt. was properly convicted

of selling liquor without a license.—*R. v. HOFFMAN* (1905), 22 S. C. 32.—*S. AF.*

**d. Sale by chemist—Proprietary medicine containing alcohol.]—***GLEESON v. HOBSON*, [1907] V. L. R. 148.—*AUS.*

**e. ——— For medicinal purpose.]—***R. v. DENHAM* (1874), 35 U. C. R. 503.—*CAN.*

**f. ———.]—***GARDNER v. PARR* (1881), 14 N. S. R. (2 R. & G.) 225; 1 C. L. T. 710.—*CAN.*

**g. ———.]—***R. v. KAY, Ex p. NUGENT* (1908), 39 N. B. R. 135; 6 E. L. R. 272.—*CAN.*

**h. Sale by sheriff—Under distress warrant.]—**Canada Temperance Act does not prohibit judicial sales of intoxicating liquors, & property can be levied on, though it consists of intoxicating liquors only, & is in a place where the Act, Pt. II., is in force.—*Ex p. FITZPATRICK* (1893), 32 N. B. R. 182.—*CAN.*

**k. Omission to renew license—Postponement of licensing meeting—Expiry.]—***Held*: no defence to a charge for selling liquor without a license that the meeting to consider the applications for license had not

imposed by Licensing (Consolidation) Act, 1910 (c. 24), s. 65.—**TITMUS v. LITTLEWOOD**, [1916] 1 K. B. 732; 85 L. J. K. B. 738; 114 L. T. 614; 80 J. P. 239; 32 T. L. R. 278; 25 Cox, C. C. 337, D. C.

**607. Retail delivery of wholesale quantity—Vendor holding wholesale license.**—Resp. was not licensed to sell beer by retail, but held a wholesale beer dealer's license under Excise Licenses Act, 1825 (c. 81), which empowered him to sell beer in quantities of not less than 4½ gallons. On Apr. 8, 1910, one B. bought at the licensed premises 18 quart bottles of stout, & resp. agreed to store & deliver the bottles as the purchaser from time to time might require. Resp. gave on Apr. 8 to B. a receipt, & in his presence put aside 18 quart bottles of stout, which were placed in a locker under the counter in the shop together with a bill-head bearing B.'s name. From time to time the stout delivered was taken from the bottles which had been set aside by resp. on Apr. 8, & each delivery was recorded on the bill-head bearing B.'s name which had been placed with the bottles. On May 28, 1910, the last two of the 18 bottles paid for by B. on Apr. 8, were delivered at his house in accordance with an order given by him:—**Held**: there was a complete sale on Apr. 8, 1910, & resp. had not sold in respect of the last delivery the stout by retail without a license, contrary to Licensing Act, 1872 (c. 94), s. 3.—**HALES v. BUCKLEY** (1911), 104 L. T. 34; 75 J. P. 214, D. C.

**Sunday sale with six-day license.**—See Licensing (Consolidation) Act, 1910 (c. 24), s. 58 (3), (4); & Part IX., Sect. 7, *ante*.

**Sale by agent or servant of unlicensed principal.**—See Sub-sect. 1, A. (b), *post*.

(b) *By Agent or Servant of Unlicensed Principal.*

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 65, 85; Licensing Act, 1921 (c. 42), s. 7.

**608. Liability of servant or agent.**—**WILLIAMSON v. NORRIS**, No. 625, *post*.

**609. Liability of principal—Agent unlicensed.**—C., a license holder in the country, left the premises on Apr. 15, & no one knew where he went. The owner obtained possession on Apr. 23, & put in M., a new tenant, who sold liquors for his own benefit, but received authority from Mrs. C. & O., the owner. M. had no justices' license, & was supplied with liquors by O. for sale. O. being charged under 11 & 12 Vict. c. 43, s. 5, with aiding & abetting M. in selling liquors without a license:—**Held**: the justices rightly convicted O. as aiding & abetting M.—**OWEN v. LANGFORD** (1891), 55 J. P. 484, D. C.

**610. ——— Knowledge as to agent's acts.**—**JONES v. HARTLEY**, No. 627, *post*.

**611. ——— Husband & wife.**—Upon an information for unlawfully selling beer, under Beerhouse Act, 1834 (c. 85), s. 17, it was proved that applt.'s wife had actually supplied the beer to three persons who had asked applt. for beer,

been held till after Apr. 1, & that deft.'s application for a license had then been refused.—*Ex p. DRISCOLL* (1888), 27 N. B. R. 216.—**CAN.**

**1. Several licenses paid simultaneously—One omitted in error.**—A., who owned a number of hotels, sent a cheque intended to cover all his licenses to the proper officer, but by mistake the amount for the license in question was omitted. When he received the licenses, A., thinking that he had all his licenses, put them away without checking them. He was convicted of selling liquor without a license.—*R. v. VILGGE* (1917), E. D. L. 160.—**S. AF.**

**m. Statutory offence—Effect of Municipal Act, 1892.**—S. 208 of the above Act made it an offence to sell liquor by retail without a license, whether a bye-law providing for the issue of such licenses & fixing the amount of fees had been passed or not.—*Re Kwong Wo* (1893), 2 B. C. R. 336.—**CAN.**

**n. ———**—A sale of liquor is an offence only if not authorised by license under Ontario Temperance Acts.—*R. v. POWELL* (1920), 48 O. L. R. 492; 57 D. L. R. 741; 31 Can. Crim. Cas. 240.—**CAN.**

**o. Absence of knowledge—Of intoxicating nature of beverage.**—*R. v. RYAN* (1909), 7 E. L. R. 395.—**CAN.**

**p. Sale to Government—Liquor Act, 1921 (c. 30), s. 47.**—The chief inspector of provincial police gave money to two constables who, on instructions, bought with it whisky from A. The money was received from the provincial govt. —**Held**: on a charge of unlawfully selling liquor A. could not rely on the above sect. that "nothing in this Act shall apply to or prevent the sale of liquor by any person to the Govt."—*R. v. RODGERS*, [1923] 1 W. W. R. 1361; 39 Can. Crim. Cas. 379; 32 B. C. R. 199.—**CAN.**

**q. Sale to informant.**—*R. v. BURKE*, [1925] 2 W. W. R. 480; 43 Can. Crim. Cas. 393.—**CAN.**

## PART XII. SECT. 1, SUB-SECT. 1.—A. (b).

**608 l. Liability of servant or agent.**—

A waitress in a restaurant on unlicensed premises who gets an order from a customer for liquor & receives payment therefor & being supplied with the liquor in the restaurant brings it to the customer is not a person selling liquor within Licensing Act, 1890, s. 182.—**MOONEY v. STILL**, [1909] V. L. R. 227.—**AUS.**

**608 ii. ———**—**MOONEY v. MCKEAND**, [1909] V. L. R. 294.—**AUS.**

**608 iii. ———**—The servant of an unlicensed person who sells liquor, being ignorant of the nature of the article sold, or that it was liquor, is not guilty as principal of the offence nor can he be convicted as an aider & abettor.—**ALICHURCH v. COOPER**, [1923] S. A. S. R. 370.—**AUS.**

**608 iv. ———**—*R. v. WILLIAMS* (1878), 42 U. C. R. 462.—**CAN.**

**608 v. ———**—Deft., servant of a keeper of an unlicensed tavern, was convicted of selling liquor in her master's absence.—**Held**: good.—*R. v. HOWARD* (1880), 45 U. C. R. 346.—**CAN.**

**608 vi. ———**—*Ex p. KELLY* (1901), 32 N. B. R. 268.—**CAN.**

**608 vii. ———**—Deft. sought to set aside a conviction on the ground that the premises in which the sale was admitted to have taken place, although the property of deft., were at the time of the sale under lease to M., & deft. was in possession solely as the agent or servant of M.:—**Held**: the lease was a mere cover to enable deft. to continue the business, & deft. was the occupant of the premises.—*R. v. McNUTT* (1900), 33 N. S. R. 14.—**CAN.**

**608 viii. ———**—A person who simply acts as a messenger for the purchase of liquor, making no profit, cannot be convicted of the sale of liquor without a license.—*R. v. DAVIS* (1912), 23 O. W. R. 412; 4 O. W. N. 358; 8 D. L. R. 1046.—**CAN.**

**608 ix. ———**—An agent who sells intoxicating liquor on behalf of a principal, with knowledge that the latter has no license, is liable, as well as his principal, for selling intoxicating liquor without a license.—*R. v. DUNBAR* (1906), T. S. 226.—**S. AF.**

**609 i. Liability of principal—Agent unlicensed.**—The owner of a shop is criminally liable for any unlawful act done therein, in his absence by clerk or assistant, as the sale of liquor without a license by a female attendant.—*R. v. KING* (1869), 20 C. P. 246.—**CAN.**

**609 ii. ———**—The principal may be convicted under the Canada Temperance Act for selling liquor, although his agent who actually made the sale is unknown, & therefore cannot be convicted. *Ex p. JOHNSON* (1908), 39 N. B. R. 73.—**CAN.**

**609 iii. ———**—Where a contractor opened a store at his works, where he did not himself reside, & placed a shopman in charge of it, & the manager of the works was left temporarily in charge of the store by the shopman, & in his absence sold intoxicating liquor in the store, which was unlicensed:—**Held**: these facts did not make him an agent of the contractor so as to make the contractor liable for a breach of the Licensing Act.—*R. v. MAYBE* (1895), 9 E. D. C. 186.—**S. AF.**

**610 i. ——— Knowledge as to agent's acts.**—*Ex p. SALMON* (1866), 5 N. S. W. S. C. R. (L.) 397.—**AUS.**

**610 ii. ———**—In a prosecution for selling liquor without license, proof that the sale was made by A. in deft.'s shop in his absence, without showing any general or special employment of A. by deft. in the sale of liquors, is sufficient *prima facie* evidence against him.—*Ex p. PANKS* (1855), 8 N. B. R. (3 All.) 237.—**CAN.**

**610 iii. ———**—*R. v. CONROD* (1902), 35 N. S. R. 79.—**CAN.**

**610 iv. ———**—*R. v. PAKMERIN* (1909), 6 E. L. R. 541; 43 N. S. R. 448.—**CAN.**

**610 v. ———**—*R. v. MAXWELL* (1923), 40 Can. Crim. Cas. 345.—**CAN.**

**611 i. ——— Husband & wife.**—On an information for selling liquor without a license, proof merely of a sale by deft.'s wife in his house in his absence, does not justify a conviction.—*HITTENBACH v. ISLEY* (1881), 7 V. L. R. 104.—**AUS.**

*Sect. 1.—Relating to sale: Sub-sect. 1, A. (c), (d) & (e) i. & ii.]*

customer's house was merely the taking of an order to be forwarded on to the licensed premises, to be there dealt with by applt. & therefore, there was no evidence of any contract, whether executory or otherwise, for the sale of the beer made at the customer's house, & applt. could not be convicted under Licensing Act, 1872 (c. 94), s. 3, of selling the beer at a place where he was not authorised to do so by his license.—*STRICKLAND v. WHITTAKER* (1904), 90 L. T. 445; 68 J. P. 235; 52 W. R. 538; 20 T. L. R. 224; 48 Sol. Jo. 246; 20 Cox, C. C. 610, D. C.

*Annotation:—Reid. Titmus v. Littlewood, [1916] 1 K. B. 732.*

**623.** ————.]—Resp., who was licensed to sell by retail, at his brewery, beer for consumption off the premises, employed a drayman to deliver beer to customers. The drayman had no authority to sell any beer for resp., his sole duty being to deliver beer to customers only who had previously given orders for it, & he had been expressly ordered not to sell or deliver beer to other persons, & to bring back to the brewery any beer which he was unable to deliver. The drayman sold & delivered some bottled beer from his van to persons in a street who had not previously ordered it:—*Held*: resp. was not liable to be convicted under Licensing Act, 1872 (c. 94), s. 3, which prohibits, under penalties, any person licensed to sell by retail intoxicating liquor from selling the same at any place where he is not authorised by his license so to do.—*BOYLE v. SMITH*, [1906] 1 K. B. 432; 75 L. J. K. B. 282; 94 L. T. 30; 70 J. P. 115; 54 W. R. 519; 22 T. L. R. 200; 21 Cox, C. C. 84, D. C.

*Annotation:—Reid. Elder v. Bishop Auckland Co-op. Soc. (1917), 86 L. J. K. B. 1112.*

**624.** ————.]—Appls. were licensed to sell beer by retail at their brewery for consumption off the premises. To distribute their beer they employed a number of draymen, each of whom, as he went out, was supplied with an order book in which he entered the orders he received on his round; & he handed this book in at the brewery on his return, & from it his next day's load was made up. Draymen were warned not to deliver beer unless the order for it had been received at the brewery. On a certain day a drayman, S., went out with the goods on his van loaded in the usual way. None of the goods bore the name of any customer, & there was no identifying marks upon any of the bottles or crates of beer appropriating the same to a particular customer. S. sold a crate to a customer who had ordered it; he also sold bottles of beer to persons who had not ordered them. He received the money & paid it to applts. S. was convicted for selling the beer without being duly licensed, contrary to Licensing Act, 1872 (c. 94), s. 3, & applts. were afterwards convicted of aiding & abetting their drayman in the commission of the offence:—*Held*: applts. were properly convicted of aiding & abetting their drayman in the commission of the offence of unlawfully selling the beer without being duly licensed.—*STANSFELD & CO., LTD. v. ANDREWS* (1909), 100 L. T. 529; 73 J. P. 167; 25 T. L. R. 259; 22 Cox, C. C. 84, D. C.

—[See, also, No. 605, ante.

**625. House of Commons.]**—A servant of the House of Commons who, while serving at a bar within the precincts of the House, sells intoxicating liquor to a person who is not a member of the House, is not liable to be convicted under

Licensing Act, 1872 (c. 94), s. 3, of selling by retail intoxicating liquor without being duly licensed. *Semble*: the Licensing Acts are applicable to the Houses of Parliament.

It was argued for resp. that no offence had been committed, on the ground that the Houses of Parliament, in the regulation of their internal arrangements as to the sale of liquor, were entirely outside the control of the law as to licensing. Having regard to the view which we take of the other question to which I have referred, it is not necessary for us to decide this question; but I think it right to say that I am far, very far, from being satisfied that no offence has been committed. I am not at all impressed by the argument that because many of the provisions of the Licensing Acts cannot be worked with reference to the House of Commons, therefore the Acts do not apply. It does not follow that intoxicating liquor can lawfully be sold without a license, because some of the provisions of the Licensing Acts are inapplicable. Licensing Act, 1872 (c. 94), s. 3, begins with a very sweeping prohibition against the sale of intoxicating liquor by unlicensed persons: "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his license to sell the same." Then follow various provisions for the purpose of carrying out the objects of the Act, & there is a long series of exceptions in s. 72, which does not include the present case. I am far from saying that no offence has been committed by those under whose authority the sale took place. I wish to add that, in the face of the doubt, the very grave doubt, which exists, it is obvious that an appeal should be made to the Legislature to legalise & regulate what is going on, if Parliament thinks it expedient that the sale of liquor should take place within the precincts of the Houses of Parliament (*LORD RUSSELL OF KILLOWEN, C.J.*).—*WILLIAMSON v. NORRIS*, [1899] 1 Q. B. 7; 68 L. J. Q. B. 31; 79 L. T. 415; 62 J. P. 700; 47 W. R. 94; 15 T. L. R. 18; 43 Sol. Jo. 29; 19 Cox, C. C. 203, D. C.

*Annotations:—Consd. Dunning v. Owen, [1907] 2 K. B. 237; Caldwell v. Bethell, [1913] 1 K. B. 119. Reid. Peckover v. Defries (1906), 95 L. T. 883; Stanfeld v. Andrews (1909), 100 L. T. 529; Dickson v. Mayes (1910), 79 L. J. K. B. 253; Mellor v. Lydiate, [1914] 3 K. B. 1141. Mentd. Boyle v. Smith, [1906] 1 K. B. 432.*

**626. Unlicensed restaurant or hotel—Buying from licensed premises for customer—Restaurant keeper partner of licensee.]**—The keeper of a restaurant, carrying on business in premises not licensed for the sale of intoxicating liquors, was also a partner in a wine dealer's business carried on upon duly licensed premises in the neighbourhood. A customer, taking a meal in the restaurant, ordered a pint of claret from a waiter & gave him the money for it; the waiter went to the licensed premises, & there bought & paid for a pint bottle of claret which he brought back to the restaurant, where the customer consumed it. Upon the hearing of a summons against the keeper of the restaurant for selling wine without a license, a magistrate found that there had been a sale at the restaurant of the wine by deft.'s waiter to the customer, & convicted the defendant:—*Held*: there was evidence upon which the magistrate might properly hold that the sale was at the restaurant, & the conviction was right.—*PASQUIER v. NEALE*, [1902] 2 K. B. 287; 71 L. J. K. B. 835; 87 L. T. 230; 67 J. P. 49; 51 W. R. 92; 18 T. L. R. 704; 46 Sol. Jo. 616; 20 Cox, C. C. 350, D. C.

**627.** — [—]—Resp. was the owner of a hydro, for which she held no license. She ordered bottles of beer from a local stores, paying for them out of a deposit account at a rate charged to retailers buying in order to retail again. A servant of resp. supplied bottled beer to a guest, & the guest paid the bookkeeper for it:—*Held*: apart from the question of resp.'s knowledge of her servant's acts, there was evidence that she had sold the beer without a license, & should have been convicted.—*JONES v. HARTLEY* (1918), 88 L. J. K. B. 271; 118 L. T. 815; 82 J. P. 291; 26 Cox, C. C. 255, D. C.

(d) *Under Sale of Beer Act, 1795.*

*See Sale of Beer Act, 1795 (c. 113).*

**628. Jurisdiction of justices.**—*R. v. DRAKE*, No. 586, *ante*.

**629. Liability to penalty.**—The Sale of Beer Act, 1795 (c. 113), imposed no duty & is not an excise law. Its object was the regulation of the police. . . . If, therefore, a person sells ale without the magistrates' license, he sells it subject to the penalty provided by the Act. . . . Under 48 Geo. 3, c. 143 . . . there is no appeal given. The rule of law is that although a *certiorari* lies unless expressly taken away, yet an appeal does not lie unless expressly given by statute (*ABBOTT, C.J.*).—*R. v. HANSON* (1821), 4 B. & Ald. 519; 106 E. R. 1027.

*Annotations*.—*Reid. R. v. Stock* (1838), 8 Ad. & El. 405; *Ash v. Lynn* (1866), L. R. 1 Q. B. 270; *Furtado v. City of London Brewery Co.*, [1914] 1 K. B. 709. *Mentd. R. v. Warwickshire JJ.* (1838), 2 Jur. 543; *R. v. Surrey JJ.* (1869), 18 W. R. 166; *R. v. Dickinson, Ex p. Davis* (1909), 102 L. T. 48.

**630.** — *Sale of beer at races.*—(1) Excise Licenses Act, 1825 (c. 81), s. 11, which enacts that nothing herein contained shall extend to prohibit any person duly licensed to sell beer, cider, or perry by retail, to carry on his trade, for which he is licensed, in booths or other places, at the time & place within the limits of any lawful fair or any public races, does not dispense with the necessity of a magistrate's license, & any person selling beer at a race without such license is liable to the penalty imposed by Sale of Beer Act, 1795 (c. 113), s. 1. *Qu.*: whether a regatta is a race within Excise Licenses Act, 1825 (c. 81), s. 11.

(2) A person duly licensed, both by the magistrates & excise, to sell beer by retail in P., was held not entitled to sell beer by retail at a fair or public race in D., an adjoining borough, not having a license from the magistrates of D.—*ASH v. LYNN* (1866), L. R. 1 Q. B. 270; 7 B. & S. 255; 35 L. J. M. C. 159; 14 L. T. 224; 30 J. P. 247; 12 Jur. N. S. 485; 14 W. R. 583.

*Annotation*.—*Reid. Hannant v. Foulger* (1867), L. R. 2 Q. B. 399.

(e)

i. *Mode of Prosecution.*

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 99.*

**631. Whether indictment lies.**—An indictment will not lie where a statute creates an offence, & appoints the punishment.—*ANON.* (1897), 3 Salk. 25; 91 E. R. 670.

**632.** — [—]—*R. v. EDWARDS* (1701), 3 Salk. 27; 91 E. R. 671.

**633.** — [—]—*WATSON'S CASE* (1701), 3 Salk. 26; 91 E. R. 26; *sub nom. STEPHENS v. WATSON*, 1 Salk. 45.

*Annotations*.—*Reid. R. v. Edwards* (1701), 3 Salk. 27; *Anon.* (1703), 6 Mod. Rep. 86; *Anon.* (1703), 3 Salk. 189; *R. v. Robinson* (1759), 2 Burr. 799. *Mentd. R. v. Hill* (1729), 1 Barn. K. B. 259.

**634.** — [—]—*ANON.* (1703), 6 Mod. Rep. 86; 87 E. R. 844.

ii. *"Second Offence."*

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 65.*

**635. Meaning of "second offence"**—Must be of same description as previous offence.—By 32 & 33 Vict. c. 27, s. 17, where any person is convicted of an offence against the tenor or conditions of a license granted to him under any of the therein recited Acts, if any previous conviction since the passing of this Act be proved against him, the offence of which he is last convicted shall be deemed to be a second or third offence as the case may be.

*Deft.*, who held a license to sell beer under Beerhouse Act, 1830 (c. 64), one of the recited Acts, had been, since the passing of the former Act, convicted under 11 & 12 Vict. c. 49, s. 1, for keeping her house open on Sunday forenoon, which was also contrary to the tenor of her license, & she was afterwards convicted of refusing to admit a constable under Beerhouse Act, 1834 (c. 85), s. 7, & adjudged as for a second offence:—*Held*: the first conviction was for an offence against the tenor of her license so as to make it a previous conviction within 32 & 33 Vict. c. 27, s. 17.—*Ex p. SHORT* (1870), L. R. 5 Q. B. 174; 39 L. J. M. C. 63; 22 L. T. 94; 34 J. P. 599.

**636.** — *Previous conviction must be under same Act.*—The manager of a club was duly convicted under Beerhouse Act, 1834 (c. 85), s. 17, of selling beer by retail without having an excise retail license. Subsequently he was convicted under Licensing Act, 1872 (c. 94), s. 3, of selling intoxicating liquor, to wit beer, without a license. Upon the hearing of the latter charge the magistrate treated it as a second offence, & imposed the full penalty of £100 authorised in the case of "the

PART XII. SECT. 1, SUB-SECT. 1.—

A. (a).

**627 I. Unlicensed restaurant or hotel**—*Buying from licensed premises for customer.*—*GRAVES v. PANAM*, [1905] V. L. R. 297.—*AUS.*

**627 II.** — [—]—*A.*, taking a meal in *deft.*'s unlicensed restaurant, asked the waiter to buy him three bottles of beer, for which he gave him the money. The waiter purchased the beer at a saloon next door:—*Held*: there was not any disposal of liquor by *deft.*, to Y. under Municipal Act, 1911 (c. 170), s. 318.—*R. v. BOGROTAS* (1912), 18 B. C. R. 123.—*CAN.*

**c. Livery stable—Sale by employee**—*Liability of occupant.*—A livery stable is a "place" within Liquor License Act, 1903 (c. 22), s. 99, in which a sale of intoxicating liquor by a person employed by the occupant,

may make the occupant liable to a penalty under the Act, though there be no proof that the offence was committed with his authority or by his direction.—*R. v. McQUARRIE, Ex p. ROGERS* (1906), 37 N. B. R. 374.—*CAN.*

**d. Prohibition district—Orders taken for extra-provincial sales.**—*R. v. LE-MAIRE* (1920), 48 O. L. R. 475; 57 D. L. R. 631; 34 Can. Crim. Cas. 254; 19 O. W. N. 295.—*CAN.*

**e. — Delivery in.**—*NEWHOOK v. RYAN* (1907), 9 Nfld. L. R. 220.—*NFLD.*

**f. Bar on premises—Not in licensed house—Erected after license.**—*MURNANE v. ADAMS*, [1910] 2 I. R. 175.—*IR.*

**g. Licensed & unlicensed premises**—*On same erf—Sale on unlicensed premises.*—*ROULSTON v. R.* (1911),

T. P. D. 65.—*S. AF.*

**h. Subscription dance—Refreshments sold by promoters.**—*R. v. WALKER* (1904), 21 S. C. 195.—*S. AF.*

PART XII. SECT. 1, SUB-SECT. 1.—

A. (a) II.

**635 I. Meaning of second offence**—*Must be of same description as previous offence.*—Under Nova Scotia Temperance Act, 1910, s. 24, sale of liquors & keeping for sale are separate & distinct offences, & a person who had been convicted for selling cannot be convicted for a second offence where the subsequent charge is for keeping for sale.—*R. v. MOORE* (1917), 51 N. S. R. 51; 35 D. L. R. 394; 38 Can. Crim. Cas. 91.—*CAN.*

**635 I. — Previous conviction must be under same Act.**—*R. v. FOX*, [1918]

—*Relating to sale: Sub-sect. 1, A. (e) ii. & iii., & B. (a), (b) & (c) i. & ii.*

second offence" by Licensing Act, 1872 (c. 94), s. 3 (2):—*Held*: there could only be a conviction under Licensing Act, 1872 (c. 94), s. 3, for a second offence where the conviction for the first offence had been under the same statute, & the second conviction was therefore bad.—*Re* AUTHERS (1889), 22 Q. B. D. 345; 60 L. T. 454; 53 J. P. 116; 5 T. L. R. 216; 16 Cox, C. C. 588; *sub nom.* *Ex p.* AUTHERS, 37 W. R. 320; *sub nom.* *Ex p.* ANPHERS, 58 L. J. M. C. 62, D. C.

**637. Second or subsequent offence—Must follow previous conviction.**—The expression "second or any subsequent offence" in Licensing Act, 1872 (c. 94), s. 3, means a second or subsequent offence committed after a previous conviction or previous convictions, as the case may be, for an offence under the sect. & therefore the license is not forfeited upon a second conviction for an offence which is committed before the conviction for the first offence.—*R. v. SOUTH SHIELDS LICENSING JJ.*, [1911] 2 K. B. 1; 80 L. J. K. B. 809; *sub nom.* *R. v. SOUTH SHIELDS LICENSING JJ.*, *Ex p.* MORRISON, 105 L. T. 41; 75 J. P. 299; 27 T. L. R. 330; 22 Cox, C. C. 431; *sub nom.* *R. v. SOUTH SHIELDS LICENSING JJ.*, *Ex p.* NORRISON, 55 Sol. Jo. 386, D. C.

3 W. W. R. 197; 13 Alta. L. R. 535; 42 D. L. R. 650.—CAN.

**636 II.** —.—.—]—A conviction under the repealed Saskatchewan Temperance Act, 1917, of unlawfully selling liquor is considered to operate as a conviction under the Act of 1920.—*Re* SASKATCHEWAN TEMPERANCE ACT, *Re* KENNEDY, [1923] 1 W. W. R. 160.—CAN.

**k.** —.—.—]—*Whether under same section of the Act.*—*R. v. SIMMONS* (1903), 17 O. L. R. 239; 12 O. W. R. 776.—CAN.

**i.** —.—.—]—Ontario Temperance Act, s. 58, does not require that the conviction for the previous offence shall have been made under the same sect. as that under which the second charge is laid.—*R. v. JOHNSTON* (1921), 49 O. L. R. 74; 68 D. L. R. 452; 19 O. W. N. 446.—CAN.

**637 I. Second or subsequent offence—Must follow previous conviction.**—*CHRISTIE v. BRITNELL* (1895), 21 V. L. R. 71.—AUS.

**637 II.** —.—.—]—*R. v. QUEENS COUNTY JJ.* (1875), 15 N. B. R. (2 Puk.) 485.—CAN.

**637 III.** —.—.—]—*R. v. WALKER* (1909), 7 E. L. R. 295.—CAN.

**637 IV.** —.—.—]—*R. v. McMANUS*, [1918] 3 W. W. R. 3; 30 Can. Crim. Cas. 122.—CAN.

**637 v.** —.—.—]—*R. v. ROBINS* (1920), 48 O. L. R. 527; 35 Can. Crim. Cas. 1; 19 O. W. N. 348.—CAN.

**637 vi.** —.—.—]—A., against whom there was no previous conviction, was convicted of selling liquor without a certificate on four occasions:—*Held*: the offence was a first offence although it had been effected by a number of sales.—*McCLUSKEY v. BOYD*, [1916] S. C. (J.) 31.—SCOT.

**m.** —.—.—]—*Must be after first information.*—*R. v. McKENZIE* (1890), 23 N. S. L. (11 R. & G.) 6.—CAN.

**n.** —.—.—]—In a conviction, for a second offence, it must appear that such offence was committed after the information had been laid down for the first offence.—*Ex p.* LE BLANC (1895), 33 N. B. R. 90.—CAN.

**o.** —.—.—]—*Whether more than one second offence.*—There is no authority under Canadian Temperance Act to convict a person of more than one "second" offence.—*Ex p.* EDWARDS (1895), 31 N. B. R. 118.—CAN.

### iii. Imprisonment.

**Prior issue of distress warrant.**—*See* DISTRESS, Vol. XVIII., p. 434, Nos. 1709, 1710.

**Duration of imprisonment.**—*See* DISTRESS, Vol. XVIII., p. 435, No. 1717.

### B. Without Excise License.

#### (a) Manufacturer's License.

*See* Finance (1909–1910) Act, 1910 (c. 8), s. 50 (1).

#### (b) Wholesale Dealer's License.

**638. Who is wholesale dealer—Person buying with intention to sell.**—*R. v. EXCISE COMRS.*, No. 679, *post*.

**639. Minimum quantity saleable.**—*R. v. JENKINS, ETC.*, GLAMORGANSHIRE JJ., No. 560, *ante*.

#### (c) Retailer's License.

##### i.

*See* Excise Licenses Act, 1825 (c. 81), ss. 23, 26, 27, 29; Beerhouse Act, 1840 (c. 61), s. 7; Refreshment Houses Act, 1860 (c. 27), s. 22.

*See* Finance (1909–1910) Act, 1910 (c. 8), s. 50 (3), (4), sched. VI.

**640. To what liquor applicable—"Sweets or made wine."**—By 9 Geo. 4, c. 61, s. 18, a penalty is imposed on every person who shall, without a

**p.** —.—.—]—*Proof of previous conviction.*—It is sufficient to put in certificates of the previous convictions, without otherwise identifying deft. as the party named therein; & identity of name is evidence of identity of person.—*Ex p.* DUGAN (1893), 32 N. B. R. 98.—CAN.

**q.** —.—.—]—*R. v. MURPHY* (1894), 27 N. S. R. (15 R. & G.) 161.—CAN.

**r.** —.—.—]—A certificate that deft. had been convicted for keeping intoxicating liquor for sale contrary to Canada Temperance Act:—*Held*: sufficient proof of a previous offence upon which to base a second conviction, though it did not appear from the certificate, nor was proved, that such previous conviction was for a first offence.—*R. v. BYRON, Ex p. DATSON* (1906), 37 N. B. R. 83.—CAN.

**t.** —.—.—]—Dft. was convicted of a second offence against Liquor License Act, by the same justices who had made the former conviction. Among papers returned upon *certiorari* was a certificate of the previous conviction, signed by the justices, but it did not appear that any use was made of the certificate at the trial:—*Held*: the conviction was valid.—*R. v. WELLMAN* (1908), 17 O. L. R. 583; 12 O. W. R. 822; 14 Can. Crim. Cas. 335.—CAN.

**a.** —.—.—]—Where at the trial a conviction made by the same magistrate was proved:—*Held*: there was some evidence of identity, & the conviction must stand.—*R. v. BLACKBURN* (1919), 62 N. S. R. 29; 49 D. L. R. 482; 32 Can. Crim. Cas. 119.—CAN.

**b.** —.—.—]—While Ontario Temperance Act, s. 96, states a method by which a prior conviction may be proved, this is merely permissive; & nowhere is the procedure expressly laid down by which a magistrate shall "inquire concerning such previous conviction."—*R. v. HELPERT* (1921), 48 O. L. R. 627; 35 Can. Crim. Cas. 25; 19 O. W. N. 368.—CAN.

**c.** —.—.—]—If the words, in an information for selling liquor contrary to law, are added "for a second offence" to the particulars, it is necessary to prove the prior offence, under Ontario Temperance Act.—*R. v. MERRITT* (1921), 36 Can. Crim. Cas. 137.—CAN.

**d.** —.—.—]—*Whether necessary to allege previous conviction.*—An information which charged a second offence, did not allege a previous conviction:—*Held*: It is not sufficient merely to allege a previous offence or a previous information for an offence.—*R. v. JORDAN* (1909), 7 E. L. R. 53.—CAN.

**e.** —.—.—]—It is the fact of a first offence, not a first conviction, that attaches the increased punishment to the second offence; & in an information it is apparently possible & proper to allege, not a previous conviction, but a previous offence. But a charge in the information that deft. previously had been convicted of having unlawfully sold liquor on a certain named day, is a sufficient allegation that a previous offence had been committed.—*R. v. TANSLEY*, [1917] 3 W. W. R. 70.—CAN.

### PART XII. SECT. 1, SUB-SECT. 1.—B. (a).

**f. Sale of patent medicine—Under license issued to another.**—The manufacture & sale of an alleged patent medicine containing a prohibited percentage of alcohol, under a certificate issued to another permitting the manufacture of a registered medicine, constitutes an infringement of Sales of Liquor Act (Sask.), 1915, c. 39.—*R. v. REDMAN*, [1918] 1 W. W. R. 572; 29 Can. Crim. Cas. 304.—CAN.

### PART XII. SECT. 1, SUB-SECT. 1.—B. (b).

**g. Sale in wholesale quantities—Under manufacturer's license—Whether additional license required.**—A brewer licensed to manufacture ale at P. under a Dominion license, had a cellar or vault at B., where he stored the ale & sold it in quantities not less than allowed to be sold by wholesale:—*Held*: the sale was authorised under the Dominion license, & a provincial license was not required.—*R. v. YOUNG* (1885), 8 O. R. 476.—CAN.

**h. Under Liquor License Act, 1886—Wholesale & brewers' license clauses—Validity.**—*R. v. McDUGALL* (1889), 22 N. S. R. (10 R. & G.) 462.—CAN.

### PART XII. SECT. 1, SUB-SECT. 1.—B. (a) i.

**aa. Vigneron—Sale by agent—Liability.**—A vigneron sold his wine



license, sell any excisable liquor by retail to be drunk on the premises; & by sect. 37 "excisable liquor" is to include sweets or wine, which now are or hereafter may be charged with duty either by customs or excise. By 4 & 5 Will. 4, c. 77, s. 9, the excise duty on sweets or made wines is repealed; but, by sect. 10, the duty on licenses to be taken out by retailers thereof is continued, & all such licenses shall still be taken out:—*Held*: a person who, since 4 & 5 Will. 4, c. 77, sold sweets or made wines by retail, etc., without a license could not be convicted under 9 Geo. 4, c. 61, s. 18, sweets & made wines being no longer excisable liquors within the meaning of that Act.—*R. v. LANCASHIRE* (1857), 7 E. & B. 839; 29 L. T. O. S. 181; 22 J. P. 226; 2 Jur. N. S. 1095; 5 W. R. 658; 119 E. R. 1458; *sub nom.* LANCASHIRE *v.* STAFFORDSHIRE JJ., 26 L. J. M. C. 171.

*Annotation*:—*Apld.* Jones *v.* Whittaker (1870), L. R. 5 Q. B. 541.

**641. — Beer at one penny halfpenny per quart.**—Beerhouse Act, 1840 (c. 61), s. 13, which imposes a penalty on persons selling beer by retail without a license, applies to persons selling beer at one penny halfpenny the quart.—*READ v. STOREY* (1861), 6 H. & N. 423; 30 L. J. M. C. 110; 3 L. T. 674; 25 J. P. 88; 7 Jur. N. S. 344; 9 W. R. 418; 158 E. R. 174.

**642. — Manufactured liquor sold as "beer."**—*FAIRHURST v. PRICE*, No. 7, *ante*.

**643. Maximum quantity saleable.**—*R. v. JENKINS, ETC., GLAMORGANSHIRE JJ.*, No. 560, *ante*.

## ii. Orders taken without License.

See Revenue Act, 1867 (c. 90), s. 17; Finance (1909–1910) Act, 1910 (c. 8), s. 50 (3).

**644. Licensee with licensed & unlicensed premises—Orders received at unlicensed premises—By agent of licensee.**—*Applts.* were convicted under Excise Licenses Act, 1825 (c. 81), s. 2, for retailing spirits in Cheltenham without a retailer's excise license. They carried on business as wine & spirit merchants in Worcester, & held all the necessary licenses for dealing in & retailing spirits there. They did not hold a license to retail spirits at Cheltenham; but they caused premises at Cheltenham to be let to D., one of their travellers, for their own use, took out a license for the purpose of carrying on there the business of dealers in beer, & put up a board inscribed with their names as "Distillers, Wine Merchants, & Brewers, Worcester." D. took orders for spirits at these premises & transmitted them to Worcester, where *appls.* executed them by sending spirits from Worcester:—*Held*: the conviction must be affirmed, for *appls.* must be taken to carry on

business at Cheltenham as retailers of spirits, although the spirits they sold were kept in & delivered from a store in another town.—*STALLARD v. MARKS* (1878), 3 Q. B. D. 412; 47 L. J. M. C. 91; 38 L. T. 566; 42 J. P. 359; 26 W. R. 694.

*Annotations*:—*Distd.* Stuchbery *v.* Spencer (1886), 51 J. P. 181. *Refd.* Stephenson *v.* Rogers (1899), 80 L. T. 193; Strickland *v.* Whittaker (1904), 90 L. T. 445.

**645. — By traveller of licensee.**—*S.* was traveller of P., of Bristol, a spirit merchant, & resided in Glamorgan, having a house & office which were part of an agricultural implement maker's premises. *S.* also took orders there, which he sent on to P., who forwarded the spirits from Bristol to the customer. The justices held that *S.* was a traveller, & exempt from taking the excise licence:—*Held*: it was a question of fact for justices, & their finding that *S.* was acting merely as a traveller could not be interfered with.—*STUCHBERY v. SPENCER* (1886), 55 L. J. M. C. 141; 51 J. P. 181; 2 T. L. R. 789, D. C.

**646. — Place of appropriation.**—*Brewers* having a retail off license for the sale of beer in respect of premises in P. street, Cardiff, occupied an office in M. street, Cardiff, for which they held no license & at which no beer was kept. This office was opened merely for the purpose of receiving orders, which were then sent on to the licensed premises in P. street, where they were accepted or rejected. No orders were accepted & no payments were made at this office, & there was no appropriation of the beer there, but the orders were simply forwarded to the licensed premises, where, if the order were accepted, the beer was appropriated to the purchaser, & the beer so appropriated was afterwards delivered at the purchaser's residence where payment was made:—*Held*: what took place in the office in M. street, where the orders were merely received & forwarded, was not a sale of the beer at that place within the meaning of Excise Act, 1860 (c. 113), s. 37, & the brewers could not be convicted under that section of selling the beer "at any other house or place than the house or place specified in their license."—*STEPHENSON v. ROGERS (W. J.), LTD.* (1899), 80 L. T. 193; 63 J. P. 230; 15 T. L. R. 148, D. C.

*Annotations*:—*Consd.* Strickland *v.* Whittaker (1904), 90 L. T. 445. *Refd.* Titmus *v.* Littlewood, [1916] 1 K. B. 732.

**647. —**—*A.* grocer, having an excise license for the sale of beer by retail at one of his shops, took an order for beer at another of his shops in respect of which he had no such license:—*Held*: he was liable to the penalty imposed by Inland Revenue Act, 1867 (c. 90), s. 17, upon persons who, without having a proper excise license authorising them so to do, take orders for spirits, wine or other articles, for the

through an unlicensed agent at a place elsewhere than the vineyard where it was made:—*Held*: the agent could not be convicted of selling without a license.—*MUGRAVE v. GRAHAM* (1904), 4 S. R. N. S. W. 475; 21 N. S. W. W. N. 145.—*AUS.*

**1. Effect of single sale—Whether proof of regular dealing.**—The provisions of Excise License Act, 1825, c. 81, imposing penalties for retailing beer without a license applied only to dealers, & a person who, without a license, sold one bottle of beer, was not liable in the penalty if it appeared that the sale was an isolated act; but a single act may legitimately lead to the conclusion that the seller is a dealer.—*R. v. BRATTE* (1866), 5 Maoph. (Ct. of Sess.) 191; 39 Sc. Jur. 90.—*SCOT.*

*m. Hawking — Sale on road —*

*Liquor obtained from licensed premises.*—*NEILSON v. DUNSMORE* (1900), 3 F. (Ct. of Sess.) 6, J.—*SCOT.*

*n.* — *J. A.*, in the employment of a licensed grocer, sold & delivered a pint of whisky from a van to B. on a public road. B. had not ordered the same previously. Liquors taken out by A. were frequently returned by him to his master as being unsold or undelivered, & A.'s actings were known to him:—*Held*: the master, as well as A., were rightly convicted of hawking excisable liquors.—*HOGG v. DAVIDSON* (1901), 3 F. (Ct. of Sess.) 49; 38 Sc. L. R. 544; 8 S. L. T. 487, J.—*SCOT.*

**PART XII. SECT. 1, SUB-SECT. 1. — B. (c) ii.**

*e. By agent—In province not covered*

*by licensr.*—*FOWLER v. MORTON*, [1905] V. L. R. 76.—*AUS.*

*p.* — *On licensed premises.*—*BRYANT v. SALEM*, [1916] N. Z. L. R. 1085.—*N.Z.*

*q.* — *Liability of agent.*—An agent who takes orders for liquor on behalf of his principal cannot be convicted of selling liquor without a license in contravention of Act 28 of 1883, s. 75.—*R. v. LYONS* (1908), 25 S. C. 657.—*S. AF.*

*r.* — *A.* took orders for liquor directed to a certain farmer. In execution of such orders he bought the wine with his own money, & after receiving a commission, delivered it to his customer, & took payment therefor:—*Held*: as he was not the *bona fide* agent of the farmer, he was rightly convicted of dealing in liquor without



**Sect. 1.—Relating to sale:** *Sub-sect. 1, B. (c) ii. & iii. & C.; sub-sect. 2, A. (a), (b) & B.; sub-sect. 3, A.* dealing in, retailing or selling whereof an excise license is by law required.—*ELIAS v. DUNLOP* [1906] 1 K. B. 266; 75 L. J. K. B. 168; 94 L. T. 164; 70 J. P. 103; 22 T. L. R. 162; 50 Sol. Jo. 158; 21 Cox, C. C. 105, D. C.

iii. *Offences relating to Spirits.*

See *Spirits Act, 1880* (c. 24), ss. 146, 147, 148.

*C. Sale under Statutory Privilege to Trade.*

See 56 Geo. 3, c. 67; Statute Law Revision Act, 1873 (c. 91).

Licensing (Consolidation) Act, 1910 (c. 24) s. 65 (1).

**648. Soldiers of Peninsular war—Exercise of privilege—Necessity for licence.**—A soldier's child who keeps a house for retailing beer & wine, is not exempted from the penalties imposed by the revenue Acts for doing so without having the usual excise licenses.—*ANDERSON v. GUTTERIDGE* (1862), 26 J. P. 326.

**649.** ————]—56 Geo. 3, c. 67, provided that all such officers, mariners, soldiers or marines, as had been employed in the service of His Majesty since 1802, & also the wives & children of such officers, etc., might set up & exercise such trades as they were apt & able for in any city, town or place, without any let, suit or molestation of any person whatsoever, any statute, law ordinance, custom or provision, to the contrary in anywise notwithstanding:—*Held:* this Act did not exempt persons coming within the classes described therein from the general provisions of the licensing or other Acts, but had reference merely to various restrictions such as those imposed by charters, or by local privileges or customs, & therefore did not enable a person to sell intoxicating liquor without the proper license under the Licensing Acts.—*KILLIN v. SWATTON* (1896), 76 L. T. 55; 61 J. P. 150; 45 W. R. 235; 13 T. L. R. 121; 18 Cox, C. C. 477, D. C.

**SUB-SECT. 2.—SALE AND CONSUMPTION CONTRARY TO TERMS OF LICENSE.**

*A. Justices' License.*

(a) *Drinking on or near Premises with Off License.*

See Licensing (Consolidation) Act, 1910 (c. 24), s. 66 (1).

**650. Highway near premises.**—Deft., a person licensed to sell beer not to be drunk on the premises, sold beer to Y., who brought a jug for it & carried it across the highway to the cottage of one S., about fourteen yards from deft.'s premises & handed the jug to S., who was standing in his own garden. S., having drunk some of the beer,

returned the jug over the wall to Y. & others, who also drank of it standing on the pathway close to the wall. The jug was refilled two or three times, & the beer drunk in the same way. Deft. received the money for the beer on each occasion, & saw or might have seen what was going on:—*Held:* this evidence did not justify a conviction of deft. under Licensing Act, 1872 (c. 94), s. 5, for permitting drinking "on the premises where the beer was sold, or on any highway adjoining or near such premises, with the privity or consent of the seller."—*BATH v. WHITE* (1878), 3 C. P. D. 175; 42 J. P. 375; 26 W. R. 617.

—]—See, also, Nos. 651, 652, post.

(b) *Carrying to Unlicensed Place.*

See Licensing (Consolidation) Act, 1910 (c. 24), s. 66 (2).

*B. Excise License.*

See Finance (1909–10) Act, 1910 (c. 8), s. 50 (4).

**651. Off license—Customer drinking outside—On bench affixed to house.**—A person licensed to sell beer by retail, "to be drunk or consumed off the premises," supplied a pint of beer to a traveller who sat upon a bench placed & fastened against the wall of the house, returning the mug in which he was served:—*Held:* the beer-shop keeper was properly convicted of the offence of selling beer to be drunk on the premises, within the Beerhouse Act, 1834 (c. 85), s. 17; the justices are not warranted in adjudicating a forfeiture of the license without legal proof of a former conviction: a mere reference to the records of the petty-sessions, where former convictions were entered, will not suffice.—*CROSS v. WATTS* (1862), 13 C. B. N. S. 239; 1 New Rep. 62; 32 L. J. M. C. 73; 7 L. T. 463; 27 J. P. 7; 9 Jur. N. S. 776; 11 W. R. 210; 143 E. R. 96.

*Annotation:—Distd. Deal v. Schofield* (1867), L. R. 3 Q. B. 8.

**652.** ————] **Beer handed through window.**—Deft. was a person licensed to sell beer not to be drunk on the premises; his servant handed beer in a mug of deft.'s through an open window of deft.'s premises, to a person who, after paying for it, drank it immediately, standing on the highway as close as possible to the window:—*Held:* this evidence did not justify a conviction of deft. under Beerhouse Act, 1840 (c. 61), s. 13, for "selling beer to be consumed on the premises where sold."—*DEAL v. SCHOFIELD* (1867), L. R. 3 Q. B. 7; 8 B. & S. 760; 37 L. J. M. C. 15; 32 J. P. 81; 16 W. R. 77; *sub nom.* *Schofield v. Deal JJ.*, 17 L. T. 143.

—]—See, also, No. 650, ante.

**SUB-SECT. 3.—DRUNKENNESS ON PREMISES.**

*A. Permitting Drunkenness.*

See Licensing (Consolidation) Act, 1910 (c. 24), s. 75 (1), (2), (3).

a license.—*R. v. SPANGENBERG* (1909), 26 S. C. 312; 19 C. T. R. 629.—*S. AF.*  
t. — *Order taken in street—Actual sale on licensed premises.*—*R. v. COHEN* (1909), 26 S. C. 331.—*S. AF.*

**PART XII. SECT. 1, SUB-SECT. 2.—B.**

a. *Off license—Grocer's certificate—"Gift" of drink on premises.*—*Held:* a grocer permitting a customer to test whisky on his premises while the purchase of a gallon was being made did not amount to a breach of his certificate.—*LENNOX v. FERGUSON* (1888), 5 Couper, 33; 19 So. L. R. 672.—*SCOT.*

b. — *Liquor consumed on pre-*

*mises—By guests.*—*Held:* gratuitously giving ale by way of a treat to two persons in the kitchen behind the shop was not giving ale to be consumed on the premises in the sense of the Public-Houses Act, 1862.—*KAY v. GEMMELL* (1884), 12 R. (Ct. of Sess.) 14; 22 So. L. R. 89, J.—*SCOT.*

c. ————]—*M'PETRIE v. CADENHEAD* (1885), 12 R. (Ct. of Sess.) 35; 22 So. L. R. 566, J.—*SCOT.*

d. ————]—A. called on a grocer in his licensed premises to settle an account & to introduce B. as a new customer. He asked that B. should be supplied with half a glass of whisky, & it was drunk by B. on

the premises:—*Held:* the grocer had committed a breach of his certificate.—*MACPHERSON v. CAMPBELL* (1892), 19 R. (Ct. of Sess.) 99; 29 So. L. R. 618; 3 White, 236, J.—*SCOT.*

e. *On license—Orders obtained by canvasser—Liability of licensee.*—A canvasser authorised by the licensee of a bottle-store to canvass & receive orders off the premises & to receive money with such orders, on the understanding that all such orders are subject to the acceptance or rejection of the licensee, merely by virtue of such authority, cannot lawfully render the licensee guilty of selling liquor off the premises.—*R. v. STEWART* (1911), T. P. D. 1004.—*S. AF.*

**653. What amounts to—Customer found drunk near premises.]**—A licensed person may be convicted for permitting drunkenness on his premises upon evidence that a person who had been drinking on such premises was found drunk at some distance from them.—*ETHELSTANE v. OSWESTRY JJ.* (1875), 33 L. T. 339; *sub nom. Ex p. ETHELSTANE*, 40 J. P. 39.

**654. — Licensee drunk on premises.]**—A licensed person cannot be convicted of permitting drunkenness under Licensing Act, 1872 (c. 94), s. 13, by reason of getting drunk on his own premises.—*WARDEN v. TYE* (1877), 2 C. P. D. 74; 46 L. J. M. C. 111; 35 L. T. 852; 41 J. P. 120, D. C.

*Annotations:—*Consd. *Thompson v. McKenzie*, [1908] 1 K. B. 905; *Young v. Gentle*, [1915] 2 K. B. 661. *Mattison v. Johnson* (1916), 85 L. J. K. B. 741. *Blay v. Dadswell*, [1922] 1 K. B. 632.

**655. — Selling to drunken person.]**—A licensed person who sells intoxicating liquor on his premises to a drunken person is liable to be convicted under Licensing Act, 1872 (c. 94), s. 13, of the offence of permitting drunkenness to take place on his premises.—*EDMUNDS v. JAMES*, [1892] 1 Q. B. 18; 61 L. J. M. C. 56; 65 L. T. 675; 56 J. P. 40; 40 W. R. 140; 8 T. L. R. 4; 36 Sol. Jo. 13, D. C.

**656. — Drunken person on premises—No drink supplied.]**—It is not necessary to constitute the offence of permitting drunkenness on licensed premises within Licensing Act, 1872 (c. 94), s. 13, to show that a drunken person was served with drink on the premises.—*HOPE v. WARBURTON*, [1892] 2 Q. B. 134; 61 L. J. M. C. 147; 66 L. T. 589; 56 J. P. 328; 40 W. R. 510; 30 Sol. Jo. 489, D. C.

*Annotations:—*Refd. *Lawson v. Edmondson* (1908), 78 L. J. K. B. 36; *Thompson v. McKenzie*, [1908] 1 K. B. 905.

**657. — Condition unknown to licensee—Not "knowingly permitting."]**—In the absence of all knowledge by a licensed person of the fact of a person on his premises being in a drunken condition justices are justified in dismissing an information against such licensed person for "permitting drunkenness" on his premises. "Permitting" in Licensing Act, 1872 (c. 94), s. 13, implies "knowingly permitting" the commission of the offences therein mentioned.—*SOMERSET v. WADE*, [1894] 1 Q. B. 574; 63 L. J. M. C. 126; 70 L. T. 452; 58 J. P. 231; 42 W. R. 399; 10 T. L. R. 313; 10 R. 105, D. C.

**658. — Condition known to servant in charge—Liability of licensee.]**—*WORTH v. BROWN* (1890), 40 Sol. Jo. 515; 62 J. P. Jo. 658, D. C.

**659. — ]**—By Licensing (Consolidation) Act, 1910 (c. 24), s. 75 (3), if the holder of a justices' license is charged with permitting drunkenness on

his premises, & it is proved that any person was drunk on his premises, it shall lie on the holder of the license to prove that he & the persons employed by him took all reasonable steps for preventing drunkenness on the premises:—*Held*: it may be a reasonable step for preventing drunkenness on licensed premises for the barman who supplies two drinks to a sober person to ascertain for whom the second drink is intended, & if he omits to do so, he may be omitting to take all reasonable steps for preventing drunkenness on the premises if in fact the second drink is intended for a drunken person.—*RADFORD v. WILLIAMS* (1913), 110 L. T. 195; 78 J. P. 90; 30 T. L. R. 108; 24 Cox, C. C. 22, D. C.

*Compare* Sub-sect. 3, B., *post*.

**660. — Drunkenness after permitted hours—Acceptance of drunk person as guest.]**—Premises licensed for the sale of intoxicating liquors do not during the hours when they are closed to the public cease to be licensed premises for the purposes of Licensing Act, 1872 (c. 94), s. 13, even as regards lodgers upon the premises.

A guest arrived at an hotel after the closing hour & engaged a bedroom. At the time of his doing so he was drunk to the knowledge of the hotel manager. He was shortly afterwards found drunk upon the premises by a constable:—*Held*: as by Licensing Act, 1872 (c. 94), s. 18, a licensed person may refuse to admit to & may turn out of the premises any person who is drunk, the hotel proprietor was liable to be convicted under sect. 13 of permitting drunkenness upon his premises, he being unable under the circumstances to discharge the onus cast upon him by Licensing Act, 1902 (c. 28), s. 4, of showing that he took all reasonable steps for preventing drunkenness upon the premises.—*THOMPSON v. MCKENZIE*, [1908] 1 K. B. 905; 77 L. J. K. B. 605; 98 L. T. 896; 72 J. P. 150; 24 T. L. R. 330; 52 Sol. Jo. 302; 21 Cox, C. C. 620, D. C.

*Annotations:—*Consd. *Lawson v. Edmondson*, [1908] 2 K. B. 952; *Young v. Gentle*, [1915] 2 K. B. 661.

**661. — Friends of licensee—No payment for drink.]**—*LAWSON v. EDMINSON*, No. 664, *post*.

**662. — Customer supplied by stranger—No knowledge of licensee.]**—Two men were on the premises of resp., a licensed beerhouse keeper, & one produced from his pocket a bottle of whisky which he handed to the other, who drank out of the bottle without the knowledge of resp. & became helplessly drunk. Resp. caused him to be laid on a sofa & provided him with tea in order to bring him to his senses. Finally, when he was still in a dazed condition, he was conducted home by the resp.'s daughter. On a summons against resp. for permitting drunkenness on her licensed

out, does not constitute a permitting or suffering by him of drunken persons to meet on the premises, under Liquor Act, 1916, s. 36.—*R. v. CRIGHTON*, [1917] 3 W. W. R. 499; 29 Can. Crim. Cas. 181.—*CAN.*

**663 iii. — ]**—*R. v. POMERLEAU*, [1917] 1 W. W. R. 1457; 28 Can. Crim. Cas. 7.—*CAN.*

**665 iv. — ]**—Soldiers, while verging upon intoxication, were served by N., the holder of a license, with liquor. A quarrel arose between the soldiers & another man who was on the premises. N., removed this man, but made no attempt to get the soldiers to leave the place:—*Held*: N. had rightly been convicted of permitting drunkenness on his premises.—*R. v. NORMAN* (1902), 19 S. C. 200.—*S. AF.*

**1. — Knowledge of licensee.]**—*R. v. OTTO* (1896), 13 S. C. 251.—*S. AF.*

#### PART XII. SECT. 1, SUB-SECT. 3.—A.

**655 i. What amounts to—Selling to drunken person.]**—*BROWN v. BOWDEN* (1900), 19 N. Z. L. R. 98.—*N.Z.*

**656 i. — Drunken person on premises—No drink supplied.]**—In a charge against the holder of a liquor license of permitting drunkenness to take place on his licensed premises, it is sufficient that a drunk person was permitted to remain on the licensed premises, & it is not a valid defence to show that such person got drunk somewhere else, & that no liquor was supplied to him at the licensed premises in question.—*R. v. REYNOLDS* (1896), 11 E. D. C. 17.—*S. AF.*

**658 i. — Condition known to servant in charge—Liability of licensee.]**—*MOURITZEN v. WHITE* (1910), 12 W. A. L. R. 158.—*AUS.*

**658 ii.**

*McROBIE v. BOWDEN* (1904), 24 N. Z. L. R. 10.—*N.Z.*

**659 iii. — ]**—To establish the guilt of a licensee charged with permitting drunkenness on licensed premises, there must be knowledge, actual or constructive, of the part of such licensee & if in the circumstances there ought to have been such knowledge, the ct. will presume it. The knowledge of barman in the employment of the licensee is the constructive knowledge of the latter.—*R. v. SCHMITZ* (1912), C. P. D. 507; W. R. 422.—*S. AF.*

**659 i. — ]**—*R. v. LICENSEES REDUCTION BOARD, Ex p. CARLTON BREWERY*, [1908] V. L. R. 79.—*AUS.*

**659 ii. — ]**—The failure to eject immediately from a hotel persons who are found intoxicated therein, & who are told by the proprietor to get

*Sect. 1.—Relating to sale: Sub-sect. 3, A., B. C.; sub-sects. 4 & 5, A. & B.; sub-sect. 6, A. (a).]*

premises, after the above facts had been proved by the prosecution, the justices found that resp. acted reasonably in endeavouring to restore the man to consciousness & took all reasonable steps for preventing drunkenness on the premises, & they therefore dismissed the summons without calling upon resp. for her defence:—*Held*: on the above facts there was evidence to support the finding of the justices.—*TOWNSEND v. ARNOLD* (1911), 75 J. P. 423, D. C.

663. "Reasonable steps to prevent drunkenness"—Onus of proof on licensee.]—*THOMPSON v. MCKENZIE*, No. 660, *ante*.

664. ———.]—The wife of a licensee entertained some private friends on the licensed premises after the hour of closing. No drinks were supplied for payment after the hour of closing, but the wife of the licensee stood drinks round. Subsequently two of the guests were found drunk on the premises at one a.m.:—*Held*: the licensee was guilty under Licensing Act, 1872 (c. 94), s. 13, of the offence of permitting drunkenness upon licensed premises, as the licensee had not shown that he had taken all reasonable steps to prevent drunkenness on his premises: & the hour of closing has nothing to do with the offence of permitting drunkenness on licensed premises under sect. 13.—*LAWSON v. EDMINSON*, [1908] 2 K. B. 952; 78 L. J. K. B. 30; 90 L. T. 797; 72 J. P. 479; 25 T. L. R. 11; 53 Sol. Jo. 15; 21 Cox, C. C. 734, D. C.

*Annotation*:—*Consd.* Young v. Gentle, [1915] 2 K. B. 661.

665. ———. What amount to.]—*TOWNSEND v. ARNOLD*, No. 662, *ante*.

666. ———.]—*RADFORD v. WILLIAMS*, No. 659, *ante*.

### B. Selling to Drunken Person.

*See* Licensing (Consolidation) Act, 1910 (c. 24), s. 75 (1), (2).

667. Prohibition absolute—Knowledge of customer's condition immaterial.]—The Licensing Act, 1872 (c. 94), s. 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. A publican sold intoxicating liquor to a drunken person who had given no indication of intoxication, & without being aware that the person so served was drunk:—*Held*: the prohibition was absolute, & knowledge of the condition of the person served with liquor was not necessary to constitute the offence.—*CUNDY v. LE COQC* (1884), 13 Q. B. D. 207; 53 L. J. M. C. 125; 51 L. T. 265; 43 J. P. 599; 32 W. R. 769, D. C.

*Annotations*:—*Consd.* Newman v. Jones (1886), 17 Q. B. D.

668 i. "Reasonable steps to prevent drunkenness"—Onus of proof on licensee.]—*KERRACK v. SMITH* (1905), 7 F. (Cl. of Sess.) 76, J.—*SCOT*.

668 ii. ———.]—*SOUTAR v. AUCHINCLOSS*, [1909] S. C. (J.) 16; 46 So. L. R. 243; 16 S. L. T. 663.—*SCOT*.

668 iii. ———.]—*CAMPBELL v. CAMERON*, [1916] S. C. (J.) 1.—*SCOT*.

g. Statute prescribing penalty—Remedial—Strict enforcement discretionary.]—*R. S. O.*, 1887, c. 194, s. 122, which imposes a liability on innkeepers who give liquor to persons, who thereby become intoxicated, is a remedial measure & should receive a liberal construction.—*PRICE v. ROBINSON* (1888), 16 O. R. 433.—*CAN.*

### PART XII. SECT. 1, SUB-SECT. 3.—B.

667 i. Prohibition absolute—Knowledge of customer's condition immaterial.]

132. *Apld.* Bond v. Evans (1888), 21 Q. B. D. 249. *Consd.* Somerset v. Wade, [1894] 1 Q. B. 574. *Refd.* Burrows v. Rhodes, [1899] 1 Q. B. 816; Hobbs v. Winchester Corp., [1910] 2 K. B. 471. *Mentd.* Chisholm v. Doulton (1889), 58 L. J. M. C. 133; Phillips v. Britannia Hygienic Laundry Co., [1923] 1 K. B. 639.

668. What amounts to—Sale to sober companion—Consumption by drunken person.]—A publican was convicted by justices of selling intoxicating liquor to a drunken person, though at the hearing it had been proved that the liquor had been ordered & paid for by the sober companion of such drunken person:—*Held*: the conviction was right & must be affirmed.—*SCATCHARD v. JOHNSON* (1888), 57 L. J. M. C. 41; 52 J. P. 389; 4 T. L. R. 462, D. C.

669. ———. Sale by servant of licensee—In general scope of employment—Contrary to orders of licensee.]—The Licensing Act, 1872 (c. 94), s. 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. Resp., a licensed person, gave orders to his servants that no drunken persons were to be served; during his absence one of his servants sold intoxicating liquor to a drunken person:—*Held*: resp. was guilty of an offence under the section for he was liable for the act of his servant, that act having been done by the servant within the general scope of his employment, although contrary to the orders of his master.—*POLICE COMRS. v. CARTMAN*, [1890] 1 Q. B. 655; 65 L. J. M. C. 113; 74 L. T. 720; 60 J. P. 357; 44 W. R. 637; 12 T. L. R. 334; 40 Sol. Jo. 439; 18 Cox, C. C. 341, D. C.

*Annotations*:—*Consd.* Emary v. Nolloth, [1903] 2 K. B. 264; Boyle v. Smith, [1906] 1 K. B. 432; Caldwell v. Bethell, [1913] 1 K. B. 119. *Refd.* Worth v. Brown (1896), 62 J. P. 658; Star Cinema (Shepherd's Bush) v. Baker (1921), 126 L. T. 506. *Mentd.* Coppen v. Moore (1898), 78 L. T. 520.

—].—Compare Nos. 655–659, *ante*.

### C. Evidence and Procedure.

670. The summons—Defective—Waiver of defect.]—*ARNOTT v. NORTH HUNSLEY BEACON DIVISION JJ.* (1877), 42 J. P. 28.

671. Evidence—Admissibility—Remarks of customers—In presence of servant of licensee.]—*WORTH v. BROWN* (1896), 40 Sol. Jo. 515; 62 J. P. Jo. 658, D. C.

672. The conviction—Form & contents—Locus in quo within jurisdiction.]—By Beerhouse Act, 1830 (c. 64), s. 13, a penalty is imposed on beer sellers licensed under that Act, who shall permit drunkenness or disorderly conduct in their houses, not exceeding for the first offence £5, & for the second such offence £10. By sect. 15 all penalties under the Act are to be recovered before two justices in petty sessions, & are to be sued for within three calendar months. By sect. 35 a

— An innkeeper sold liquor to a drunken person without being aware that the person so served was already drunk:—*Held*: the prohibition under Licensing Act, 1881, s. 146, was absolute, & knowledge of the condition of the person served with liquor was not necessary to constitute the offence.—*MCVEIGH v. ECOLES* (1899), 18 N. Z. L. R. 44.—*N.Z.*

h. What amounts to—Sale to drunken person—Liquor consumed by other persons.]—*R. v. MOUNT* (1899), 30 O. R. 303.—*CAN.*

668 i. ———. Sale to sober companion—Consumption by drunken person.]—A sober man applied for & obtained & paid for a glass of liquor to be consumed, & which was in fact consumed, by a drunken man on the premises. There was no collusion between the two men, or agency:—*Held*: no offence had been committed by the innkeeper within

Licensing Act, 1881, s. 146.—*DWYER v. HERMANN* (1900), 19 N. Z. L. R. 209.—*N.Z.*

668 ii. ———.]—*HOULDS-WORTH v. FAIRHALL* (1905), 25 N. Z. L. R. 1.—*N.Z.*

669 i. ———. Sale by servant of licensee—In general scope of employment—Contrary to orders of licensee.]—A licensee may be convicted of supplying liquor to a person intoxicated although the liquor was actually supplied by a barman without the knowledge & contrary to the orders of the licensee who had taken all reasonable precautions to prevent such occurrence.—*DAVIS v. YOUNG*, [1910] V. L. R. 369.—*AUS.*

### PART XII. SECT. 1, SUB-SECT. 3.—C.

k. Offence against Temperance Act, 1864—Pleading.]—*MCCURDY v. SWIFT* (1866), 17 C. P. 126.—*CAN.*

general form of conviction is given. By Beer-house Act, 1834 (c. 85), this Act was amended, & licenses were to be granted for the sale of beer, etc., to be consumed on the premises or not, but all the provisions, penalties, etc., of Beerhouse Act, 1830 (c. 84), were to apply to persons licensed under the subsequent Act. A conviction stated that W., of the parish of Ashford, in the county of K., was convicted by two justices in & for the county of K., acting in petty sessions in & for the division of Ashford in the said county, for that he being a seller of beer licensed to sell the same by retail to be consumed on the premises, under the provisions of the statutes in such case made & provided, did at the parish of Ashford aforesaid permit drunkenness & other disorderly conduct in the house mentioned in such license, & situate in the said parish of Ashford, against the tenor of such license granted under the provisions of the said statutes, & contrary to the form of the said statutes, whereby the said W. had forfeited £10 this being adjudged to be his second offence against the provisions of the aforesaid statutes to permit the general sale of beer, etc., by retail in England & the justices thereby awarded one moiety of the penalty, after deducting the costs of the conviction, to the informer, & the other moiety, after deducting the costs as aforesaid, to the treasurer of the county:—*Held*: (1) the conviction need not be by two justices of the division within which the licensed house was situate, but if it were necessary it appeared from the conviction that they were so; (2) it was unnecessary to allege that the conviction took place within three calendar months after the offence; (3) the offence was properly stated to be contrary to the form of the statutes; (4) the conviction need not state the names of the persons permitted to be drunk or allege that they were unknown; (5) the offence charged to have been committed was not double; (6) it was unnecessary to set out the license in the conviction; (7) the conviction was not bad for not ascertaining the costs; (8) the conviction need not be on parchment.—*WRAY v. TOKE* (1848), 12 Q. B. 492; 3 New Mag. Cas. 84; 3 New Sess. Cas. 290; 17 L. J. M. C. 183; 12 L. T. O. S. 289; 12 J. P. 804; 12 Jur. 936; 116 E. R. 951.

673. — Time within which penalty proceeded for.]—*WRAY v. TOKE*, No. 672, *ante*.

674. — Statutes under which prosecution made.]—*WRAY v. TOKE*, No. 672, *ante*.

675. — The charge—Misbehaving persons not named.]—*WRAY v. TOKE*, No. 672, *ante*.

676. — Adjudication on second offence—First offence not set out.]—*WRAY v. TOKE*, No. 672, *ante*.

#### SUB-SECT. 4.—PROCURING DRINK FOR DRUNKEN PERSON.

See Licensing Act, 1902 (c. 28), s. 7.

Selling to drunken person.]—See Sub-sect. 3, B., *ante*.

#### PART XII. SECT. 1, SUB-SECT. 5.—A.

1. Keeping liquor for sale.]—*R. v. BREEN* (1874), 36 U. C. R. 84.—*CAN.*

m. — ]—*R. v. COULTER* (1887), 4 Man. L. R. 309.—*CAN.*

a. Liquor brought & consumed by strangers—With restaurant-keeper's permission.]—Two persons went into deft.'s restaurant & asked permission to drink some beer which they had brought with them. Deft. gave them permission:—*Held*: deft. should be acquitted, there being no evidence of "procuring" the liquor by accused.—*R. v. MA HONG* (1909), 10 W. L. R. 262.—*CAN.*

o. — Dance hall.]—*MAHONEY v. BIBRON*, [1925] V. L. R. 248; 46 A. L. T. 185; 31 Argus L. R. 179.—*AUS.*

p. Liquor in shop—Not being private dwelling-house—Small quantity found.]—*R. v. MELVIN* (1916), 38 O. L. R. 231; 34 D. L. R. 382; 27 Can. Crim. Cas. 350.—*CAN.*

q. Liquor on yacht—Right of search.]—*FLEMING v. SFRACKLIN* (1920), 48 O. L. R. 533; 56 D. L. R. 518; 35 Can. Crim. Cas. 40; 19 O. W. N. 355.—*CAN.*

r. Simulating a licensed house—Local option beer for sale.]—*R. v.*

*BEVAN* (1912), 23 O. W. R. 510; 4 O. W. N. 400; 8 D. L. R. 86.—*CAN.*  
t. Search of premises.]—*R. v. INYLAND* (1899), 20 C. L. T. 4; 31 O. R. 267.—*CAN.*

PART XII. SECT. 1, SUB-SECT. 5.—B.  
a. Materials for distillation.]—*R. v. LAHORONE*, [1924] 2 W. W. R. 610.—*CAN.*

PART XII. SECT. 1, SUB-SECT. 6.—A. (a).

b. Minor supplied by stranger.]—The act of a stranger in supplying liquor to a minor, even if handed by

#### SUB-SECT. 5.—LIQUOR UNLAWFULLY ON PREMISES.

##### A. Without Authority from Justices.

See Licensing (Consolidation) Act, 1910 (c. 24), ss. 73, 82.

677. Seizure by justices—Order for sale—Right of licensee to be heard—Prior to sale.]—When liquors kept for unlawful sale have been seized under s. 15 of 33 & 34 Vict. c. 29, the justices cannot order them to be sold without giving the persons, upon whose premises they were seized, an opportunity of being heard, & of showing that the seizure was improper or that the sale ought not to take place.—*GILL v. BRIGHT* (1871), 41 L. J. M. C. 22; 25 L. T. 591; 36 J. P. 198; *sub nom. R. v. DEVON JJ.*, *GILL v. BRIGHT*, 20 W. R. 248.

Annotations.—*Mentd. Waye v. Thompson* (1885), 53 L. T. 358; *Ex p. Francis*, [1903] 1 K. B. 275.

678. — Persons on premises at time of seizure—Deemed to be illegally dealing—Purchaser as well as seller.]—Licensing Act, 1874 (c. 49), s. 17, after providing for the seizure & removal in certain cases by constables of any intoxicating liquor found on unlicensed premises which there is reasonable ground to suppose is in such place for the purpose of unlawful sale, goes on to enact "that any person found at the time on the premises shall, until the contrary be proved, be deemed to have been on such premises for the purpose of illegally dealing in intoxicating liquor, & be liable to a penalty not exceeding 40s." :—*Held*: the words "illegally dealing" included a purchaser as well as a seller of intoxicating liquor.—*MCKENZIE v. DAY*, [1893] 1 Q. B. 289; 62 L. J. M. C. 49; 68 L. T. 315; 57 J. P. 216; 41 W. R. 384; 9 T. L. R. 180; 37 Sol. Jo. 194; 17 Cox, C. C. 604; 5 R. 161, D. C.

##### B. Without Authority from Excise.

679. Wine in stock before license procured.]—A person who intends to become a dealer in foreign wine must take out his license, & enter his warehouse, before he lays in his stock. A dealer in wine is not entitled to a permit to remove wine sold, which wine was laid in before he took out his license.

For the purposes of this Act I think a man does commence to be a dealer from the moment when he buys the wine with an intention to sell it again (ASHURST, J.).—*R. v. EXCISE COMRS.* (1788), 2 Term Rep. 381; 100 E. R. 205.

Annotation:—*Reftd. R. v. Paddington Vestry* (1829), 9 B. & C. 456.

#### SUB-SECT. 6.—OFFENCES RELATING TO CHILDREN.

##### A. Sale or Delivery to Children.

###### (a) For Consumption on Premises.

See, now, Intoxicating Liquor (Sale to Persons under Eighteen) Act, 1923 (c. 28); City of London Police Act, 1839 (c. xciv), s. 27.

*Sect. 1.—Relating to sale: Sub-sect. 6, A. (b) i. & ii., (c), & B.]*

*(b) On Behalf of Third Party.*

*i. Vessel Corked and Sealed.*

*See Children Act, 1908 (c. 67), s. 120; Licensing (Consolidation) Act, 1910 (c. 24), s. 68.*

**680. Vessel not in fact sealed—Bonâ fide belief of licensee—Mens rea.]**—By 1 Edw. 7, c. 27, s. 2, every holder of a license who knowingly sells or delivers, save at the residence or working place of the purchaser, any intoxicating liquor to any child under fourteen for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked & sealed vessels in the prescribed manner, shall be liable to penalties:—*Held*: the holder of a license, who had delivered intoxicating liquor to a child under fourteen in a vessel not corked & sealed as 1 Edw. 7, c. 27, required, was guilty of an offence under sect. 2, although he honestly believed when he delivered the liquor that the vessel was so corked & sealed.—*BROOKS v. MASON*, [1902] 2 K. B. 743; 72 L. J. K. B. 19; 88 L. T. 24; 67 J. P. 47; 51 W. R. 224; 19 T. L. R. 4; 47 Sol. Jo. 13; 20 Cox, C. C. 464, D. C.

*Annotations:—Reid, Emary v. Nolloth, [1903] 2 K. B. 264; Jones v. Shervington, [1908] 2 K. B. 539.*

**681. Child unable to reach liquor undetected.]**—Applt. was charged under Intoxicating Liquors (Sale to Children) Act, 1901 (c. 27), s. 2, with selling beer to a child under fourteen, the beer not being sold in a sealed vessel. It was proved that a gummed paper label was affixed over the screw stopper of the bottle, extending about an inch down two sides of the neck of the bottle. The label was dry at the time of the sale, but by moistening the label with the tongue & so damping the gum the label could be removed without its being torn. The justices found that the bottle was not sealed as required by the Act, & convicted applt.:—*Held*: there was evidence to support the finding of the justices.

I think that the true test is whether or not the stopper is so secured that the child cannot get at the liquor without the abstraction of the liquor being detected (*LORD ALVERSTONE, C.J.*).—*MITCHELL v. CRAWSHAW*, [1903] 1 K. B. 701; 72 L. J. K. B. 389; 88 L. T. 403; 67 J. P. 179; 19 T. L. R. 352; 47 Sol. Jo. 406; 20 Cox, C. C. 395, D. C.

*Annotations:—Apld. Macey v. McKenzie (1903), 88 L. T. 631. Consd. Jones v. Shervington, [1908] 2 K. B. 539.*

**682. What amounts to sealing—Vessel sealed with label—Whether removable without destruction.]**—Applt. sold to a child under the age of fourteen years, for consumption off the premises a pint of beer in a bottle corked by means of a screw stopper & having an adhesive paper label fastened to the top of the stopper & to the sides of the neck of the bottle. Upon an information under 1 Edw. 7, c. 27, s. 2, the magistrate was of opinion that the label could be removed in several ways without destruction, as by steam or by a penknife, & the stopper withdrawn & the label afterwards refastened to the bottle, & he held that the bottle was not "sealed" in compliance with the sect., & convicted applt. There was no evidence that the stopper had been removed or could be removed without destroying the label:—*Held*: there was no evidence before the magistrate on which he could properly find that the label could

be removed without destruction or that the bottle was not "sealed" in compliance with 1 Edw. 7, c. 27, s. 2, & the conviction therefore could not be supported.—*MACEY v. MCKENZIE* (1903), 88 L. T. 631; 67 J. P. 251; 20 Cox, C. C. 449, D. C.

**683. ———.]**—*MITCHELL v. CRAWSHAW*, No. 681, *ante*.

**684. Vessel must not belong to sender—Although capable of being corked & sealed—Intention of sender.]**—(1) The mere fact that the vessel with which a child is sent to fetch liquor is capable of being corked & sealed by the vendor after being filled is not enough to bring the sender within the exception in 1 Edw. 7, c. 27, s. 2.

The exception applies only to the case of liquor which is sold in a corked & sealed vessel belonging to the vendor, & the purchaser is not entitled to send a child with an empty bottle in which to fetch the liquor, whether intended to be corked & sealed or not.

(2) *Semle*: the sending of a child for less than a reputed pint, although to be purchased in a corked & sealed vessel, would be an offence within the sect.—*FARNDAL v. DILLON*, [1907] 2 K. B. 513; 76 L. J. K. B. 922; 97 L. T. 284; 71 J. P. 374; 21 Cox, C. C. 500, D. C.

*Annotation:—Is to (1) Dbd. Jones v. Shervington, [1908] 2 K. B. 539.*

**685. Any intoxicating liquor included.]**—The holder of a license who sells or delivers intoxicating liquor to a person under the age of fourteen years in a corked & sealed vessel in a quantity of not less than one reputed pint, for consumption off the premises only, does not commit an offence under 1 Edw. 7, c. 27, s. 2, even though the intoxicating liquor is not of a kind commonly sold in a corked & sealed vessel, inasmuch as the effect of the exception contained in the sect. is to enable the license holder to so sell or deliver not merely intoxicating liquor which is ordinarily sold in a corked & sealed vessel, but any intoxicating liquor which is in fact in a corked & sealed vessel.—*JONES v. SHERVINGTON*, [1908] 2 K. B. 539; 77 L. J. K. B. 771; 99 L. T. 57; 72 J. P. 381; 24 T. L. R. 693; 52 Sol. Jo. 582; 21 Cox, C. C. 642, D. C.

*ii. Quantity.*

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 68.*

**686. Not less than one pint.]**—*FARNDAL v. DILLON*, No. 684, *ante*.

*(c) Knowledge of Licensee.*

*See Licensing (Consolidation) Act, 1910 (c. 24), s. 68; Intoxicating Liquor (Sale to Persons under Eighteen) Act, 1923 (c. 28).*

**687. Licensee ignorant of sale—Servant bonâ fide deceived as to age.]**—A license holder cannot be convicted under 1 Edw. 7, c. 27, s. 2, for "knowingly selling" intoxicating liquor to a person under the age of fourteen years, when he himself has no knowledge of the sale & when the barman who sells the liquor has no knowledge that the person to whom he sells is under the age of fourteen years, but honestly believes that he has attained that age.

The section does not create an absolute prohibition against the sale of intoxicating liquor to any person under the age of fourteen years, except in corked & sealed vessels & where there is no

him to the minor within the precincts of a licensed house, is not an offence against Liquor License Act, 1887 (c. 194), s. 76, amended by 63

Vict. c. 66, s. 8.—*R. v. RAYNOR*, 15 C. L. T. Occ. N. 403.—*CAN.*

*s. No evidence that minor appar-*

*ently under age.]—R. v. FARRELL* (1910), 14 O. W. R. 630; 21 O. L. R. 549; 1 O. W. N. 1045.—*CAN.*



knowledge on the part of the license holder or the barman who sells, the license holder cannot be convicted.—*GROOM v. GRIMES* (1903), 89 L. T. 129; 67 J. P. 345; 47 Sol. Jo. 567; 20 Cox, C. C. 515, D. C.

**688. — Sale by servant against orders.]—**Intoxicating liquor was knowingly sold to a child under fourteen in a bottle neither corked nor sealed by a servant of a licensed person contrary to the express orders & without the knowledge of his master, who was himself in charge of the premises at the time of the sale:—*Held*: the license holder could not be convicted under 1 Edw. 7, c. 27, s. 2, of "knowingly allowing" a person to sell intoxicating liquor to a child under fourteen in a vessel neither corked nor sealed.—*EMARY v. NOLLOTH*, [1903] 2 K. B. 264; 72 L. J. K. B. 620; 89 L. T. 100; 67 J. P. 354; 52 W. R. 107; 19 T. L. R. 530; 47 Sol. Jo. 567; 20 Cox, C. C. 507, D. C.

*Annotations:—Apld. Allchorn v. Hopkins* (1905), 69 J. P. 355; *McKenna v. Harding* (1905), 69 J. P. 354. *Reid. Boyle v. Smith*, [1906] 1 K. B. 432; *Williams v. Pearce* (1916), 85 L. J. K. B. 959. *Mentl. Strutt v. Chiff*, [1911] 1 K. B. 1.

**689. — —.]—**A license holder left the management of a public-house to a manager. A barmaid, contrary to express orders, sold intoxicating liquors to a child under fourteen years of age in a bottle not corked & sealed. At the time the manager was in an adjoining bar, & might have seen, but did not see, what she was doing. The magistrate found as a fact that the manager was at the time in charge of the premises, & that neither the license holder nor the manager knowingly allowed or connived at the sale:—*Held*: he was right.—*ALLCHORN v. HOPKINS* (1905), 69 J. P. 355, D. C.

**690. — — Licensee's means of knowledge.]—**(1) A barmaid, contrary to express orders, knowingly sold intoxicating liquor to a child under fourteen years of age in a bottle not corked & sealed. The license holder, although not in the bar, was within call, & the justices found as a fact that he had not delegated to the barmaid the charge & control of the bar:—*Held*: the license holder could not be convicted on a charge of "knowingly allowing" the barmaid to so sell the liquor.

(2) It cannot be said, as a matter of law, that a license holder who is absent from his bar, but

within call, has delegated the control of it to the person serving in it.—*McKENNA v. HARDING* (1905), 69 J. P. 354, D. C.

*Annotation:—Apld. Allchorn v. Hopkins* (1905), 69 J. P. 355.

#### B. Allowing Child to be in Bar.

*See Children Act, 1908 (c. 67), s. 120.*

**691. Presence unconnected with trade purpose—Invitation of licensee's wife—Licensee without knowledge.]—**Appl. held a license for an inn & his wife carried on a dressmaker's business on the upper floor. Two girls, one of whom was aged ten years entered the premises, the elder having come for a coat & skirt. Applt.'s wife invited them into the bar parlour to wait there while she fetched the coat & skirt. The two girls were in the bar parlour for a few minutes, but applt. had not seen & could not see them enter & did not know that they were there. Applt. having been summoned & convicted under (Children Act, 1908 (c. 67), s. 120:—*Held*: under the circumstances applt. was not responsible for the action of his wife, & as the justices had not found that there was any want of due diligence on his part, the conviction must be quashed.—*RUSSON v. DUTTON* (No. 1) (1911), 104 L. T. 599; 75 J. P. 207; 27 T. L. R. 198; 22 Cox, C. C. 487, D. C.

**692. What is "bar"—Room exclusively or mainly used for trade purposes—Interpretation of "mainly"—Part user for domestic purposes.]—**By (Children Act, 1908 (c. 67), s. 120 (1), "The holder of the license of any licensed premises shall not allow a child to be at any time in the bar of the licensed premises except during the hours of closing." Sub-sect. 5: "In this sect. the bar of licensed premises means any open drinking bar or any part of the premises exclusively or mainly used for the sale & consumption of intoxicating liquor:—*Semle*: for the purpose of determining whether a room is "mainly used" for the sale & consumption of intoxicating liquor regard must be had to the user of the room during the whole portion of the day that the house is open, & if the user as a whole is not mainly for that purpose it is immaterial whether the room is or is not being used for that purpose at the time when the child is found in it.—*PILKINGTON v. ROSS*, [1914] 3 K. B. 321; 83 L. J. K. B. 1402; 111 L. T. 282; 78 J. P. 319; 30 T. L. R. 510; 12 L. G. R. 944; 24 Cox, C. C. 277, D. C.

#### PART XII. SECT. 1, SUB-SECT. 6.—A. (c).

**688 i. Licensee ignorant of sale—Sale by servant against orders.]—**Where the servant of a licensee supplied minors with liquor contrary to express instructions, but within the scope of his employment the licensee was properly convicted under Liquor License Act.—*R. v. QUIRK* (1910), 8 E. L. R. 56.—CAN.

**688 ii. — —.]—**CONLON v. MULDOONEY, [1904] 2 I. R. 498.—IR.

**688 iii. — —.]—**SIVYER v. TAYLOR, [1916] N. Z. L. R. 586.—N.Z.

**688 iv. — —.]—**GREIG v. MACLEOD, [1908] S. C. (J.), 14; 45 S. C. L. R. 233; 15 S. L. T. 620.—SCOT.

**690 i. — — Licensee's means of knowledge.]—**Liquor was sold to a person under twenty-one by the wife of a licensee & contrary to his general instructions. The sale was effected through a slide, & the person supplying the liquor could not see clearly to whom the liquor was being sold:—*Held*: it was the duty of any person selling liquor to take ordinary measures to ascertain to whom it was sold or supplied in order to ensure that the person who got it was not under twenty-

one years of age, & the licensee was rightly convicted.—*BAKER v. POTTER* (1913), 32 N. Z. L. R. 716.—N.Z.

**d. Child purchasing for adult—Necessity for inquiry by licensee.]—***Held*: though there would be no breach of a public-house certificate committed by supplying liquor to a child "apparently under fourteen" when he is a messenger for an adult yet the publican is not entitled to assume without inquiring & satisfying himself that the child is the messenger of an adult.—*DONALDSON v. LINTON* (1875), 3 R. (Ct. of Sess.) 16; 13 Sc. L. R. 163.—SCOT.

**e. — —.]—**GRAHAM v. LANG (1876), 4 R. (Ct. of Sess.) 12; 14 Sc. L. R. 179.—SCOT.

**f. — —.]—**PATTERSON v. REUCASSEL (1892), 3 White, 232.—SCOT.

**g. — No defence—Where licensee ignorant & liquor deliberately sold to child.]—***R. v. DEYDIER* (1896), 13 S. C. 388.—S. AF.

**h. Knowledge immaterial—Prohibition absolute—Act 25, 1913, s. 48.]—**A barman supplied liquor to a child in the bona fide belief in the child's false statement that he was acting as the agent of his father:—*Held*: any

traffic in intoxicating liquor between a licensee & a child was absolutely prohibited & the barman's bona fide belief in the child's statement was no defence to a charge against the licensee under the above sect.—*R. v. COHEN* (1916), T. P. D. 457.—S. AF.

**k. — — —.]—***R. v. LIEBMAN*, [1918] T. P. D. 367.—S. AF.

**l. Under twenty-one years—Apparently or to knowledge of licensee.]—***R. v. AYER* (1908), 17 O. L. R. 509; 12 O. W. R. 1223; 14 Can. Crim. Cas. 210.—CAN.

#### PART XII. SECT. 1, SUB-SECT. 6.—B.

**m. What is "bar"—Children's Act, 1908, s. 120.]—***DONAHUE v. MINTYRE*, [1911] S. C. (J.) 61; 48 Sc. L. R. 310; 1 S. L. T. 131; 6 Adam, 422.—SCOT.

**n. Responsibility of occupant of licensed premises.]—**In the absence of proof of knowledge, connivance, carelessness or wilful blindness on his part an occupant of premises, where beer is licensed to be kept, cannot be convicted for permitting persons apparently under the age of twenty-one to remain on the premises, even *semble* where he is the licensee.—*H. v. BROOKS*, [1925] 1 D. L. R. 274; 43 Can. Crim.,



*Sect. 1.—Relating to sale: Sub-sects. 7, 8, 9 & 10.*  
*Sect. 2: Sub-sects. 1, 2, 3 & 4, A.]*

**SUB-SECT. 7.—SALE NOT BY STANDARD MEASURE.**

See Licensing (Consolidation) Act, 1910 (c. 24), s. 69; Licensing Act, 1921 (c. 42), s. 9, & generally, WEIGHTS & MEASURES.

**693. Form of charge.]—**Deft. was indicted for selling beer, & the indictment set forth, that he sold several quantities of beer to divers persons by false measure:—*Held*: judgment must be arrested, because the charge is too general for the ct. to inflict punishment; which should be proportioned to the crime.—*R. v. GIBBS* (1722), *Sess. Cas. K. B.* 76; 8 Mod. Rep. 58; 1 Stra. 497; 93 E. R. 77.

**694. What is "measure"—Earthenware mug.]—**"Mugs," & other earthenware vessels used to measure beer for sale by a publican, are "measures" within 5 & 6 Will. 4, c. 63, s. 21, & as such may be seized by the inspector, if found too small.—*WASHINGTON v. YOUNG* (1850), 5 Exch. 403; 19 L. J. Ex. 348; 15 L. T. O. S. 234; 14 J. P. 591; 155 E. R. 176.

*Annotation:—Fold. R. v. Aulton* (1861), 3 E. & E. 568.

**695. ——— Not stamped as measures.]—**Earthenware jugs or drinking cups, ordinarily used as imperial measures by a publican in his business are, although not stamped as measures, & exempted by 5 & 6 Will. 4, c. 63, s. 21, from being so stamped, nevertheless "measures" within 5 & 6 Will. 4, c. 63, s. 28, which empowers any authorised inspector of weights & measures to enter any shop or place within his jurisdiction, in which goods are exposed & kept for sale, & there to examine all measures, & to compare & try them with the copies of the imperial standard measures required by the Act to be provided: & renders measures, found on such examination to be unjust, liable to be seized & forfeited; & the person in whose possession they are found to be convicted in a penalty.—*R. v. AULTON* (1861), 3 E. & E. 568; 80 L. J. M. C. 129; 3 L. T. 609; 25 J. P. 69; 9 W. R. 278; 121 E. R. 556.

**696. ——— Display of notice as to vessel.]—**A publican supplied to a customer, at the request of the customer, what was known as a "blue" of beer, which was a quantity of beer in a blue jug, more than half a pint & about one-third of a quart. At the time of the sale there were conspicuously posted up in the room notices that the vessel called a "blue" was not represented as containing any amount of imperial measure, or as being a measure of imperial standard, & in fact the vessel was not an imperial measure or marked as such:—*Held*: the publican had, under Licensing Act, 1872 (c. 94), s. 8, committed the offence of selling intoxicating liquor, not being a quantity less than half a pint, in a measure not marked according to the imperial standards, & he was properly convicted of the same.—*PAYNE v. THOMAS* (1890), 60 L. J. M. C. 3; 63 L. T. 456; 54 J. P. 824; 39 W. R. 240; 7 T. L. R. 7; 17 Cox, C. C. 212, D. C.

*Annotations:—Ridd. Herts County Council v. Hobday* (1895), 59 J. P. 72; *Riddell v. Neilson* (1903), Allwood's Appeal Cases under Weights & Measures, etc. Acts, 163.

**697. ——— Measure being multiple or part of imperial measure—Duly stamped as such.]—**An alehouse keeper, having in his possession for use for trade a pewter pot marked one-third of a gill, which he used for selling spirits by the three-

penny worth, was charged with having in his possession for use for trade a measure not of the denomination of some Board of Trade standard, contrary to Weights & Measures Act, 1878 (c. 49), s. 24:—*Held*: the use or having in possession for use for trade of a measure being a multiple or part of one of the imperial measures, & duly stamped as such, is no offence under the Act, & the pewter pot in question was a measure of the denomination of a Board of Trade standard, viz., of one gill.—*BELLAMY v. POW* (1896), 60 J. P. 712; 12 T. L. R. D. C.

*used. Liquor drawn in marked measure—Transferred to unmarked vessel—Not drawn in presence of customer—Sale not completed until delivery.]—*By Licensing Act, 1872 (c. 94), s. 8, all intoxicating liquor which is sold by retail, & not in cask or bottle, & is not sold in a quantity less than half a pint, is to be sold in measures marked according to the imperial standards. A publican, being asked for a pint of beer by a customer, went into an inner room, where he drew the beer into a marked measure & poured it into a jug, which he then brought into the room where the customer was sitting & handed to him. The customer could not see the beer drawn, & never saw it while in the measure. The publican having been convicted of an offence under Licensing Act, 1872 (c. 94), s. 8:—*Held*: the sale was not complete until the beer was handed to the customer, the beer was not sold in a marked measure as required by the statute, & the conviction was right.—*ADDY v. BLAKE* (1887), 19 Q. B. D. 478; 56 L. T. 711; 51 J. P. 599; 35 W. R. 719; 3 T. L. R. 564; 16 Cox, C. C. 259, D. C.

*Annotations:—Distd. Pennington v. Pincock*, [1908] 2 K. B. 244. *Refd. Payne v. Thomas* (1890), 60 L. J. M. C. 3.

**699. ——— In presence & sight of customer—"Long pull."]—**By Licensing Act, 1872 (c. 94), s. 8, all intoxicating liquor which is sold by retail, & not in cask or bottle, & is not sold in a quantity less than half a pint, is to be sold in measures marked according to the imperial standards. Applt., who was the holder of an off license for the sale of beer, was asked for a pint of beer by a customer. Applt., in the presence & sight of the customer, twice filled a properly marked half-pint measure & poured the contents into a jug, which had been handed to him by the customer, & added a further quantity of beer to the jug from the tap. The jug, containing a pint & a gill of beer, was then handed to the customer, who paid applt. the price of a pint of beer:—*Held*: as the pint of beer had been measured in a properly marked measure in the presence & sight of the customer, no offence had been committed under Licensing Act, 1872 (c. 94), s. 8, & the subsequent addition of a further quantity of beer was immaterial.—*PENNINGTON v. PINCOCK*, [1908] 2 K. B. 241; 77 L. J. K. B. 537; 98 L. T. 801; 72 J. P. 199; 24 T. L. R. 509; 52 Sol. Jo. 413; 6 L. G. R. 830; 21 Cox, C. C. 609, D. C.

**700. No opportunity to verify & stamped measure—Conviction of licensee not thereby precluded.]—**A local authority are not precluded from prosecuting a person for using a measure not stamped in conformity with Weights & Measures Act, 1878 (c. 49), s. 29, by reason of having failed to fix times & places for verifying & stamping weights & measures in accordance with Weights & Measures Act, 1878 (c. 49), s. 44.—*HAYLEY v.*

*Cas. 104; 21 Alta. L. R. 51; [1924] 3 W. W. R. 809.—CAN.*

**PART XII. SECT. 1, SUB-SECT. 7.**  
**o. What is "measure"—Im-**

**perial standard—"Schooner."]—Held**: an offence to sell beer by the "schooner," this measure not being an imperial standard though exceeding half a pint.—*RIDDELL v. NEILSON*

(1903), 40 So. L. R. 539.—*SCOT.*  
*p. Liquor served in glass—Not Board of Trade measure—Appropriate price charged.]—ROSE v. JOHNSTON* (1886), 23 So. L. R. 695.—*SCOT.*

TAYLOR (1900), 82 L. T. 803; 16 T. L. R. 447; 19 Cox, C. C. 538, D. C.

**701. Seller need not be licensee—Sale by servant or other person.**—By Licensing (Consolidation) Act, 1910 (c. 24), s. 69 (2), "If any person sells" otherwise than by standard measure any intoxicating liquor not in cask or bottle & in a quantity not less than half a pint, he is to be liable to a penalty:—*Held*: the words "any person" are not confined to the licensee holder or other person whose property the liquor is, but include the barman or other person who does the physical act of transferring the liquor to the purchaser.—*CALDWELL v. BETHELL*, [1913] 1 K. B. 119; 82 L. J. K. B. 101; 107 L. T. 685; 77 J. P. 118; 29 T. L. R. 94; 23 Cox, C. C. 225, D. C.

#### SUB-SECT. 8.—PROHIBITED HOURS.

See Sect. 3, *post*.

#### SUB-SECT. 9.—OFFENCES RELATING TO PRODUCTION OF LICENSE.

**Excise license.**—See Excise Licenses Act, 1825 (c. 81), s. 28.

**Justices' license.**—See Licensing (Consolidation) Act, 1910 (c. 24), s. 84.

#### SUB-SECT. 10.—FORGERY OF JUSTICES' LICENSE.

See, now, Forgery Act, 1913 (c. 27), s. 5, & generally, CRIMINAL LAW, Vol. XV., pp. 1041 *et seq*.

### SECT. 2.—RELATING TO REGULATION OF LICENSED PREMISES.

#### SUB-SECT. 1.—AFFIXING NAME.

**By holder of excise license.**—See Excise Licenses Act, 1825 (c. 81), s. 25.

**By holder of justices' license.**—See Licensing (Consolidation) Act, 1910 (c. 24), s. 74.

#### SUB-SECT. 2.—NOTICE OF EXEMPTION ORDER.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 55 (2); Licensing Act, 1921 (c. 42).

#### PART XII. SECT. 2, SUB-SECT. 1.

**g. By licensed tavern keeper—"Licensed Tavern" on sign-board.**—*MCGILVERY v. GAULT* (1878), 17 N. B. R. (1 P. & B.) 641.—CAN.

**r. Sign exhibited by unlicensed innkeeper.**—*Held*: it was not an excess of authority of a committee of the corps, for the purpose of granting or refusing tavern licenses to compel the removal from over the door of taverns not licensed to sell liquor of a sign-board or other notice of such license being granted them.—*RE BRIGHT & TORONTO CITY* (1862), 12 C. P. 433.—CAN.

**t. — Pending result of local option poll.**—*WREY v. BURT* (1883), 6 Nfld. L. R. 517.—NFLD.

#### PART XII. SECT. 2, SUB-SECT. 3.

**a. Dancing room—Permitting music.**—Where a building used as a dancing room was built separate from a house licensed as a tavern, but had com-

munication therewith through a porch, & there was no other entrance to the dancing-room:—*Held*: it was a part of the house, & the proprietor was liable to a fine for allowing music to be played therein.—*EX p. HARLEY* (1862), 10 N. B. R. (5 All.) 264.—CAN.

**b. Structural separation—What amounts to.**—A separation between the bar of an hotel & a billiard room, which is not licensed, but which is owned by the hotel proprietor & used for the purposes of profit, if it contain a glass partition through which a signal for drink can be given & received, resulting in the delivery of the drink ordered by taking out the drink from the bar to the billiard room through a yard, is not a "structural separation" within Intoxicating Liquors Act, 1906, s. 2.—*BEIRNE v. DUFFY*, [1914] 2 I. R. 68.—IR.

#### PART XII. SECT. 2, SUB-SECT. 4.—A.

**e. What amounts to refusal—Ad-**

#### SUB-SECT. 3.—INTERNAL COMMUNICATION WITH PLACE OF PUBLIC RESORT.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 70; Metropolitan Police Act, 1839 (c. 47), ss. 44, 45; City of London Police Act, 1839 (c. 94), ss. 28, 29.

#### SUB-SECT. 4.—REFUSING ADMISSION TO CONSTABLE OR EXCISE OFFICER.

##### A. Constable.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 81; Licensing Act, 1921 (c. 42), ss. 18, 22.

**702. Special ground for suspicion—Necessity for—Bonâ fide intention to prevent breach.**—S., a police constable, went within the hours of closing on Sunday, knocked at the door of a public-house, & demanded entry, the sole reason given being that he wanted to visit the house. He was told there was no one inside, & the door being locked, he was refused entry. In point of fact the constable's object was to inspect all the licensed houses to prevent or detect offences, but he had no special ground of suspicion:—*Held*: the conviction could not be set aside if the justices were satisfied as to the *bonâ fide* intention of the constable to prevent violation of the Act.—*R. v. DOBBINS* (1883), 48 J. P. 182, D. C.

**703. — — —**—(1) By Licensing Act, 1874 (c. 49), s. 16, "Any constable may, for the purpose of preventing or detecting the violation of any of the provisions of the principal Act or this Act which it is his duty to enforce, at all times enter on any licensed premises":—*Held*: a constable cannot under the above sect. demand admission to the licensed premises unless he has reasonable ground for suspecting that some violation of the said Acts is taking place or is about to take place thereon.

(2) A police constable is not entitled under Licensing Act, 1874 (c. 49), s. 16, to demand admittance to a private room on licensed premises merely upon the ground that he desires to prevent or detect any violation of the Licensing Acts, 1872 & 1874.

(3) In order to support a conviction of a licensed person for refusing to admit a constable to such a room, there must be some evidence affording a reasonable ground for supposing that a breach of the law is taking place or is about to take place there.—*DUNCAN v. DOWDING*, [1897] 1 Q. B. 575; 66 L. J. Q. B. 362; 76 L. T. 294; 61 J. P. 280; 45 W. R. 383; 13 T. L. R. 290; 41 Sol. Jo. 352; 18 Cox, C. C. 527, D. C.

**mission must be demanded.**—A conviction under Licensing Act, 1881, s. 186, for refusal to admit a constable into a licensed house should show that a demand for admission was made, but it is not necessary that such a demand should purport to be made in pursuance of that sect.—*BOWMAN v. BAWLEY* (1885), 3 N. Z. L. R. 463 (S. C.).—N.Z.

**d. — Failing to admit without unnecessary delay.**—*BULLIVANT v. WILSON* (1894), 12 N. Z. L. R. 420.—N.Z.

**e. — Innkeeper ignorant of office & object of constable.**—*Held*: a constable who demands admittance to licensed premises must take means to let those inside the premises know that he is a constable & demands admission by virtue of his office.—*ALEXANDER v. HANKIN* (1899), 2 Adm. 687; 1 F. (Ct. of Sess.) 58; 36 So. L. R. 327, J.—SCOT.

**f. Liability of licensee for offence of**

**Sect. 2.—Relating to regulation of licensed premises:**  
**Sub-sect. 4, A. & B.; sub-sects. 5, 6, 7 & 8, A.]**

**704. To what premises applicable—Outhouse used only as cellar.**—An alehouse keeper licensed, under Beerhouse Act, 1834 (c. 85), to sell beer to be drunk in his house, & on the premises thereunto belonging, is liable to a penalty, under sect. 7 of the Act, if he refuse to admit a police officer to an outhouse in the yard belonging to the house, though only used as a cellar.—*R. v. TOTT* (1861), 30 L. J. M. C. 177; 4 L. T. 306; 25 J. P. 327; 7 Jur. N. S. 630; *sub nom. TOTT v. SELFE*, 9 W. R. 663.

**705. — Private room.**—*DUNCAN v. DOWDING*, No. 703, *ante*.

**706. — Premises licensed by excise only.**—Resp. being a person duly licensed as a dealer in spirits in England under 23 & 24 Vict. c. 114, s. 195, & holding an additional excise license authorising him to sell by retail, in any quantity not less than one reputed quart bottle, at a shop, spirits not to be drunk or consumed on the premises, under 24 & 25 Vict. c. 21, s. 2; refused to admit resp., a constable, who demanded to enter applt.'s premises in pursuance of Licensing Act, 1874 (c. 49), s. 10. Upon complaint by applt., justices refused to convict resp.:—*Held*: sect. 10 of the Act of 1874, applies only to premises in respect of which a license, as defined by Licensing Act, 1872 (c. 94), s. 74, has been granted & is in force, & not to resp.'s premises, which were required to be licensed by the excise only, & the justices were right.—*HARRISON v. McL'MEEL* (1884), 50 L. T. 210; 48 J. P. 400, D. C.

**707. What amounts to refusal—Refusal by licensee's wife—No authority from licensee.**—C., a licensed publican, was summoned for unlawfully refusing to admit a constable, contrary to Licensing Act, 1874 (c. 49), s. 16. The constable had been in the house twenty minutes previously, but, hearing a noise, desired to enter again. Mrs. C. was standing at the door, & being irritated, said he should not go in till he had heard her opinion of him. He heard her, then went in, & found C. serving customers, & made no complaint of the refusal. Mrs. C. had no general authority to manage the house, & was never told by C. not to admit a constable:—*Held*: the justices & quarter sessions were wrong in convicting C., there being no evidence that C., or any manager of his, had refused admission.—*CASWELL v. HUNDRED HOUSES JJ.* (1880), 54 J. P. 87, D. C.

**B. Excise Officer.**

See Beerhouse Act, 1840 (c. 61), ss. 11, 12; Inland Revenue Act, 1880 (c. 20), ss. 29, 35; Spirits Act, 1880 (c. 24), s. 141.

**SUB-SECT. 5.—HOLDING SEDITIOUS MEETINGS.**

See Unlawful Societies Act, 1799 (c. 79), s. 14; Seditious Meetings Act, 1817 (c. 19); CRIMINAL LAW, Vol. XV., pp. 633 *et seq.*

**servant.**—A licensed hotel-keeper is personally responsible for the refusal of his servant to admit an officer claiming the right of search.—*It. v. PORTER* (1893), 20 A. R. 516.—**CAN.**

**g. Right to search without warrant—& demand names of persons present.**—Constables entered a hotel & found eight men, & intoxicating liquor, contrary to Ontario Temperance Act, 1916. The constables proceeded to ascertain the names of the men in the room. Deft. advised the men not to give their real names & they refused to do so. Deft. asked to see the constables' war-

rant, & was told that a warrant was not necessary:—*Held*: the Act authorised the constables entry into this "place of public entertainment" & also their search; & their demand for the names of the men present, who were persons found on unlicensed premises where intoxicating liquor was being seized.—*R. v. L.* (1922), 69 D. L. R. 618; 34 Can. Crim. Cas. 243; 51 O. L. R. 575.—**CAN.**

**PART XII. SECT. 2, SUB-SECT. 4.—B. h. Liquor licensee inspector—Verbal obstruction sufficient.**—Where a liquor

**SUB-SECT. 6.—HARBOURING, SUPPLYING LIQUOR TO, OR BRIBING CONSTABLE.**

See Licensing (Consolidation) Act, 1910 (c. 24), s. 78; County Police Act, 1839 (c. 93), s. 16; Towns Police Clauses Act, 1847 (c. 89), s. 34, & generally, POLICE.

**708. Supply of liquor to constable—By servant—Without knowledge of licensee.**—The servant of a licensed victualler knowingly supplied liquor to a constable on duty, without the authority of his superior officer:—*Held*: the licensed victualler was liable to be convicted under Licensing Act, 1872 (c. 94), s. 16 (2), although he had not knowledge of the act of his servant.—*MULLINS v. COLLINS* (1874), L. R. 9 Q. B. 292; 43 L. J. M. C. 67; 29 L. T. 838; 38 J. P. 629; 22 W. R. 297.

**Annotations:**—*Conad. Bosly v. Davies* (1875), 33 L. T. 528; *Somerset v. Hart* (1884), 12 Q. B. D. 360; *Newman v. Jones* (1886), 17 Q. B. D. 132; *Bond v. Evans* (1888), 21 Q. B. D. 249. *Refd. R. v. Holland, Lincolnshire JJ.* (1882), 46 J. P. 312; *Roberts v. Woodward* (1890), 63 L. T. 200; *Massey v. Morris* (1894), 63 L. J. M. C. 185; *Sherras v. De Rutzen* (1895), 15 R. 388; *Coppen v. Moore*, [1898] 2 Q. B. 306. *Mentd. Chisholm v. Doulton* (1889), 58 L. J. M. C. 133.

**709. — Constable off duty—Bonâ fide belief of licensee—Onus of proof.**—If a licensed person supplies liquor to a constable on duty without the authority of any superior officer of such constable, in the *bonâ fide* belief, formed on reasonable grounds, that such constable is not on duty, he does not commit any offence within Licensing Act, 1872 (c. 94), s. 16 (2). But knowledge that a constable is on duty will be inferred unless deft. adduces evidence to the contrary.—*SHERRAS v. DE RUTZEN*, [1895] 1 Q. B. 918; 64 L. J. M. C. 218; 72 L. T. 830; 59 J. P. 440; 43 W. R. 526; 11 T. L. R. 369; 39 Sol. Jo. 451; 18 Cox, C. C. 157; 15 R. 388, D. C.

**Annotations:**—*Mentd. Bank of New South Wales v. Piper*, [1897] A. C. 383; *Derbyshire v. Houlston*, [1897] 1 Q. B. 772; *Korten v. West Sussex County Council* (1903), 72 L. J. K. B. 514; *Hobbs v. Winchester Corp'n.*, [1910] 2 K. B. 471; *Griffiths v. Studebakers* (1923), 87 J. P. 199; *R. v. Leinster*, [1924] 1 K. B. 311.

**SUB-SECT. 7.—HARBOURING THIEVES.**

See Prevention of Crimes Act, 1871 (c. 112), s. 10.

**710. Suffering known thieves to assemble—To procure assistance for accused person—No disorderly conduct or illegal purpose.**—Applt., who occupied a place where exciseable liquors were sold, allowed a meeting to be held there for the purpose of getting up a subscription in aid of the wife & children of a man charged with an offence, or for procuring means for his defence. At the meeting were several thieves, or reputed thieves, who were known by applt. to be such; but no disorderly conduct occurred, & the meeting was not held pursuant to any unlawful design:—*Held*: such an assemblage was forbidden by 32 & 33 Vict. c. 99, s. 10, inasmuch as it afforded opportunity & inducement to devise crimes; & applt. was guilty of an offence within the meaning of the sect.—

licence inspector entered to search deft.'s premises on which liquor was reputed to be sold & deft. said, "I refuse you to search," & the inspector testified he believed that he would have had to use force to make a search:—*Held*: obstruction of an officer making a search may consist of words only.—*R. v. MATHESON, Ex p. GUIMOND* (1913), 41 N. B. R. 581; 13 D. L. R. 480; 13 E. L. R. 58.—**CAN.**

**PART XII. SECT. 2, SUB-SECT. 7. k. Receiver of stolen property.**—A licensed victualler was proceeded

**MARSHALL v. FOX** (1871), L. R. 6 Q. B. 370; 40 L. J. M. C. 142; 24 L. T. 751; 35 J. P. 631; 19 W. R. 1108.

#### SUB-SECT. 8.—DISORDERLY HOUSES.

##### A. Keeping Disorderly Houses.

See Licensing (Consolidation) Act, 1910 (c. 24), s. 76; Towns Police Clauses Act, 1847 (c. 89); Metropolitan Police Act, 1839 (c. 47), s. 44; City Police Act, 1839 (c. xciv), s. 28; CRIMINAL LAW, Vol. XV., pp. 757-760, Nos. 8148-8178.

**711. Requisites of offence—Assembling for purposes other than refreshment—Disorderly conduct unnecessary.]—PURKIS v. HUXTABLE** (1859), 1 E. & E. 780; 28 L. J. M. C. 221; 33 L. T. O. S. 106; 23 J. P. Jo. 293; 120 E. R. 1102; *sub nom.* **PURKIS v. CONSTABLE**, 5 Jur. N. S. 790.

*Annotations:—Mentd.* *Ex p. Markham* (1869), 21 L. T. 748; *Knight v. Halliwell* (1874), L. R. 9 Q. B. 412; *Kates v. Jeffery*, (1914) 3 K. B. 160.

**712. ———.]—By Refreshment Houses Act, 1860 (c. 27), s. 32, “every person licensed to keep a refreshment house under this Act who shall knowingly suffer prostitutes, thieves, or drunken & disorderly persons to assemble at or continue in or upon his premises” is liable to a penalty recoverable before justices. Upon an information under this sect., a metropolitan police magistrate convicted applt., & in a case stated for the opinion of this ct., found that prostitutes assembled on the premises of applt. in furtherance of prostitution. The ct. upheld the conviction.**

It would be sufficient to warrant a conviction if the magistrate found that prostitutes assembled as such (**BLACKBURN, J.**).—**BELASCO v. HANNANT, BARTON v. HANNANT** (1862), 3 B. & S. 13; 31 L. J. M. C. 225; 6 L. T. 577; 26 J. P. 823; 8 Jur. N. S. 1226; 10 W. R. 867; 9 Cox, C. C. 203; 122 E. R. 6.

**713. ——— Knowledge of licensee.]—PURKIS v. HUXTABLE** (1859), 1 E. & E. 780; 28 L. J. M. C. 221; 33 L. T. O. S. 106; 23 J. P. Jo. 293; 120 E. R. 1102; *sub nom.* **PURKIS v. CONSTABLE**, 5 Jur. N. S. 790.

*Annotations:—Mentd.* *Ex p. Markham* (1869), 21 L. T. 748; *Knight v. Halliwell* (1874), L. R. 9 Q. B. 412; *Kates v. Jeffery*, (1914) 3 K. B. 160.

**714. Who are prostitutes — “Persons of notoriously bad character.”]**—On the hearing of an information before two justices of the peace, preferred under 9 Geo. 4, c. 61, against a person licensed to sell excisable liquors by retail, for that he did “unlawfully & knowingly permit & suffer persons of notoriously bad character to assemble & meet together in his house & premises”: **Held:** (1) it having been proved that on the occasion in question a number of prostitutes assembled & met together at the house of deft., it was admissible evidence against him that on a previous occasion several of the same prostitutes assembled & met together at his house; (2) prostitutes, as such, are “persons of notoriously bad character” within the meaning of the license.—**PARKER v. GREEN** (1862), 2 B. & S. 299; 31 L. J. M. C. 133; 6 L. T. 46; 26 J. P. 247; 8 Jur. N. S. 409; 10 W. R. 316; 9 Cox, C. C. 169; 121 E. R. 1084.

**715. Liability of alehouse keeper—Information under local Act—Incorporated in Town Police Clauses Act, 1847 (c. 89).]**—A licensed alehouse is

a place of public resort for the sale of refreshments, within s. 35 of the above Act, & the keeper of it is liable to penalties under that sect. for allowing prostitutes to assemble therein; although he may also at the same time be guilty of an offence against the tenour of his licence, under 9 Geo. 4, c. 61.

A local Act for the improvement & management of the town of L., after incorporating certain sects. of the above Act, amongst others, s. 35, enacted, that penalties recovered before justices, not otherwise directed to be paid, should be awarded to the corpn. of the town, or the comrs. under the Act, according as the proceeding for the penalty was taken on behalf of one or other of those bodies. An information, under s. 35, against the keeper of a house of public resort for the sale of refreshments, was laid by the clerk to the comrs., but he had no authority from them, express or implied, otherwise than from having published, by their orders, a printed notice that s. 35 would be enforced in the town:—**Held:** the information being for an offence against public policy might be laid by any one, without authority from the party to whom the penalties to be recovered were to be awarded, so long as he professed that the recovery of the penalties should enure to the benefit of that party.—**COLE v. COULTON** (1860), 2 E. & E. 695; 29 L. J. M. C. 125; 2 L. T. 216; 24 J. P. 596; 6 Jur. N. S. 698; 8 W. R. 412; 121 E. R. 261.

*Annotations:—Reid.* *Johnson v. Henderson* (1900), 82 L. T. 260. *Mentd.* *R. v. Stewart* (1896), 65 L. J. M. C. 83; *Savill v. Harben* (1919), 89 L. J. K. B. 47.

**716. Liability of servant—Obeying master's orders—Liability of master.]—**Where a master keeps a refreshment house, so that prostitutes are allowed to meet together & remain there contrary to Metropolitan Police Act, 1839 (c. 47), s. 44, & in his absence a servant manages the house, if the servant was employed for the very purpose of allowing the prostitutes to meet there, he may be convicted of the offence of aiding & abetting under Summary Jurisdiction Act, 1848 (c. 43), s. 5, though the mere relationship of master & servant is not enough to warrant such conviction.—**WILSON v. STEWART** (1863), 3 B. & S. 913; 2 New Rep. 115; 32 L. J. M. C. 198; 8 L. T. 277; 27 J. P. 661; 9 Jur. N. S. 1130; 11 W. R. 640; 9 Cox, C. C. 354; 122 E. R. 341.

**717. Evidence—Admissibility—Previous attendance of same persons.]—PARKER v. GREEN**, No. 714, *ante*.

**Sufficiency — Women assembling, going & returning—Only some taking refreshments.]—**W., a freeman of the Vintner's Co. of London, selling foreign wines without licence, was subjected by a local Act to the same penalties as those licensed to sell. In his house one night, a constable saw forty prostitutes, about half of them taking refreshments & talking with men, & he told W. what they were. An hour afterwards some of the same women were there with other prostitutes, only a few of them taking refreshment, & they were going out & coming in with men. There was no indecent or improper behaviour:—**Held:** there was evidence sufficient to sustain a conviction against W. for suffering persons of notoriously bad character to assemble & meet together contrary to the license.—**WHITFIELD v. BAINBRIDGE** (1866), 30 J. P. 644; 12 Jur. N. S. 919.

**719. ——— Circumstantial evidence.]—**M. was convicted under Licensing Act, 1872 (c. 94),

against for permitting a reputed thief to be on his premises:—**Held:** a receiver of stolen property is not a thief within Licensing Act, 1890, s. 121.—**MCGAN v. PRATLEY** (1899), 24 V. L. R.

840.—AUS.

#### PART XII. SECT. 2, SUB-SECT. 8.—A.

7111. Requisites of offence—A.

assembling for purposes other than refreshment—Disorderly conduct unnecessary.]—**CLELAND v. ROBINSON** (1862), 11 C. P. 416.—CAN.

**Sect. 2.—Relating to regulation of licensed premises:**  
**Sub-sect. 8, A. & B.; sub-sects. 9, 10 & 11.**  
**Sect. 3: Sub-sects. 1 & 2, A.]**

s. 14, of having permitted a reputed prostitute to remain on licensed premises longer than a reasonable time for the woman to take refreshments:—**Held:** (1) the conviction must be quashed because the evidence of the offence having been committed given by the prosecution was in fact circumstantial; (2) before a publican could be convicted affirmative evidence in every case must be given by the prosecution; (3) under Summary Jurisdiction Act, 1879 (c. 49), s. 39, the onus of proving the offence rests on prosecutor, & deft. was right in not calling evidence to rebut the charge.—**MILLER v. DUDLEY JJ.** (1898), 46 W. R. 606; 42 Sol. Jo. 510, D. C.

**720. ——— Must be affirmative.]—MILLER v. DUDLEY JJ., No. 719, ante.**

**721. Onus of proof—On prosecution.]—MILLER v. DUDLEY JJ., No. 719, ante.**

**B. Permitting Premises to be used as a Brothel.**

**See Licensing (Consolidation) Act, 1910 (c. 24), s. 77: CRIMINAL LAW, Vol. XV., pp. 754-757, Nos. 8128-8147.**

#### SUB-SECT. 9.—PERMITTING GAMING.

**See Licensing (Consolidation) Act, 1910 (c. 24), s. 70: Betting Act, 1853 (c. 110).**

**Games & gaming.]—See, generally, GAMING & WAGERING, Vol. XXV., pp. 422 et seq.**

**—Gaming on licensed premises.]—See GAMING & WAGERING, Vol. XXV., p. 429.**

**Betting & betting houses.]—See GAMING & WAGERING, Vol. XXV., pp. 433 et seq.**

#### SUB-SECT. 10.—USER FOR PARLIAMENTARY OR MUNICIPAL ELECTION.

**See ELECTIONS, Vol. XX., p. 146, Nos. 1213-1216.**

**720 i. Evidence—Sufficiency—Must be affirmative.]—To support a charge of allowing men or women of notoriously bad fame to assemble or meet in a public-house it is necessary to prove that the assembling or meeting had reference to the bad character referred to. **KIRTON v. CADENHEAD** (1880), 8 R. (Ct. of Sess.) 4; 18 Sc. L. R. 19, J.—SCOT.**

**721 i. Onus of proof—On prosecution.]—Under Licensing Act, 1902, s. 119, it is necessary to prove that the persons remaining on the premises were prostitutes, & for this purpose the mere assertion in evidence of police officers that they were prostitutes is insufficient. The prohibition not being absolute it is necessary for the prosecution to prove deft.'s knowledge that the women were prostitutes. **GILL v. WILLIAMS**, [1918] 12 Tas. L. R. 87.—AUS.**

#### PART XII. SECT. 3, SUB-SECT. 1.

**1. Strangers in closed inn—In prohibited hours—Whether offence per se.]—A person went into an hotel on Sunday with the object of obtaining liquor, but was unsuccessful.—**Held:** his presence there was in contravention of Licensing Act, 1906, & he was properly convicted of having been found on licensed premises at a time when such premises should not be open for the sale of liquor to the public.—**CHARLES v. GRIERSON** (1908), 7 C. L. R. 18.—AUS.**

**j. ———.]—WILSON v. JONES**, [1916] V. L. R. 636.—AUS.

**k. ———.]—The fact**

of a person being in his licensed public house in company with another after prohibited hours, the outside doors being fastened, does not per se constitute the statutory offence of keeping open house.—**M'GREGOR v. LANG** (1876), 3 Couper, 289.—SCOT.

**o. ——— Supplied with liquor.]—A bye-law prohibited the keeping open of places for public refreshment after 11 p.m. The door of premises used as a place for public refreshment was locked at 11.30 p.m., after which hour no one was allowed to enter; but customers already on the premises were allowed to order, & were served with refreshments after that hour, & the door was opened from time to time to allow them to depart.—**Held:** the bye-law had been contravened.—**CLAPPERTON v. DICKIE-SMITH**, [1915] 52 Sc. L. R. 667.—SCOT.**

**p. Carrying liquor away—Prevention of police seizure—Obstruction of police.]—A person who is found carrying away liquor from licensed premises during prohibited hours is guilty of obstructing a member of the police force in the execution of his duty if he runs away with the liquor when the police endeavour to seize it.—**PEACHE v. MCCARTHY**, [1919] V. L. R. 342.—AUS.**

**q. Regulation of prohibited hours—By local authority.]—Re BRIGHT & TORONTO (CITY)** (1862), 12 C. P. 433.—CAN.

**r. Inn doors left open.]—Re O'NEIL** (1892), 7 Nfld. L. R. 581.—NFLD.

**s. ———.]—M'INTYRE v. PERSICHINI** (1914), 51 Sc. L. R. 610.—SCOT.

#### SUB-SECT. 11.—POSSESSION OF SUGAR BY DEALER IN OR RETAILER OF BEER.

**See Finance Act, 1896 (c. 28), s. 11.**

**Adulteration of liquor.]—See Sect. 8, post.**

#### SECT. 3.—RELATING TO PROHIBITED HOURS.

##### SUB-SECT. 1.—IN GENERAL.

**NOTE.—Cases dealing with bond fide travellers & closing hours of premises are omitted as obsolete.**

**722. Effect of Licensing Act, 1921 (c. 42)—Closing hours abolished.]—SMITH v. FENNELL, No. 566, ante.**

**723. Mistake as to time.]—HOPKINS v. ELLIS** (1924), 88 J. P. Jo. 446, D. C.

##### SUB-SECT. 2.—SALE OR SUPPLY.

###### A. In General.

**NOTE.—The offence of keeping open in prohibited hours for the purpose of sale has ceased to exist since the Licensing Act, 1921 (c. 42). Some of the following cases are however retained as illustrating the offence of selling or supplying liquor in prohibited hours.**

**See Licensing Act, 1921 (c. 42), ss. 4, 5.**

**724. What amounts to a sale—Entertainment of friends by licensee.]—O., an alehouse keeper, on Sunday night, after 11 p.m., entertained a few friends & neighbours, not being lodgers or travellers, at his own expense in his inn, & gave them (*inter alia*), a glass of whisky. There was no sale of beer, wine, or spirits after the above hour. O. having been convicted under 18 & 19 Vict. c. 118, s. 2:—**Held:** the conviction must be quashed, as there was no offence within the statute, there being no sale after 11 p.m.—**OVERTON v. HUNTER** (1859), 1 L. T. 366; 23 J. P. 808.**

**Annotations:—Reid, Patten v. Rhymer** (1860), 24 J. P. 342; **Blakey v. Harrison**, [1915] 3 K. B. 258.

**725. ———.]—An order of licensing justices [under Intoxicating Liquor (Temporary Restriction**

**a. ——— For bond fide travellers.]—R. v. RYAN**, [1909] 43 L. T. 110.—IR.

**b. Keeping open for grocery business—No structural separation.]—MOLLOY v. STACK**, [1915] 2 L. R. 338; 49 L. T. 164.—IR.

#### PART XII. SECT. 3, SUB-SECT. 2.—A.

**724 i. What amounts to a sale—Entertainment of friends by licensee.]—Treating or giving liquor to friends by a landlord in a private room in his licensed premises on a Sunday is an offence under R. S. O. 1887, c. 194, s. 54, & is covered by the words "other disposal" in that sect.—**R. v. WALSH** (1897), 29 O. R. 36.—CAN.**

**724 ii. ———.]—BATT v. CULLEN** (1897), 16 N. Z. L. R. 17.—N.Z.

**724 iii. ———.]—There is nothing in any provision of the Licensing Acts which makes it unlawful for a licensee to entertain his bond fide guests with liquor upon his licensed premises during closing hours.—**RYLAND v. FOLEY** (1898), 16 N. Z. L. R. 670.—N.Z.**

**724 iv. ———.]—It is not a breach of the condition of his license for a publican bond fide to entertain his friends with excisable liquors after 11 p.m. in part of his licensed premises, which were also his dwelling-house.—**SMITH v. STIRLING** (1878), 5 R. (Ct. of Sess.) 24; 15 Sc. L. R. 420, J.—SCOT.**

**724 v. ———.]—WHITE v. NEILSON** (1904), 6 F. (Ct. of Sess.) 51; 41 Sc. L. R. 855; 19 S. L. T. 286, J.—SCOT.



tion) Act, 1914 (c. 77), s. 1 (1)], directed that the sale or consumption of intoxicating liquor on licensed premises should be suspended on Sundays between 2.30 p.m. & 6 p.m., except in the case of *bonâ fide* residents in hotels. At 4 p.m. on a Sunday beer was supplied gratuitously by resp., the landlord of licensed premises, to three men who were his personal friends & who drank the beer on the premises:—*Held*: the Act, & order did not apply to a case where a licensee was entertaining his personal friends, & resp. had not acted in contravention of the order.—**BLAKEY v. HARRISON**, [1915] 3 K. B. 258; 84 L. J. K. B. 1886; 113 L. T. 733; 79 J. P. 454; 31 T. L. R. 503, D. C.

*Annotations*:—**Distd.** King v. Slim (1916), 85 L. J. K. B. 1621; Thomson v. Davison, [1916] 1 K. B. 917. *Refd.* Williams v. Pearce (1916), 85 L. J. K. B. 959; Caldwell v. Jones, [1923] 2 K. B. 309.

**726.** ————*J.*—Defence of the Realm (Liquor Control) Regulations, 1915, made in pursuance of Defence of the Realm (Amendment) (No. 3) Act, 1915, provided that the Central Control Board (Liquor Traffic) might "for the purpose of the control of the sale & supply of any intoxicating liquor" regulate the hours of closing of any licensed premises or club, & by regulation 27, "for the purpose of these Regulations the expression 'supply' in relation to intoxicating liquor means supply otherwise than by way of sale."

By an order made under the regulations on July 30, 1915, it was provided (*inter alia*) that after 9 p.m. on weekdays no person should "sell or supply to any person in any licensed premises or club any intoxicating liquor, to be consumed on the premises, or permit any person to consume in any such premises or club any intoxicating liquor" except in the case of a person residing in the licensed premises or club. At 11 p.m. on a weekday resp., the licensee of a public-house, supplied whisky in the public-house gratuitously to a man who was a personal friend of resp. & who consumed the whisky in the house:—*Held*: the order applied to a case where a licensee was entertaining his personal friends, & resp. had acted in contravention of the Order.—**THOMPSON v. DAVISON**, [1916] 1 K. B. 917; 85 L. J. K. B. 969; 114 L. T. 1040; 80 J. P. 274; 32 T. L. R. 430; 14 L. G. R. 678; 25 Cox. O. C. 390, D. C.

*Annotations*:—**Apld.** King v. Slim (1916), 85 L. J. K. B. 1621. *Refd.* Caldwell v. Jones, [1923] 2 K. B. 309.

**727.** ————*J.*—Gift of beer by licensee.—A. went to a beerhouse; the door was shut; the landlady said she could not draw, it was past the hour, but she said she would give A. a drop of beer, which she did. She refused money, but said, "You may

send me some greens," which was done:—*Held*: there was no evidence to justify a conviction for selling beer after the hours prescribed by the Act for closing.—**PETHERICK v. SARGENT** (1862), 0 L. T. 48; 26 J. P. 135.

**728.** ————*J.*—Sale to *bonâ fide* lodger.—For consumption by his *bonâ fide* guests.—*Appl.*, a licensed innkeeper, sold & supplied to a *bonâ fide* lodger in his house intoxicating liquors which were consumed, during the time at which the premises are directed to be closed, in a private room on the premises by the lodger & *bonâ fide* guests of the lodger after a dinner given by him to them:—*Held*: *applt.* was not liable to be convicted under Licensing Act, 1874 (c. 49), s. 9.—**PINE v. BARNES** (1887), 20 Q. B. D. 221; 57 L. J. M. C. 28; 58 L. T. 520; 52 J. P. 199; 36 W. R. 473, D. C.

*Annotations*:—**Follid.** Cope v. Landles (1896), 13 T. L. R. 18. *Distd.* Atkins v. Agar, [1914] 1 K. B. 26.

**729.** ————*J.*—A sale of liquor during prohibited hours to a *bonâ fide* lodger, to be consumed by the lodger & his *bonâ fide* guests, is not an offence within the Act.—**COPE v. LANDLES** (1896), 13 T. L. R. 18, D. C.

*Annotation*:—**Distd.** Atkins v. Agar, [1914] 1 K. B. 26.

**730.** ————*J.*—Sale during permitted hours.—Delivery during prohibited hours.—A dozen bottles of beer were ordered from a beerhouse-keeper & paid for on a Saturday evening, & they were to have been delivered at the house of the purchaser on the Saturday night, but in consequence of an accident the delivery was overlooked, & did not take place on the Saturday as arranged. On the Sunday during closing hours the purchaser of the beer sent his servant to the public-house for two bottles of the beer, which were delivered to the servant, who was seen to come out of the public house with the beer:—*Held*: although the beer had been ordered & paid for during the time the premises were allowed to be open, the beerhouse keeper, by the delivery of the two bottles of beer during prohibited hours, had "opened his premises for the sale of intoxicating liquors" within Licensing Act, 1874 (c. 49), s. 9, & was liable to the penalty imposed by the sect.—**SAUNDERS v. THORNEY** (1898), 78 L. T. 627; 62 J. P. 404; 14 T. L. R. 346; 42 Sol. Jo. 451, D. C.

*Annotations*:—**Apld.** Stoddart v. Hawke (1901), 71 L. J. K. B. 133. *Follid.* Noblett v. Hopkinson, [1905] 2 K. B. 214. *Distd.* Bristow v. Piper, [1915] 1 K. B. 271.

**731.** ————*J.*—**MACKENZIE v. SPEAR** (1902), 74 L. J. K. B. 546, n., D. C.

*Annotation*:—**Distd.** Noblett v. Hopkinson, [1905] 2 K. B. 214.

**732.** ————*J.*—Two men went into

**727 i.** ————*J.*—*Gift of beer by licensee.*—A publican who gives liquor to his friends or visitors, not being *bonâ fide* travellers or lodgers during closing hours, does not supply the same within Licensed Victuallers Act, 1880, s. 96.—**DUNN v. BENNETT**, [1887] S. A. L. R. 12.—**AUS.**

**727 ii.** ————*J.*—Certain persons consumed liquor on Sunday on licensed premises. The liquor was a free gift to the consumers from the licensee & no sale or traffic in the liquor took place:—*Held*: the licensee had committed an offence.—**IRWIN v. POYTZ** (1894), 20 V. L. R. 282.—**AUS.**

**727 iii.** ————*J.*—The words "sold or disposed of" in Licensing Act, 1915, s. 177, include gratuitous disposal.—**MARTIN v. WHITTAKER**, [1922] V. L. R. 207.—**AUS.**

**727 iv.** ————*J.*—A gift by a publican, the motive of which is to indirectly benefit the giver, is not a sale within Licensing Act, 1881, s. 155.—**DALTON v. BOWDEN** (1903), 13 N. Z. L. R. 165.—**N.Z.**

**727 v.** ————*J.*—**WILSON v. CAMMINE**, [1923] N. Z. L. R. 835.—**N.Z.**

**728 i.** ————*J.*—Sale to *bonâ fide* lodger.—For consumption by his *bonâ fide* guests.—**CRAMPTON v. STAIR** (1898), 24 V. L. R. 537.—**AUS.**

**728 ii.** ————*J.*—**BREWER v. STAGPOOLE** (1894), 13 N. Z. L. R. 134.—**N.Z.**

**728 iii.** ————*J.*—**WHITE v. NESTOR** (1895), 13 N. Z. L. R. 751.—**N.Z.**

**728 iv.** ————*J.*—**LESLIE v. CLARKE** (1903), 22 N. Z. L. R. 967.—**N.Z.**

**728 v.** ————*J.*—Liquor was supplied to two *bonâ fide* lodgers, which was paid for by the lodgers & consumed by them & their guests:—*Held*: no offence had been committed.—**LOCKIE v. MCCROBIE**, [1922] N. Z. L. R. 1137.—**N.Z.**

**728 vi.** ————*J.*—**GEMMELL v. FLECK** (1882), 10 R. (Cl. of Sess.) 17; 20 Sc. L. R. 27, J.—**SCOT.**

**728 vii.** ————*J.*—**GUTHRIE'S**

**TRUSTLES v. IRLAND** (1891), 18 R. (Cl. of Sess.) 833; 28 Sc. L. R. 641.—**SCOT.**

**728 viii.** ————*J.*—**LAMB v. STOTT** (1899), 1 F. (Cl. of Sess.) 91; 36 Sc. L. R. 913; 7 S. L. T. 121, J.—**SCOT.**

**728 ix.** ————*J.*—**R. v. SOUTHWICK** (1892), 21 O. R. 670.—**CAN.**

**730 i.** ————*J.*—Sale during permitted hours.—Delivery during prohibited hours.—A bottle of whiskey was bought from def., a licensed hotel-keeper, upon his premises, & paid for, on a Saturday before 7 p.m., but was kept upon the premises until the following day, Sunday, & then delivered to the purchaser:—*Held*: there was a "disposal" of the liquor on Sunday, contrary to Liquor License Act, 1897, s. 54.—**R. v. CLARK** (1912), 27 O. L. R. 525; 4 O. W. N. 529; 9 D. L. 517.—**CAN.**

**730 ii.** ————*J.*—**R. v. PILE-INGTON** (1893), 10 S. C. 132.—**S. AF.**

**4.** ————*J.*—Sale at railway refreshment room.—To persons other than



**Sect. 3.—Relating to prohibited hours: Sub-sect. 2, A. & B.; sub-sect. 3.]**

a public-house on Saturday before closing time, & asked if they could have half a gallon of beer & if it could be delivered the next morning to them at the place where they were working; on being told that they could, they paid for the beer. The beer was directly afterwards drawn & put into a bottle, which was kept during the night in a building within the curtilage of the licensed premises, & was taken by the barman on the Sunday morning during prohibited hours & delivered to the purchasers. A charge against the licensee under Licensing Act, 1874 (c. 49), s. 9, of unlawfully opening his licensed premises for the sale of intoxicating liquor during prohibited hours on Sunday, having been dismissed by justices:—*Held*: there had been no sufficient appropriation of the beer to the purchasers on the licensed premises on the Saturday, & the licensee ought to have been convicted.—*NOBLETT v. HOPKINSON*, [1905] 2 K. B. 214; 74 L. J. K. B. 544; 92 L. T. 462; 69 J. P. 269; 53 W. R. 637; 21 T. L. R. 448; 49 Sol. Jo. 459, D. C.

*Annotations*:—*Consd.* Hales v. Buckley (1911), 104 L. T. 34. *Distd.* Bristol v. Piper, [1915] 1 K. B. 271. *Refd.* Elias v. Dunlop (1905), 75 L. J. K. B. 108.

**733.** —[—]—A man called at resp.'s licensed premises at 8 o'clock on a Sunday evening, handed to resp. a quart bottle, & asked that it should be filled with beer & put out in the stable yard that night so that he could call for it & take it away with him while on his way to work next morning before the premises opened. The beer, which was paid for at the time it was ordered, was filled by resp. into the bottle & placed in the stable yard, which was within the curtilage of the licensed premises, on the same evening. The purchaser called for & took away the beer before the licensed premises were open on the Monday morning. An information against resp., under Licensing (Consolidation) Act, 1910 (c. 24), s. 61, for having unlawfully opened his licensed premises on the Monday morning for the sale of intoxicating liquors during prohibited hours was dismissed by the justices:—*Held*: the justices were right in dismissing the information as the whole transaction of sale was completed when the beer was placed in the stable yard on the Sunday night.—*BRISTOW v. PIPER*, [1915] 1 K. B. 271; 84 L. J. K. B. 607; 112 L. T. 426; 79 J. P. 177; 31 T. L. R. 80; 59 Sol. Jo. 178, 221; 24 Cox, C. C. 553, D. C.

**B. Evidence of.**

See Licensing Act, 1921 (c. 42), ss. 4, 5.

**734. Customers on premises before permitted hour.]**—On an information for opening a public-house for the sale of spirits before half-past twelve

p.m. on Sunday, it appeared that the front door was open at twenty-two minutes past twelve on Sunday morning, & a policeman found in the commercial room four persons, one of whom was a traveller; there was a small quantity of spirits & water in a glass, from which one of the persons had been drinking. The landlady was sitting in the parlour. No spirits had been sold after twenty minutes before twelve o'clock on Saturday night:—*Held*: the fact of the house being open at twenty-two minutes past twelve on Sunday morning was no proof that it was open for the sale of beer, etc., before half-past twelve on Sunday afternoon, within 11 & 12 Vict. c. 49, & the above stated facts did not warrant a conviction.—*CATES v. SOUTH* (1859), 1 L. T. 365; 23 J. P. 823.

**735. Customer seen drinking.]**—Upon an information, under 11 & 12 Vict. c. 49, s. 1, against the keeper of a licensed public-house, for opening his house for the sale of beer after twelve o'clock on Saturday night, it appeared that the house was closed at twelve o'clock, & at two o'clock a guest was seen drinking in the house: soon after the door was opened, & he left the house:—*Held*: it was not necessary to prove that the guest was a traveller within the exemption in sect. 1, but there was no evidence to support a conviction upon this information, though there would have been evidence upon an information for selling beer after twelve o'clock on Saturday night.—*TENNANT v. CUMBERLAND* (1859), 1 E. & E. 401; 5 Jur. N. S. 703; 23 J. P. Jo. 51; 120 E. R. 960; *sub nom.* R. v. CUMBERLAND, 7 W. R. 161.

*Annotations*:—*Fold.* Jefferson v. Richardson (1871), 35 J. P. 470. *Expld. & Distd.* Brower v. Shepherd (1872), 37 J. P. 102. *Refd.* Police Comrs. v. Roberts (1904), 52 W. R. 560. *Mentd.* Taylor v. Humphries (1864), 17 C. B. N. S. 539; Davis v. Scrase (1869), L. R. 4 C. P. 172; Jeffrey v. Weaver, [1899] 2 Q. B. 449.

**736. —Liquor purchased in permitted hours.]**—The Central Control Board (Liquor Traffic) made an order prohibiting the sale of intoxicating liquor in a certain area between 2.30 p.m. & 6 p.m. A person went into certain licensed premises within that area shortly before 2.30 p.m., & was supplied with a bottle of stout to take home with him; & he left at 2.30 p.m., taking the bottle of stout with him. He returned at 3 p.m., & was supplied with a bottle of non-alcoholic stout. A constable who visited the premises at 3.30 p.m. found the man sitting in the bar with an uncorked bottle of stout on the table before him, part of its contents having been consumed. An empty stout bottle was also on the table. When the constable entered, that man put his hand in front of the bottle containing stout. The man told the constable that he did not know anything about the bottle of stout, that it was not his; & that he had not brought it into the house. The licensee of the

passengers.]—The lessee of railway refreshment rooms who by his lease has to keep open those rooms at all times required by the railway comrs. & to supply refreshments on demand to all persons arriving or departing by train at any time during the day or night, commits an offence against Police Offences Act, 1901, s. 61, if he sells refreshments on Sunday to a person other than a person arriving or departing by train.—*KELLY v. HART* (1909), 28 T. L. R. 121.—*AUS.*

**e. —Liquor taken to be consumed off the premises.]**—A licensee of an hotel during prohibited hours took out two bottles & a glass of liquor from his hotel & placed them in the dray of one M., who was seated in the dray, which was standing in a road outside the hotel. The liquor was not paid for, but was charged to M.:—*Held*:

there had been a supply of liquor to M., but not on the licensed premises.—*BOWEN v. GROW*, [1924] S. A. S. R. 132.—*AUS.*

**f. Sale on polling days.—Prohibition absolute.]**—*WIDDERFIELD v. METCALFE* (1861), 21 U. C. R. 247.—*CAN.*

**g. Who may be prosecuted.]**—Only the holder of a license can be prosecuted under R. S. O. 1877, c. 181, s. 43, for selling liquor on prohibited days.—*R. v. DUQUETTE* (1881), 9 P. R. 39.—*CAN.*

**h. —Sale to detective visiting saloon on duty.]**—*R. v. HARRIS* (1893), 2 B. C. R. 177.—*CAN.*

**k. Proof of license.—Necessity for.]**—In order to convict of the offence of selling intoxicating liquors during prohibited hours it is incumbent on

the prosecution to prove that deft. held a license for the premises where the liquor was sold, or that the premises were licensed premises.—*R. v. WILLIAMS* (1892), 8 Man. L. R. 342.—*CAN.*

**l. Conviction of licensee & servant for same offence.]**—*R. v. BOOMER* (1907), 15 O. L. R. 321; 10 O. W. R. 978.—*CAN.*

**PART XII. SECT. 3, SUB-SECT. 2. —B.**

**735 i. Customer seen drinking.]**—A conviction for keeping licensed premises open during prohibited hours cannot be sustained where the evidence shows that the doors of the premises were kept closed, although a number of persons were in the premises drinking.—*RICHARDS v. SHEEHAN* (1887), 5 N. Z. L. R. 487 (S. C.).—*N.Z.*

premises, when summoned for selling intoxicating liquor between 2.30 p.m. & 6 p.m., gave evidence that he did not sell any intoxicating liquor after 2.30 p.m., & that he did not know anything about the bottle of stout, unless it had been served before 2.30 p.m. The customer gave evidence that the bottle of stout before him on the table was the one which he had purchased before 2.30 p.m.:—*Held*: there was evidence upon which the justices were entitled to hold, as they did, that there had been a sale of intoxicating liquor after 2.30 p.m., & therefore the conviction must be affirmed.—*WILLIAMS v. TIPPETT* (1917), 86 L. J. K. B. 828; 117 L. T. 56; 81 J. P. 139; 51 L. G. R. 527, D. C.

**737. Customers found drunk—Glasses containing liquor on table.**—A constable found the door of a public-house ajar at twenty minutes to four a.m., & pushing it open found five men in the bar parlour, three of whom were drunk. Glasses with spirits were found on the table, but none of the men were seen consuming anything:—*Held*: there was ample evidence to convict the publican of keeping his house open for the consumption of excisable liquors, contrary to Public House Closing Act, 1864 (c. 64), s. 5.—*THOMPSON v. GREIG* (1869), 34 J. P. 214.

*Annotations*.—*Consol.* *Jefferson v. Richardson* (1871), 35 J. P. 470. *Reid.* *Jeffrey v. Weaver* (1899), 47 W. R. 638.

**738. Customer leaving premises drunk.**—At 1 o'clock on Sunday morning seven men were seen to come out of the side door of an alehouse, the front door being shut, & shortly afterwards an eighth man came out drunk; the alehouse keeper said they were lodgers, & there was no evidence on that point one way or the other:—*Held*: not sufficient evidence to justify a conviction for opening the house for the sale of beer within 11 & 12 Vict. c. 49, s. 4.—*JEFFERSON v. RICHARDSON* (1871), 35 J. P. 470.

*Annotation*.—*Reid.* *Jeffrey v. Weaver*, (1899) 2 Q. B. 449.

**739. Customer remaining on premises during prohibited hours.**—In order to constitute the offence of opening or keeping open licensed premises for the sale of intoxicating liquor during prohibited hours, within Licensing Act, 1874 (c. 49), s. 9, there must be means of access to customers to the interior of the premises from the outside. If therefore the outer doors are closed at the closing hour, so as to prevent access from the outside, the offence of keeping open the premises during prohibited hours is not proved by evidence that customers, who were on the premises before closing time, remained there & were supplied with liquor afterwards, although such evidence might justify a conviction under the same section for selling intoxicating liquor during prohibited

hours.—*JEFFREY v. WEAVER*, [1899] 2 Q. B. 449; 68 L. J. Q. B. 817; 81 L. T. 193; 63 J. P. 663; 47 W. R. 638; 15 T. L. R. 422; 43 Sol. Jo. 588; 19 Cox, C. C. 386, D. C.

*Annotations*.—*Consol.* *Police Comr. v. Roberts*, [1904] 1 K. B. 369. *Reid.* *Bristow v. Piper*, [1915] 1 K. B. 271.

**740. Customer entering & leaving premises.**—A man was seen to go into a beerhouse after 10 o'clock, the hour of closing, & to come out with a bottle of beer. Afterwards the man explained that he had left the bottle before 10, ordering it to be filled, & then went to get shaved, after which he only called for the bottle. The justices having convicted the beerhouse keeper of keeping open his house for sale of beer after 10 o'clock:—*Held*: there was some evidence that the offence had been committed, & the conviction could not be interfered with.—*BREWER v. SHEPHERD* (1872), 37 J. P. 102.

*Annotations*.—*Consol.* *Saunders v. Thorney* (1898), 78 L. T. 627; *Bristow v. Piper*, [1915] 1 K. B. 271. *Reid.* *Jeffrey v. Weaver* (1899), 47 W. R. 638.

**741. — Refusal to supply intoxicants.**—H. was the holder of a six-day license. On a certain Sunday morning the police observed a number of persons being admitted to the licensed premises, & leaving after an interval of from three to twelve minutes. The only one of these persons who was called as a witness stated in evidence that when he entered the premises he called for intoxicating liquor, but that H. refused to serve him. The justices held that a *prima facie* case had been made out against H. of keeping open the premises for the sale of intoxicating liquors during part of the time at which the premises were directed to be closed, but H. refused to give or call any evidence:—*Held*: the evidence was equally consistent with innocence as with guilt, & therefore a *prima facie* case had not been established against H., & the justices were not entitled to draw any inference of guilt from his refusal to give evidence.—*HARRIES v. THOMAS* (1917), 86 L. J. K. B. 812; 117 L. T. 123; 81 J. P. 172; 25 Cox, C. C. 753, D. C.

#### SUB-SECT. 3.—CONSUMPTION ON LICENSED PREMISES.

See Licensing Act, 1921 (c. 42), ss. 4, 5.

**742. Meeting in specially hired room.**—Certain neighbours hired a room in the licensed premises of P. to let the pasture of township lands & when the hour of closing, which was 10 p.m., arrived, the guests remained transacting business, & were found at 11 p.m. with drinking glasses before them, some of which were not quite empty.

**739 i. Customers remaining on premises during prohibited hours.**—When in a prosecution for the sale of liquor on a Sunday, the prosecutor relies on the presence of two or more persons on the licensed premises as being *prima facie* evidence of a sale of liquor having taken place he must prove that such persons were not *bona fide* lodgers, travellers, inmates, or servants.—*CAHILL & MILLETT*, [1907] V. L. R. 605.—*AUS.*

**739 ii.**—*BOYD v. M'JANNET* (1879), 6 R. (Ct. of Sess.) 43; 16 Sc. L. R. 649, J.—*SCOT.*

**740 i. Customers entering & leaving premises.**—*ANTILL v. RICHARDSON* (1911), 14 W. A. L. R. 1.—*AUS.*

**740 ii.**—The mere fact of people being seen entering & leaving an hotel after the hours for closing, the house being full of resident guests, is not a reasonable ground for suspecting

a breach of the law by selling liquor after the hour for closing.—*HENDREY v. ROLLESTON* (1903), 22 N. Z. L. R. 821.—*N.Z.*

**m. Liquor handed to customer through window.**—*Ex p. MONTGOMERY* (1910), 10 S. R. N. S. W. 632; 27 N. S. W. W. N. 12, 129.—*AUS.*

**n. Liquor taken to customer waiting outside.**—*Ex p. LOVE* (1921), 21 S. R. N. S. W. 783; 38 N. S. W. W. N. 271.—*AUS.*

**o. Purchaser competent witness to prove sale.**—*Ex p. BIRMINGHAM* (1899), 18 N. B. R. 564.—*CAN.*

**p. Proof that sale was by licensee's authority.**—*HENRY v. FELTON* (1890), 8 N. Z. L. R. 551.—*N.Z.*

**q. Liquor handed over bar—Evidence that it was gift.**—*SCHULTHEIS v. WILSON* (1895), 13 N. Z. L. R. 295.—*N.Z.*

**r. Proof of consumption on premises—*Prima facie* evidence of sale by licensee.**—*JULL v. THEANOR* (1896), 14 N. Z. L. R. 513.—*N.Z.*

**t. — — —.**—*R. v. ALEXANDER* (1913), T. P. D. 561.—*S. AF.*

#### PART XII. SECT. 3, SUB-SECT. 3.

**a. Food ordered with liquor—*Must be bona fide meal.***—A customer called for liquor during the prohibited hours, which was refused unless he ordered a "meal," whereupon he ordered crackers & cheese, for which no extra charge to that for the liquor was made:—*Held*: sustaining a conviction of deft., the word "meal" applied to food eaten to satisfy the requirements of hunger, & the supply of food by deft. was a mere excuse to enable deft. to supply liquor.—*R. v. SAUER* (1894), 3 B. C. R. 308.—*CAN.*

**b. — — —.**—*R. v. BYNG* (No. 2)

**Sect. 3.—Relating to prohibited hours: Sub-sect. 3, 4 & 5. Sect. 4: Sub-sect. 1, A. & B. (a).]**

All the guests had entered the premises before 10 p.m. The front door was closed at 10 p.m., but a back door was unfastened:—*Held*: (1) there was evidence to support a conviction of P. for keeping his premises open during prohibited hours for the sale of liquors; (2) the men found inside were properly convicted of being found on premises in contravention of the statute.—*PEARSE v. GILL, HARBOTTLE v. GILL* (1877), 41 J. P. 742.

*Annotation*:—*Reld. Jeffrey v. Weaver* (1899), 81 L. T. 193.

**743. Customers remaining as guests of licensee.]**

—P. gave a dinner to some friends at a licensed house kept by L. On the breaking up of P.'s party, L. invited nine of P.'s guests, including applt., to remain after the hour for closing, to partake of two bottles of claret at his (L.'s) expense. Upon an information charging these nine persons with being found on the premises during prohibited hours, the justices, though satisfied of the *bona fides* of the transaction, convicted them under Licensing Act, 1872 (c. 94), s. 25, on the ground that the landlord, on the arrival of the hour for closing, could not convert them into "private friends," for the purpose of their consuming the wine so supplied to them by him:—*Held*: the conviction was right.—*CORBET v. HAIGH* (1879), 5 C. P. D. 50; 42 L. T. 185; 28 W. R. 490; *sub nom. COBBETT v. HAIGH*, 44 J. P. 39, D. C.

**744. Liquor procured as guest of *bona fide* traveller.]**—A *bona fide* traveller invited applt., who was not a *bona fide* traveller, to come with him into certain licensed premises as his guest for the purpose of getting something to drink at a time when the premises were required to be closed. When they went in, the *bona fide* traveller ordered & paid for a glass of whisky for each of them. Upon an information charging applt., under Licensing Act, 1872 (c. 94), s. 25, with being unlawfully on the licensed premises at a time when the premises were required to be closed:—*Held*: as applt. went to the inn with the *bona fide* traveller for the sole purpose of getting intoxicating liquor, though the liquor was to be ordered & paid for by the *bona fide* traveller, he was unlawfully on the premises & was liable to be convicted under s. 25 of the Act.—*JONES v. JONES*, [1910] 2 K. B. 262; 79 L. J. K. B. 762; 103 L. T. 41; 74 J. P. 317; 20 T. L. R. 497, D. C.

*Annotation*:—*Fold. Atkins v. Agar*, [1914] 1 K. B. 26.

**745. Liquor procured as guest of lodger.]**—A lodger at an hotel invited applt., who was his cousin & was not lodging in the hotel, to come with him into the hotel after closing hours in order to have a drink, as it was a cold night & he was leaving the hotel the next morning. Applt. entered the hotel & was supplied with intoxicating liquors

on the order, & at the expense of the lodger. Upon an information charging applt., under Licensing (Consolidation) Act, 1910 (c. 24), s. 62 (1), with being unlawfully on the licensed premises at a time when they were required by law to be closed:—*Held*: (1) the justices were entitled to find that applt. entered & was upon the licensed premises at the invitation of the lodger for the purpose of obtaining intoxicating liquor & he was unlawfully on the premises & was liable to be convicted under s. 62 (1) of the Act; (2) for the purposes of s. 62 (1) of the Act there is no distinction between the position of a lodger on the licensed premises & a *bona fide* traveller.—*ATKINS v. AGAR*, [1914] 1 K. B. 26; 83 L. J. K. B. 265; 109 L. T. 891; 78 J. P. 7; 30 T. L. R. 27; 23 Cox, C. C. 677, D. C.

**746. Liquor brought to premises—Consumed during prohibited hours.]**—*CALDWELL v. JONES*, No. 20, *ante*.

**SUB-SECT. 4.—FORM OF CONVICTION.**

See Licensing (Consolidation) Act, 1910 (c. 24), s. 99; Licensing Act, 1921 (c. 42), s. 14.

**747. Must state time of consumption—& time prescribed for consumption—Beerhouse Acts, 1830 (c. 64), ss. 14, 25, 1834 (c. 85), s. 6.]**—A conviction under the above sects. for allowing beer to be consumed in a licensed house at other hours than those prescribed by order of petty sessions, must state the time fixed by the justices at which houses may be kept open, & the hour at which the beer was consumed. It is not enough to say, "at a time declared to be unlawful by an order of the justices."—*NEWMAN v. HARDWICKE (EARL)* (1838), 8 Ad. & El. 124; 3 Nev. & P. K. B. 368; 1 Will. Woll. & H. 284; 7 L. J. M. C. 101; 2 J. P. 328; 2 Jur. 493; 112 E. R. 782.

*Annotation*:—*Mentd. Wilkinson v. Gray* (1844), 9 J. P. 71.

**748. Must include only one specific offence.]**—Where a conviction under Beerhouse Act, 1830 (c. 64), s. 14, purported to charge the party with the offence of keeping his house open for the sale of beer, & selling beer, & suffering the same to be drunk & consumed in the house at an unlawful time, & convicted him in the penalty of 40s. as upon a single offence:—*Held*: the conviction was bad, because it included more than one distinct offence.—*NEWMAN v. BENDYSHE* (1839), 10 Ad. & El. 11; 2 Per. & Dav. 340; 8 L. J. M. C. 58; 3 J. P. 437; 113 E. R. 5; *previous proceedings*, 5 J. P. 211.

*Annotations*:—*Reld. Ez p. Pardy* (1850), 1 L. M. & P. 16. *Mentd. Martins v. Upcher* (1842), 2 Gal. & Dav. 716.

**749. Silent as to indorsement of license—No objection.]**—It is no objection to a conviction for selling drink during prohibited hours that it is silent as to whether the license was to be indorsed or not.—*WRIGHT v. SOUTH SHIELDS JJ.* (1880), 44 J. P. 48.

(1908), 6 E. L. R. 239; 43 N. S. R. 40.—*CAN.*

*e.* ———.—*R. v. SUTTON* (1893), 10 S. C. 373.—*S. AF.*

*d.* ———.—*LEVY v. VICTORIA* (1911), 1 W. W. R. 83.—*CAN.*

*e.* *Purchased in permitted hours—Consumed after hours.]*—The consumption of excisable liquor by a customer after the expiry of the permitted hours, even though it was supplied to him *bona fide* during these hours, is an offence under Licensing Act 1901, s. 4.—*FRENEY v. MILLER*, [1935] S. C. (J.) 65.—*SCOT.*

**PART XII. SECT. 8, SUB-SECT. 4.**

**1. Must state the offence.]**—A con-

viction that one B. "did keep his bar-room open, & allow parties to frequent & remain in the same, contrary to law":—*Held*: bad, as showing no offence.—*R. v. HOGGARD* (1870), 30 U. C. R. 152.—*CAN.*

*e.* ———.—*R. v. FRENCH* (1874), 34 U. C. R. 403.—*CAN.*

*h.* *Must state "not required for medicinal purposes".]*—A conviction for selling liquor on a Sunday omitted to state that the liquor was not supplied upon a regulation for medicinal purposes:—*Held*: bad.—*R. v. WHITE* (1871), 21 C. P. 354.—*CAN.*

*k.* *Convictions for second & third offences.]*—Convictions imposing the increased penalties for second & third

offences are bad unless proceedings have been taken for the first offence.—*R. v. RODWELL* (1884), 5 O. R. 186.—*CAN.*

*l.* ———.—It is not necessary in order to constitute a "third offence" that the previous convictions must be shown to have been made for offences during the term of the current license.—*R. v. GATT* (1916), 34 W. L. R. 398.—*CAN.*

*m.* ———.—*R. v. BRALIN LION BREWERY, LTD.* (1919), 45 O. L. R. 340; 16 O. W. N. 107.—*CAN.*

*n.* *Direction for immediate imprisonment—No direction as to distress—Conviction bad.]*—*R. v. CANTILLON* (1890), 19 O. R. 197.—*CAN.*

**SUB-SECT. 5.—KEEPING OPEN DURING RIOT.**  
*See Licensing (Consolidation) Act, 1910 (c. 24), s. 63.*

#### SECT. 4.—OFFENCES BY THE PUBLIC.

##### SUB-SECT. 1.—PERSONS FOUND *A. In Licensed Premises.*

*See Licensing Act, 1872 (c. 94), s. 12; Licensing Act, 1902 (c. 28), s. 1; Criminal Justice Administration Act, 1914 (c. 58), s. 16; Licensing Act, 1921 (c. 42).*

**NOTE.**—*In considering the following cases regard must be had to the effect of the Licensing Act, 1921 (c. 42), which substituted "prohibited hours" for "closing hours."*

**750. Meaning of "licensed premises"—Premises closed.**—The term "licensed premises," as used in Licensing Act, 1872 (c. 94), s. 12, means licensed premises while they are open to the public for the purposes of the license; consequently a licensed person who is found drunk on licensed premises in his own occupation, after licensed hours & when the premises are closed to the public, is not liable to a penalty under sect. 12.—*LESTER v. TORRENS* (1877), 2 Q. B. D. 403; 46 L. J. M. C. 280; 41 J. P. 821; 25 W. R. 691, D. C.

*Annotations.*—*Distd. R. v. Pelly*, [1897] 2 Q. B. 33. *Expld. R. v. Forbes* (1901), 65 J. P. Jo. 618; *Young v. Gentle*, [1915] 2 K. B. 661. *Distd. Lewis v. Dodd*, [1919] 1 K. B. 1. *Reid. Thompson v. McKenzie*, [1908] 1 K. B. 905.

**751.** ————*]*—A customer, not being an inmate or lodger, who is found drunk in a public-house after the closing hour & after the premises are in fact closed, may be convicted under Licensing Act, 1872 (c. 94), s. 12, of being found drunk on licensed premises. Licensed premises do not cease to be licensed premises for the purposes of that sect. by reason of the fact that after the hour of closing they are no longer open to the public.—*R. v. PELLY*, [1897] 2 Q. B. 33; 66 L. J. Q. B. 519; 76 L. T. 467; 61 J. P. 373; 45 W. R. 504; 13 T. L. R. 319; 41 Sol. Jo. 455; 18 Cox, C. C. 556, D. C.

*Annotations.*—*Consd. Lawson v. Edminson*, [1908] 2 K. B. 952; *Thompson v. McKenzie*, [1908] 1 K. B. 905. *Expld. Young v. Gentle*, [1915] 2 K. B. 661. *Reid. Lewis v. Dodd*, [1919] 1 K. B. 1.

**752.** ————*Only for purpose of license—Open for other purposes.*—*Resp.*, who was the wife of the occupier of fully-licensed premises & lived on the premises with her husband, was found drunk on the premises at 10 p.m., & 10.30 p.m. on a week day, the premises being open at the time. The premises were situate in the district of the Central Control Board (Liquor Traffic) for the Welsh area. By an order of the board the sale & supply of intoxicating liquor for consumption on the premises on week days had been restricted to the hours between twelve noon & 2.30 p.m. & between 6 p.m. & 9 p.m., but the premises were allowed to be open for the sale of non-intoxicants until 11 p.m. An information against *resp.* under Licensing Act, 1872 (c. 94), s. 12, for being found drunk on licensed premises was dismissed by the justices on the ground that it was not an offence for a resident on licensed premises to be found drunk on the premises at a time when they were not open to the public for the purpose of the license:—

*Held*: as the premises remained licensed premises, being used as a public-house for certain purposes, though not for the sale of intoxicants, the justices ought to have convicted *resp.*—*LEWIS v. DODD*, [1919] 1 K. B. 1; 88 L. J. K. B. 117; 119 L. T. 740; 83 J. P. 25; 35 T. L. R. 9; 17 L. G. R. 299; 20 Cox, C. C. 331, D. C.

**753.** ————*Private rooms included.*—*YOUNG v. GENTLE*, No. 757, *post*.

**754. To what persons applicable—Licensee drunk on own premises.**—*WARDEN v. TYE*, No. 654, *ante*.

**755.** ————*Premises closed to public.*—*LESTER v. TORRENS*, No. 750, *ante*.

**756.** ————*Lodger or inmate.*—*R. v. PELLY*, No. 751, *ante*.

**757.** ————*]*—(1) Licensing Act, 1872 (c. 94), s. 12, which makes it an offence for a person to be found drunk on licensed premises, does not apply to a lodger on the premises who is found drunk thereon after closing hours.

(2) In such case it is immaterial whether the lodger is found drunk in the public bar of the house or in his own private rooms, as the whole premises are licensed.—*YOUNG v. GENTLE*, [1915] 2 K. B. 661; 84 L. J. K. B. 1570; 113 L. T. 322; 70 J. P. 347; 31 T. L. R. 409; 25 Cox, C. C. 23, D. C. *Annotations.*—*As to (1) Distd. King v. Sim* (1916), 85 L. J. K. B. 1621. *As to (2) Reid. Lewis v. Dodd*, [1919] 1 K. B. 1.

**Permitting drunkenness on premises—Offence by licensee.**—*See Sect. 1, sub-sect. 3, A., ante.*

##### *B. In Highway or Public Place.*

###### *(a) In General.*

*See Licensing Act, 1872 (c. 94), s. 12; Licensing Act, 1902 (c. 28), ss. 1 & 8; Criminal Justice Administration Act, 1914 (c. 58), s. 16; Towns Police Clauses Act, 1847 (c. 89), s. 20; Metropolitan Police Act, 1839 (c. 47), s. 58; City Police Act, 1839 (c. xciv), s. 37.*

**758. Charge of drunkenness & riotous behaviour—Conviction for drunkenness alone—Conviction bad.**—*Applt.* was summoned before justices, under Town Police Clauses Act, 1847 (c. 89), s. 29, on a charge of drunkenness & riotous behaviour. The justices held the riotous behaviour not proved; but convicted him of drunkenness, & fined him, under 21 Jac. 1, c. 7, s. 3:—*Held*: that the conviction was bad; & that the defect was not one which could be cured under Summary Jurisdiction Act, 1848 (c. 43), s. 1.—*MARTIN v. PRIDGEON* (1859), 1 E. & E. 778; 28 L. J. M. C. 179; 33 L. T. O. S. 119; 23 J. P. 630; 5 Jur. N. S. 894; 7 W. R. 412; 8 Cox, C. C. 170; 120 E. R. 1102.

*Annotations.*—*Folld. Boden v. Cray* (1862), 7 L. T. 324. *Mentd. R. v. Brickhill* (1864), 4 New Rep. 100; *Turner & Shepherd v. Postmaster-General* (1864), 34 L. J. M. C. 10; *R. v. Carr* (1867), 17 L. T. 217; *Blake v. Beech* (1876), 1 Ex. D. 320; *R. v. Hughes* (1879), 4 Q. B. D. 614; *Boaler v. R.* (1888), 59 L. T. 554; *Ex p. Hopkins* (1891), 61 L. J. Q. B. 240; *R. v. Jennings* (1895), 73 L. T. 412.

**759.** ————*]*—*Applt.* was proceeded against before justices, upon an information under Refreshment Houses Act, 1860 (c. 27), for being drunk & riotous. At the hearing the charge of riotousness was not proved, & he was convicted of being drunk only, under 21 Jac. 1, c. 7, & fined 5s.:—*Held*: the conviction was bad.—*SODEN v. CRAY* (1862), 7 L. T. 324; *sub nom. LOADMAN v. CRAGG*, 26 J. P. 743.

#### PART XII. SECT. 4, SUB-SECT. 1.—*B. (a).*

*c. Charge of drunkenness—Power to authorise imprisonment.*—A person was convicted of being drunk in a public street, contrary to law, & ad-

*judged to pay a fine, or to be imprisoned for six months.*—*Held*: there is no common law right to imprison any one for being drunk in a public street, & that no bye-law giving such power having been referred to, the

conviction was bad.—*Re LIVINGSTONE* (1872), 6 P. R. 17.—*OAN.*

*p.* ————*]*—*R. v. GRANT* (1889), 18 O. R. 169.—*OAN.*

*q.* ————*Convicted for riotous*



**Sect. 4.—Offences by the public: Sub-sect. 1, B. (a) & (b); sub-sects. 2, 3 & 4. Sects. 5 & 6.]**

**760. Validity of charge—Word “found” not necessary.]—**D. was convicted of an offence under Licensing Act, 1872 (c. 94), s. 12, the charge sheet charging her with being “drunk & incapable of taking care of herself” in a highway. She was further charged with having been convicted of a similar offence three times during the preceding twelve months, one of these convictions being for having been drunk & disorderly. She was fined, & in default of payment was committed to prison for thirty days. In a further commitment she was committed to prison for another sixty days for failure to comply with an order directing her to enter into a recognisance to keep the peace. On an application by D. for a writ of *habeas corpus* directed to the governor of the prison:—*Held*: (1) D. had been rightly convicted of an offence under sect. 12, although the word, “found” did not appear on her charge sheet, since the natural inference from the language of the charge sheet was that she had been “found” drunk within the meaning of the sect. & since it is not strictly necessary for the exact language of the Act of Parliament under which a person is charged to be used in the charge sheet charging such person, if the words used are sufficient to embody the elements of the offence; (2) the charge alleging previous convictions did not constitute a separate offence, but was only matter of aggravation in respect of the offence under sect. 12; (3) the conviction of being drunk & disorderly was a “previous conviction” within sect. 12; (4) the two commitments, although in two documents, in fact constituted one warrant of commitment.—*R. v. HOLLOWAY PRISON (GOVERNOR)* (1910), 85 L. J. K. B. 689; *sub nom. R. v. HOLLOWAY PRISON (GOVERNOR)*, *Ex p. DANIELS*, 80 J. P. 244, D. C.

**761. — Allegation of previous conviction—Not separate offence—Aggravation of offence charged.]—***R. v. HOLLOWAY PRISON (GOVERNOR)*, No. 760, *ante*.

**762. — — — “Drunk & disorderly.”]**—*R. v. HOLLOWAY PRISON (GOVERNOR)*, No. 760, *ante*.

**763. Validity of commitment—Two commitments—Drunkenness & failure to enter into recognisance—One warrant of commitment.]—***R. v. HOLLOWAY PRISON (GOVERNOR)*, No. 760, *ante*.

(b) *In Charge of Carriage, etc.*

See Licensing Act, 1872 (c. 94), s. 12; Towns Police Clauses Act, 1847 (c. 89), s. 61; London Hackney Carriages Act, 1843 (c. 86), s. 28.

**764. Apprehension of offender—Reasonable belief as to drunkenness.]—**By Licensing Act, 1872 (c. 94), s. 12, “Every person . . . who is drunk while in charge on any highway . . . of any carriage . . . may be apprehended, & shall be liable to a penalty” :—*Held*: the power to apprehend conferred by the sect. authorised the apprehension of persons honestly & upon reasonable grounds believed to be committing the offence at the time when they were arrested.

Deft. a sergeant of police, took pltf., a taxicab driver, into custody on a charge of being drunk while in charge on a highway of a taxicab. Pltf. denied that he was drunk & the magistrates before whom he subsequently appeared dismissed the

case. Pltf. then brought an action claiming (*inter alia*) damages for false imprisonment. The jury found that deft. honestly believed at the time he arrested pltf. that pltf. was drunk. On this finding BAILHACHE, J. entered judgment for deft. :—*Held*: judgment was rightly entered for deft.—*TREBECK v. CROUDACE*, [1918] 1 K. B. 158; 87 L. J. K. B. 272; 118 L. T. 141; 82 J. P. 69; 84 T. L. R. 57; 62 Sol. Jo. 85; 16 L. G. R. 82, C. A. *Annotation* :—*Reid. Isaacs v. Keech*, [1925] 2 K. B. 354.

**SUB-SECT. 2.—REFUSAL TO QUIT PREMISES.**

See Licensing (Consolidation) Act, 1910 (c. 24), s. 80.

**765. Right of landlord to eject—Disorderly person—Resistance—Assault.]—**If a person conducts himself in a disorderly manner in a public-house, & the landlord requests him to depart, & he refuse to do so, the landlord is justified in laying hands on him to put him out; & if, while the landlord has hold of him to put him out, the person lays hands on the landlord this is an assault; & if it is seen by a peace-officer he is justified in taking the person into custody.

So, if a person, without committing any assault, makes such noise or disturbance in a public-house as would create alarm, & disquiet the neighbourhood, & the persons passing along the street, this would be such a breach of the peace as would not only justify the landlord in turning the person out of the house, but would justify the landlord in immediately giving the person into the custody of a peace-officer, provided that this had occurred in the presence of the officer.—*HOWELL v. JACKSON* (1834), 6 C. & P. 723; 2 Nev. & M. M. C. 627, N. P.

*Annotation* :—*Reid. Sealey v. Tandy* (1901), 85 L. T. 459.

**766. — — — Creating breach of peace.]—***HOWELL v. JACKSON*, No. 765, *ante*.

**767. — — — — —.]—**The landlord of an inn or a public-house, or the occupier of a private house, whenever a person conducts himself, so as to cause a disturbance & likely to cause a breach of the peace, is justified in telling him to leave the house, & if he will not do so, he is justified in putting him out by force, & may call in his servants to assist him in so doing. He might also authorise a policeman to do it, but it would be no part of a policeman's duty as such, unless the party had committed some offence punishable by law. Although it would be no part of a policeman's duty to do this, it might be better in many cases that a policeman should assist the owner of the house in a matter of this kind, as he would probably get the person out of the house with less disturbance than the owner himself could do; but to give such person creating the disturbance in charge to a policeman “to be dealt with according to law,” is a very different thing. Although a person be in the house of another & misconducting himself, the owner has no right to turn him out by force, without first requesting him to depart (*PATTESON, J.*).—*WHEELER v. WHITING* (1840), 9 C. & P. 262, N. P.

**768. — Person in unfit state—Chimney sweep in working clothes.]—**Pltf., a chimney sweep, went, in his working dress, into the bar of an alehouse, where there were several persons taking refreshment. It was after working hours, & deft., the

behaviour—Conviction bad.]—*R. (McCARRON) v. DOWN JJ.* (1912), 46 L. T. 44.—*IR.*  
*R. What constitutes “public place.”]*

—The hallway or rooms of an hotel are not a “public place,” the term “public place” being *ejusdem generis* with “street.”—*R. v. COOK* (1913),

23 O. W. R. 425; 4 O. W. N. 383; 37 O. L. R. 406; 20 Can. Crim. Cas. 217; 8 D. L. R. 217.—*CAN.*

landlord, recommended him to go & change his clothes, & upon his refusal to leave after request, deft. desired two police constables to put him out. Pltf. offered resistance to the policemen, & when outside the door still struggled, & was thrown down on the street, & his leg was broken:—*Held*: if pltf. was in his clothes & person in an unfit condition to be in a public-house, deft. was justified in ordering the policemen to remove him, & was not responsible for the excess of violence they used in carrying out his command.—*PIDGEON v. LEGG* (1857), 20 L. T. O. S. 106; 21 J. P. 743; 5 W. R. 649.

**769. — Person not drunk or disorderly.]**—The occupier & licensee of licensed premises (not being an inn) has a right to request any person to leave whom he does not wish to remain upon his premises; his right is not limited to the case of persons who are drunken, violent, quarrelsome, or disorderly within the meaning of Licensing Act, 1872 (c. 94), s. 18.—*SEALEY v. TANDY*, [1902] 1 K. B. 296; 71 L. J. K. B. 41; 85 L. T. 459; 66 J. P. 19; 50 W. R. 347; 18 T. L. R. 38; 20 Cox, C. C. 57, D. C.  
*Annotation*:—*Reid. Thompson v. Mackenzie* (1908), 98 L. T. 896.

**770. Right of landlord to give into custody—Disorderly person—Creating breach of peace.]**—*HOWELL v. JACKSON*, No. 765, *ante*.

**771. — — — — —.]**—*WHEELER v. WHITING*, No. 767, *ante*.

**772. Refusal to quit—Whether force justifiable.]**—*WHEELER v. WHITING*, No. 767, *ante*.

**773. — — — — —.]**—*PIDGEON v. LEGG*, No. 768, *ante*.

**774. — On request of police constable—Evidence of disorderly conduct.]**—*WELLS v. CHEYNEY*, No. 789, *post*.

**775. — Person not drunk or disorderly—No offence.]**—A person cannot be convicted under Licensing Act, 1872 (c. 91), s. 18, for refusing to quit licensed premises, if he is not drunken, violent, quarrelsome, or disorderly, although he may have been requested by the landlord to leave.—*DALLIMORE v. TUTTON* (1898), 78 L. T. 469; 62 J. P. 423; 19 Cox, C. C. 31, D. C.

**776. Validity of conviction—Proof that premises licensed—Necessity for.]**—*WELLS v. CHEYNEY*, No. 789, *post*.

**777. — No request to each person to leave.]**—*WELLS v. CHEYNEY*, No. 789, *post*.

### SUB-SECT. 3.—CONSUMPTION OF LIQUOR DURING PROHIBITED HOURS.

See Parts IX., XII., Sect. 3, *ante*.

### PART XII. SECT. 5.

**a. Re-sale by private customers.]**—A purchaser who was not himself licensed to sell intoxicating liquors went to a brewery & ordered five dozen pints. He said he was "ordering it for the campers." The vendors did not ask who the campers were, or what he meant by that phrase:—*Held*: there was nothing in the reply to give the vendors reason to believe that the purchaser did not buy to re-sell, & the vendor was rightly convicted.—*R. v. CALCUTT BREWING CO.* (1908), 17 O. L. R. 363; 12 O. W. R. 1645.—*CAN.*

**a. What licenses required.]**—*R. v. SCOTT* (1873), 34 U. C. R. 20.—*CAN.*

**b. — — — — —.]**—*R. v. NEIDERSTADT* (1906), 11 B. C. R. 347; 2 W. L. R. 371.—*CAN.*

**a. Sale to unlicensed dealer—Brewer**

*cannot recover price from dealer.]*—*BOWIE v. GILMOUR* (1895), 24 A. R. 254.—*CAN.*

**d. Sale in license district to unlicensed persons.]**—*R. v. GUITIARD* (1899), 30 O. R. 283.—*CAN.*

**e. Sale of "near beer"—Above allowed strength through mistake—Brewer not liable.]**—*R. v. WESTMINSTER BREWERY, LTD.* (1921), 57 D. L. R. 712; 34 Can. Crim. Cas. 308.—*CAN.*

**f. Selling by retail without license.]**—A brewer in A. having a license to sell retail at his brewery there, had also a place of business in E. for which he had a wholesale license. A retail order for beer was received at the wholesale premises in E. & the order transmitted to & implemented from the retail premises at A.:—*Held*: he was rightly convicted of having sold beer by retail at E. without having a

### SUB-SECT. 4.—SALE OF PISTOL TO INTOXICATED PERSON.

See Firearms Act, 1920 (c. 43), s. 4, 19.

### SECT. 5.—OFFENCES BY BREWERS.

See Inland Revenue Act, 1880 (c. 20), ss. 20–35; Customs & Inland Revenue Act, 1885 (c. 51), ss. 6, 7, 8.

**778. Re-sale by private customers—With connivance of brewer.]**—Applt., a brewer, was in the habit of supplying three of his private customers, small cottagers, with beer for their own consumption. Shortly after war broke out between Great Britain & Germany a brigade of territorials was quartered in a building whose principal entrance was directly opposite the three cottages, & the supply by applt. of beer to the cottagers increased considerably, in one case from two gallons a week to twenty-five gallons a day. Applt. was told by his carman that these customers were selling beer to the soldiers when he said that they must not do it, but that there was nothing to prevent the soldiers giving the cottagers something for their trouble in obtaining the beer. This remark was communicated by the carman to the cottagers, & the increased supply of beer continued. The cottagers were charged with, & pleaded guilty to, selling intoxicating liquors without a license to the soldiers, & applt. was charged with, & convicted of, aiding & abetting them:—*Held*: there was evidence before the justices which would support such conviction.—*COOK v. STOCKWELL* (1915), 84 L. J. K. B. 2187; 113 L. T. 426; 79 J. P. 394; 31 T. L. R. 426; 25 Cox, C. C. 49, D. C.

**Sale by servant of brewer—At private house—Place of appropriation.]**—See Sect. 1, sub-sect. 1, A. (c), *ante*.

### SECT. 6.—OFFENCES AGAINST EXCISE REGULATIONS AS TO SPIRITS.

See Spirits Act, 1880 (c. 24), Finance Act, 1898 (c. 10), s. 4.

**779. Permit for removal—Right to regauge.]**—*RICE v. DENTON* (1773), Loft, 204; 98 E. R. 611.

**780. — Removal of excessive quantity.]**—*HALL v. DRACORD* (1770), 2 Wm. Bl. 1289, 1332; 96 E. R. 756, 781.

**781. — — Permit to new tenant—License in name of old tenant.]**—Where (A., the licensed keeper of a public-house, sold the lease of it to N., who entered into the occupation of it, the license still remaining in the name of A.; & a quantity

license.—*GUILD v. FREEMAN* (1898), 2 Adam, 575; 25 R. (Cl. of Sess.) 106; 36 Sc. L. R. 6; 68 L. T. 147.—*SCOT.*

### PART XII. SECT. 6.

**g. Permit for removal—Improper use of.]**—*ADVOCATE-GENERAL v. GRANT* (1853), 15 Dunl. (Cl. of Sess.) 980.—*SCOT.*

**h. Spirits extracted from wood of casks.]**—B. was a dealer in spirits. After some casks had been emptied of spirits he put a quantity of water into each of them, with the result that the spirits which had been absorbed by the wood of the casks were extracted. There were also found on his premises 33 gallons of spirits which had been extracted from the wood of casks in a similar way. An information was laid against him, claiming a penalty in respect of each of the casks, & also a



**Sect. 6.—Offences against excise regulations as to spirits: Sects. 7, 8, 9 & 10: Sub-sect. 1, A. & B.]**

of spirits, which required a permit for its removal under Excise Permit Act, 1832 (c. 16), was supplied by a distiller on the order of N., & delivered on the premises in question:—*Held*: a permit made out in the name of G. was a valid permit under the statute.—*NICHOLSON v. HOOD* (1842), 9 M. & W. 365; 12 L. J. Ex. 114; 6 J. P. 57; 6 Jur. 64; 152 E. R. 155.

**782. — Beerhouse license—Spirits obtained for third party.]**—In 1897 one B. gave resp., who was licensed to sell beer only & had no spirit license, an order, to forward to his brother, who had such a license, for two gallons of rum. The rum was delivered by a carman of resp.'s house & sent to J. B. by his potman. The spirits were not accompanied by any permit or certificate:—*Held*: resp. was guilty of sending out, delivering, & removing spirits within Spirits Act, 1880 (c. 24).—*LEESE v. JENNINGS* (1898), 79 L. T. 300; 62 J. P. 771; 19 Cox, C. O. 174, D. C.

**783. Removal from one house to another—Whether purpose of sale presumed.]**—In an action against a wine cooper, for changing on the road wine which she had been hired to carry from one house to another, the ct. will not presume that the wine was removed for the purpose of sale, & so consider the transaction illegal under the excise laws.—*TOUSSAINT v. DARBON* (1819), 1 Brod. & Bing. 5; 129 E. R. 625; *sub nom.* TOUSSAINT v. DARLAM, 3 Moore, C. P. 217.

**784. Information against defendants—Application for particulars.]**—*A.-G. v. SMITH, A.-G.* SMITH (1845), 4 L. T. O. S. 290; 9 J. P. 443.

**785. Spirits extracted from wood of casks—Active process intentionally applied—Natural exudation.]**—*Held*: (1) in order to convict of the offence of having on the premises spirits extracted from the wood of a cask, the spirits must have been extracted either by an active process intentionally applied to the cask for that purpose, or by allowing the cask to remain in a position where it would be affected by the external temperature with the knowledge that the temperature would cause the spirits to exude from the wood & collect in the

bottom of the cask; but the innocent possession of spirits which had, owing to the operation of natural causes & without any intent on the part either of the owners or of their servants, exuded from the wood & collected at the bottom of the cask did not amount to the possession of spirits "extracted" from the wood of the cask within Finance Act, 1898 (c. 10), s. 4; (2) the owners of the cask would be liable under Finance Act, 1898 (c. 10), s. 4, for the intentional act of their servants, though committed without their own knowledge or approval.—*ROBINSON BROTHERS v. DIXON*, [1903] 2 K. B. 701; 72 L. J. K. B. 717; 89 L. T. 132; 67 J. P. 386; 52 W. R. 8; 19 T. L. R. 600; 47 Sol. Jo. 673; 20 Cox, C. C. 521, D. C.

**786. — Intentional act of servants—Liability of owners.]**—*ROBINSON BROTHERS v. DIXON*, No. 785, *ante*.

**SECT. 7.—OFFENCES IN RESPECT OF CLUBS.**

See CLUBS, Vol. VIII., p. 522, Nos. 109–125.

**SECT. 8.—ADULTERATION OF LIQUOR.**

See FOOD & DRUGS, Vol. XXV., pp. 86, 87, 116, Nos. 135–142, 392.

**SECT. 9.—LIABILITY OF LICENSEE FOR ACTS OR KNOWLEDGE OF SERVANT.**

As to principal's liability for offences of servant generally, see AGENCY, Vol. I., pp. 594 *et seq.*; MASTER & SERVANT.

**787. Special liability of licensees—Reason for.]**—Reference was made to alehouse cases, but the explanation of those cases is this: licensees to keep alehouses are only granted to persons of good personal character, & it is obvious the object of so restricting the grant of licenses would be defeated if the licensed person could, by delegating the control & management of the house to another person, who was altogether unfit to keep it free

penalty in respect of the 33 gallons of spirits:—*Held*: S. was guilty of the contraventions charged, & had incurred the penalties sued for.—*LORD ADVOCATE v. STEWART* (1899), 63 J. P. 311.—SCOT.

**k. —.]**—*LORD ADVOCATE v. CARSE* (1899), 63 J. P. 472.—SCOT.

**l. Having possession of illicit still.]**—*R. v. BRENNAN* (1902), 35 N. S. R. 106.—CAN.

**m. —.]**—An accused who knowingly allows parts of a still to be on his premises, cannot escape liability by showing that they were used for innocent purposes.—*R. v. KOLTA, II. v. BRYE*, [1920] 2 W. W. R. 504.—CAN.

**n. —.]**—*R. v. SCHMIDEL*, [1920] 3 W. W. R. 23; 53 D. L. R. 1; 33 Can. Crim. Cas. 110.—CAN.

**o. —.]**—*R. v. RYSACK* (1922), 38 Can. Crim. Cas. 45.—CAN.

**p. —.]**—*R. v. LONG* (1922), 38 Can. Crim. Cas. 94.—CAN.

**q. —.]**—*R. v. CHEVALIER* (1922), 39 Can. Crim. Cas. 74.—CAN.

**r. —.]**—*R. v. LAMONTAGNE*, [1923] 2 W. W. R. 1084; 40 Can. Crim. Cas. 258.—CAN.

**t. — Knowledge of possession essential for conviction.]**—*R. v. OSWALD*, [1923] 3 W. W. R. 1355; 41 Can. Crim. Cas. 122.—CAN.

**a. —.]**—*R. (PEARCE) v. KANEGAN*, [1924] 3 W. W. R. 279.—CAN.

**b. — Right of accused to explain possession.]**—Proof of possession by accused of a part or parts of what had once been a still, worm or apparatus suitable for the manufacture of spirits & which would still be capable of such use is not alone sufficient to convict him of the offence of possessing apparatus suitable for the manufacture of spirits; he has the right to discharge, if he can, the onus resting on him because of the possession of such articles.—*R. (JACKSON) v. HUTCHINSON*, [1925] 3 W. W. R. 744.—CAN.

**c. Having beer or wash in possession.]**—Proof that accused had in his possession beer or wash made from grain, malt or saccharine matter is not sufficient to sustain a conviction without further proof that the beer or wash is suitable for the manufacture of spirits.—*R. (DAWES) v. O'BRIEN*, [1925] 1 D. L. R. 69; 38 Can. Crim. Cas. 271; 50 N. B. R. 1.—CAN.

**PART XII. SECT. 9.**

**d. Delegation of control to servant.]**—An hotel-keeper, having delegated authority to his porter or bar-tender to sell intoxicating liquors on the hotel premises, is responsible for his servant's infraction of the law by serving during prohibited hours to persons not

*fide* travellers.—*R. v. GATES* (1909), 14 B. C. R. 280.—CAN.

**e. —.]**—*TUCKER v. MERCER*, [1917] N. Z. L. R. 156.—N.Z.

**f. Servant acting against express instructions.]**—*HUGILL v. MERRIFIELD* (1862), 12 C. P. 269.—CAN.

**g. —.]**—Pltf. gave notice to def., a duly licensed innkeeper, forbidding him to supply liquor to her husband, deft. forbade his bar-keeper furnishing liquor to the husband, but the bar-keeper did serve pltf.'s husband with liquor in deft.'s tavern:—*Held*: deft. was liable.—*AUSTIN v. DAVIS* (1882), 7 A. R. 478.—CAN.

**h. —.]**—Where a co., not being licensed to sell liquor within the province carries on a lawful export liquor business, it is not liable for a sale of liquor within the province made by its clerk without the knowledge & contrary to instructions of its officials.—*R. v. BUSY BEER WINK & SPIRITS IMPORTERS OF SASKATCHEWAN, LTD.*, [1921] 2 W. W. R. 906; 14 Sask. L. R. 343.—CAN.

**aa. —.]**—*WOODLEY v. LAWRENCE*, [1924] N. Z. L. R. 1153.—N.Z.

**bb. —.]**—*GREENHILL v. STIRLING* (1885), 12 R. (Ct. of Sess.) 37; 22 So. L. R. 564, J.—SCOT.

**cc. —.]**—*R. v. WUNDERLICH* (1912), T. P. D. 1118.—S. AF.

**dd. Knowledge of employee—Whether**

himself from responsibility for the manner in which the house was conducted (CAVE, J.).—*MASSEY v. MORRIS*, [1894] 2 Q. B. 412; 63 L. J. M. C. 185; 70 L. T. 873; 58 J. P. 873; 42 W. R. 638; 10 T. L. R. 517; 38 Sol. Jo. 547; 7 Asp. M. L. C. 586; 10 R. 342, D. C.

*Annotation*.—*Mentd. Collman v. Mills* (1896), 13 T. L. R. 122.

**788. Delegation of control to servant—What amounts to—Absence from bar—But within call.**—*MCKENNA v. HARDING*, No. 690, *ante*.

**Particular offences—Sale without justices' license.**—*See* Nos. 604, 605, 624, *ante*.

—**Taking orders without excise license.**—*See* Nos. 644, 645, *ante*.

—**Sale to drunken person.**—*See* No. 669, *ante*.

—**Permitting drunkenness.**—*See* Nos. 657, 658, 662, *ante*.

—**Sale to children.**—*See* Nos. 687–690, *ante*.

—**Refusing admission to constable.**—*See* No. 707, *ante*.

—**Supplying liquor to constable.**—*See* No. 708, *ante*.

—**Keeping disorderly house.**—*See* No. 716, *ante*.

—**Sale by club secretary.**—*See* CLUBS, Vol. VIII., p. 522, No. 112.

—**Permitting gaming.**—*See* GAMING & WAGERING, Vol. XXV., pp. 430, 431, Nos. 302–305.

—**Offence against excise regulation.**—*See* No. 785, *ante*.

## SECT. 10.—LEGAL PROCEEDINGS AND PENALTIES.

### SUB-SECT. 1.—UNDER LICENSING ACTS AND REFRESHMENT HOUSES ACT, 1860.

#### A. Prosecution and Conviction.

*See* Licensing (Consolidation) Act, 1910 (c. 24), ss. 99, 107; & generally, MAGISTRATES.

**789. Validity of conviction—Several persons convicted on one information—Waiver of irregularity.**—Several persons being charged in one information with being disorderly in a licensed beer-house, & refusing to quit on request by a constable:—*Held*: (1) the objection that each case ought to be taken separately having been waived, a separate conviction against each was right; (2) it was no objection that the justices from their own knowledge assumed that the house was a licensed beerhouse, nor that no request to each person to leave the house was proved.—*WELLS v. CHEYNEY* (1871), 36 J. P. 198.

**790. — Three offences charged—Decision on first postponed until all heard—Conviction on first only.**—Three informations were preferred at petty sessions against a beerhouse-keeper for breaches of the Licensing Acts. At the conclusion of the first case the justices postponed their decision thereon & proceeded to hear the other informations which related to different charges committed on a different day, & they dismissed the second & third informations; they then announced that they had decided to convict on the first charge, & they convicted accordingly on the first infor-

mation. The justices stated that they were unanimous in favour of convicting at the close of the first case, but that they adjourned their decision & the consideration of the amount of the penalty until after the other charges were disposed of, & that in adjudicating on each case they applied to that case the evidence that was given in reference to it, & no other:—*Held*: the postponement by the justices of their decision in the first case until they had disposed of the other cases did not, under the circumstances, render the conviction in the first case bad in law.—*R. v. FRY, ETC. JJ. & STOKER, Ex p. MASTERS* (1898), 67 L. J. Q. B. 712; 78 L. T. 716; 82 J. P. 457; 46 W. R. 649; 14 T. L. R. 445; 42 Sol. Jo. 555; 19 Cox, C. C. 135, D. C.

*Annotation*.—*Held. Parker v. Sutherland* (1917), 86 L. J. K. B. 1052.

**791. — Two offences on one information—Duplicity.**—Applt. had been convicted upon an information charging him with contravening regulation 7 of the Central Control Board (Liquor Traffic) by supplying intoxicating liquor to persons on his licensed premises without the same having been paid for by the persons so supplied. Upon the hearing of the information, & before deciding whether the offence charged had been committed, the justices had admitted evidence of two offences, one at 7.55 & the other at 8.30 on the same evening, the beer in each case being supplied to different persons who did not pay for it:—*Held*: since the justices had heard & admitted evidence of two separate offences before they convicted on either of them, the conviction, which followed the words of the information, was invalid & must be set aside. Two separate offences could not be included in the same conviction.—*PARKER v. SUTHERLAND* (1917), 86 L. J. K. B. 1052; 116 L. T. 820; 81 J. P. 197; 83 T. L. R. 350; 15 L. G. R. 535; 25 Cox, C. C. 734, D. C.

**792. — Wrongful admission of evidence.**—*PARKER v. SUTHERLAND*, No. 791, *ante*.

**Costs—For or against Crown.**—*See* CONSTITUTIONAL LAW, Vol. XI., p. 531, Nos. 844, 845.

**Sale without justices' license.**—*See* Sect. 1, subsect. 1, A. (e), *ante*.

**Drunkenness on premises.**—*See* Sect. 1, subsect. 3, C., *ante*.

**Keeping disorderly house.**—*See* Sect. 2, subsect. 8, A., *ante*.

**Refusal to quit premises.**—*See* Sect. 4, subsect. 2, *ante*.

#### B. Appeals.

*See* Licensing (Consolidation) Act, 1910 (c. 24), ss. 99 (2), 112 (2), & generally, MAGISTRATES.

**793. Right of appeal.**—*R. v. HANSON*, No. 629, *ante*.

**794. Notice of appeal—Service of notice—On what persons.**—A licensed victualler, convicted by two justices under 9 Geo. 4, c. 61, s. 21, of an offence against the tenor of his license, cannot be heard on appeal to quarter sessions under sect. 27, unless he has served notice of such appeal on both the convicting justices. & this, although at the time of giving notice the conviction had in fact

does not apply to the offence of selling liquor during prohibited hours in contravention of Liquor License Amendment Act, 1916 (c. 37), under sect. 3 of which the "person violating" only is liable & the penalty applies only when accused has committed the offence or has authorised or connived at it.—*R. (ROBINSON) v. CIANCHI* (1917), 24 B. C. R. 81; 28 Can. Crim. Cas. 107.—CAN.

material).—An hotel-keeper convicted for unlawfully selling liquor to persons on his premises within prohibited hours, although the liquor was sold by deft.'s bar-tender without deft.'s knowledge.—*R. v. GATES* (1909), 11 W. L. R. 247.—CAN.

**Particular offences—Sale without medical certificate.**—*Ex p. MCKEEN* (1893), 32 N. B. R. 84.—CAN.

**Sale during hours.**—Liquor License Act, s. 118, as enacted by B. C. Stat. 1913 (c. 40), s. 9 making a licensee liable to conviction for unlawful sales by a servant,

**Servant acting outside his hours.**—*STUBBS*, [1923] 1 D. L. R. 1062; 59

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been signed only by that justice; at least, if there be no proof that the conviction so signed was communicated to applt. before he gave notice, so that he might have been misled thereby.—*R. v. CHESHIRE JJ.* (1840), 11 Ad. & El. 139; 3 Per. & Dav. 23; 9 L. J. M. C. 89; 4 J. P. 28; 113 E. R. 867.

**Annotations:—***Reid. R. v. Glamorganshire JJ., Ex p. Applegate, R. v. Glamorganshire JJ., Ex p. Evans* (1892), 36 Sol. Jo. 232; *R. v. London JJ.*, [1895] 1 Q. B. 618; *R. v. Derbyshire JJ., Ex p. New Mills U. D. C.* (1909), 100 L. T. 453.

**795. ————.]—**A notice of appeal to quarter sessions against a conviction under Licensing Act, 1872 (c. 94), s. 12, by two of the justices of the Cinque Ports, was addressed generally to the justices of the Liberties of the Cinque Ports, without naming any particular justices, & was served upon the clerk to the justices out of ct.:—*Held*: such notice, & the service thereof, were insufficient, as not being in compliance with sect. 52, which requires notice of appeal to be given to the "ct. of summary jurisdiction."—*Ex p. CURTIS* (1877), 3 Q. B. D. 13; 47 L. J. M. C. 35; 26 W. R. 210; *sub nom. CURTIS v. BUSS*, 37 L. T. 538; 42 J. P. 87, D. C.

**Annotations:—***Apld. Westmore v. Paine* (1891), 39 W. R. 463. *Reid. R. v. Glamorganshire JJ., Ex p. Applegate, R. v. Glamorganshire JJ., Ex p. Evans* (1892), 36 Sol. Jo. 232. *Mentd. South Staffordshire Waterworks Co. v. Stone* (1887), 56 L. J. M. C. 122; *Lockhart v. St. Albans Corp.* (1888), 57 L. J. M. C. 118.

**796. ———— Personal service.]—**Personal service of a notice of appeal to quarter sessions from a conviction under the Licensing Acts is not necessary.—*R. v. SOMERSET JJ., Ex p. TALBOT* (1900), 69 L. J. Q. B. 311; 64 J. P. 341; 16 T. L. R. 166, D. C.

**797. ———— Time for.]—**Notice of appeal from the judgment of justices under Excise Act, 1827 (c. 53), should now be given, in accordance with Summary Jurisdiction Act, 1879 (c. 49), s. 31, within seven days after the day on which said judgment was given.—*R. v. GLAMORGANSHIRE JJ.* (1889), 22 Q. B. D. 628; 58 L. J. M. C. 93; 60 L. T. 536; 53 J. P. 294; 37 W. R. 493; 5 T. L. R. 403; 16 Cox. C. 593, D. C.

**Annotations:—***Folld. R. v. Glamorganshire JJ. R. v. Pontypool JJ.* (1892), 61 L. J. M. C. 169. *Apld. R. v. West Riding of Yorkshire JJ., Ex p. Hawkins* (1895), 64 L. J. M. C. 192; *Edelsten v. L. C. C.*, [1918] 1 K. B. 81.

**798. ———— Sufficiency.—Justices' decision final.]—**In an appeal against a conviction under Licensing Act, 1872 (c. 94), s. 13, the justices decided that the notice of appeal was insufficient. Upon an application for a rule for a *mandamus*:—*Held*: the ct. could not interfere with the justices' decision.—*R. v. LANCASHIRE JJ.* (1877), 41 J. P. Jo. 293, D. C.

**799. Recognisance.—Time for entering into—Compliance question of fact.]—**(1) By Licensing Act, 1872 (c. 94), s. 52, an appeal is given to a person aggrieved by an order or conviction made by a ct. of summary jurisdiction, & by sub-sect. 3, applt. is required "immediately after" giving notice of appeal to the sessions against the order or conviction to enter into a recognisance to try the appeal, etc.:—*Held*: the question whether an applt. has duly complied with the requirements of the sect. was one of fact to be determined by the sessions, having regard to all the circumstances of the case.

(2) The word "immediately" means the same thing as "forthwith," & implies prompt action & as speedy as the circumstances reasonably admit of.—*R. v. BERKSHIRE JJ.* (1879), 4 Q. B. D.

469; 48 L. J. M. C. 137; 27 W. R. 798; *sub nom. Ex p. TUCK*, 43 J. P. 607, D. C.

**800. ———— Effect of entry after time—Jurisdiction to hear appeal.]—**By Summary Jurisdiction Act, 1879 (c. 49), s. 31, it is provided that, "where any person is authorised by this Act or by any future Act to appeal from the conviction or order of the ct. of summary jurisdiction to a ct. of general or quarter sessions, he may appeal to such ct., subject to the conditions & regulations following":

"Applt. shall, within the prescribed time, or, if no time is prescribed, within three days after the day on which he gave notice of appeal, enter into a recognisance . . . conditioned to appear at the said sessions & to try such appeal, & to abide the judgment of the Ct. of Appeal thereon, & to pay such costs as may be awarded by the Ct. of Appeal":—*Held*: a recognisance which has been entered into by applt. after the expiration of the three days is not void, & the ct. of quarter sessions, although by reason of the recognisance being out of time it has no jurisdiction to hear the appeal, has jurisdiction to estreat the recognisance for non-payment of such costs as may have been awarded upon the dismissal of the appeal.—*R. v. GLAMORGANSHIRE JJ.* (1890), 24 Q. B. D. 675; 59 L. J. M. C. 150; 62 L. T. 730; 55 J. P. 39; 38 W. R. 640; 17 Cox. C. 45, D. C.

**801. ———— Recognisance estreated.]—***R. v. GLAMORGANSHIRE JJ.*, No. 800, *ante*.

**802. ———— Mandamus to justices to receive.]—**On May 21 a metropolitan police ct. magistrate convicted appts. of offences under Finance Act, 1910 (c. 35). On Saturday, May 25, they gave notice of appeal. Appts. were informed at the police ct. & by prosecutors that if they applied to enter into recognisances on May 29 they would be in time. They did so, but the magistrate refused to take the recognisances, on the ground that they had not applied within three days after the day on which they gave notice of appeal within Summary Jurisdiction Act, 1879 (c. 49), s. 31 (3). Appts. now moved for a rule  *nisi*  for a *mandamus* directing the magistrate to take the recognisances on the ground that the question decided by him was not for the magistrate but for quarter sessions. The ct. refused the rule.—*Ex p. ASHTON* (1912), 76 J. P. 383; *sub nom. Ex p. GRAFTON CLUB*, 28 T. L. R. 473, D. C.

#### C. Penalties, Forfeitures and Punishment.

*See* Licensing (Consolidation) Act, 1910 (c. 24), ss. 100–105; Licensing Act, 1921 (c. 42), s. 14, & generally, MAGISTRATES.

**803. Application of fines.—Borough having no court of quarter sessions—Separate commission of peace.]—**On a conviction under 9 Geo. 4, c. 61, by justices of a borough which has a separate commission of the peace, but no ct. of quarter sessions, the portion of the penalty which, by sect. 126, is to be paid to the treasurer of the county or place for which the justices are acting must be paid to the treasurer of the county in which the town is situate, & not to the treasurer of the borough.—*R. v. DALE* (1853), Dears. C. C. 37; 22 L. J. M. C. 44; 20 L. T. O. S. 282; 17 J. P. 68; 17 Jur. 47; 6 Cox. C. C. 93, C. C. R.

**Annotations:—***Apld. Reigate Corp. v. Hart* (1868), L. R. 3 Q. B. 244. *Folld. Winn v. Mossman* (1869), L. R. 4 Exch. 293. *Reid. Brown v. Nicholson* (1868), 5 C. B. N. S. 468; *Candlish v. Simpson* (1861), 30 L. J. M. C. 178; *R. v. West Riding JJ.*, [1900] 1 Q. B. 291; *R. v. Warwickshire JJ.*, [1902] 3 K. B. 101.

**804. ————.]—**Where justices of a borough, which has a separate commission of the

peace, but not a separate ct. of quarter sessions in the exercise of their summary jurisdiction impose penalties for offences against the general law, they act for the county & the penalties must under Summary Jurisdiction Act, 1848 (c. 43), s. 31, be paid over by their clerk to the treasurer of the county or place to the quarter sessions of which the appeal from their decision lies; & it makes no difference that the borough has a separate commission of the peace. 24 & 25 Vict. c. 75, s. 4, which declares that in 9 Geo. 4, c. 61, the words "county or place" include any borough having a separate commission of the peace, though not a separate ct. of quarter sessions, only applies to the power of granting & withdrawing licenses contained in that Act & does not affect the application of penalties fixed by 9 Geo. 4, c. 61, s. 26.—*WINN v. MOSSMAN* (1869), L. R. 4 Exch. 292; 38 L. J. Ex. 200; 20 L. T. 672; 33 J. P. 743; 17 W. R. 924.

*Annotations:—**Apld.* R. v. West Riding JJ., [1900] 1 Q. B. 291. *Consd.* R. v. Warwickshire JJ., [1902] 2 K. B. 101.

## PART XII. SECT. 11.

*r. Temperance Act (O.), 1916—Keeping liquor for sale—Native wines.*—Under Ontario Temperance Act a manufacturer of native wines is permitted to sell his product, but a purchaser of native wines, if prosecuted for having or keeping liquor on his premises for the purpose of sale, barter, or other disposal, in contravention of sect. 40, is subject to the *onus* imposed by sect. 58.—R. v. NAZZARENO (1919), 41 O. L. R. 36; 15 O. W. N. 120.—CAN.

*t. ——— Presumption of intention to sell.*—R. v. LE CLAIR (1917), 39 O. L. R. 436; 12 O. W. N. 163.—CAN.

*a. ———*—R. v. MCKAY (1919), 46 O. L. R. 125; 17 O. W. N. 14; 46 D. L. R. 125.—CAN.

*b. ———*—R. v. COLLINA (1920), 48 O. L. R. 199.—CAN.

*c. ———*—Upon a motion to quash a conviction of deft. for keeping intoxicating liquor for sale:—*Held:* the possession by deft. of the liquor concerning which he was being prosecuted constituted *prima facie* evidence that he was guilty of the offence with which he was charged.—R. v. HOGAN (1920), 47 O. L. R. 243; 18 O. W. N. 56.—CAN.

*d. ———*—Proof of possession is *prima facie* evidence of guilt, unless accused proves that he did not commit the offence.—R. v. BONDY (1921), 49 O. L. R. 115; 61 D. L. R. 35.—CAN.

*e. ——— Presumption against owner of premises.*—R. v. RIDDELL (1916), 38 O. L. R. 222.—CAN.

*f. ——— Evidence of intention to sell—Price list found on premises.*—R. v. MCKENZIE (No. 1) (1921), 64 D. L. R. 223; 27 Can. Crim. Cas. 86; 50 O. L. R. 159.—CAN.

*g. ——— Diminution of stock.*—R. v. UNITED SHIPPERS, LTD. (1923), 40 Can. Crim. Cas. 18.—CAN.

*h. ——— Beyond reasonable doubt.*—R. v. NAZZARENO (1923), 39 Can. Crim. Cas. 378.—CAN.

*i. ——— Whether seizure permissible.*—Intoxicating liquor may be seized by an officer, if he believes that it is to be sold or kept for sale in contravention of the Act; & if a magistrate finds, upon a proper investigation, that it was intended that the liquor seized should be so sold or kept for sale, he may order that it be forfeited.—R. v. LANGLOIS, R. v. JOSEPHSON (1920), 48 O. L. R. 303; 56 D. L. R. 259; 35 Can. Crim. Cas. 98.—CAN.

*l. ——— Unlawful possession of liquor—Proof of innocence—Onus on accused.*—R. v. LEDUC (1918), 43 O. L. R. 290;

*Sale without justices' license.*—See Sect. 1, sub-sect. 1, A. (e), *ante*.

## SUB-SECT. 2.—UNDER SALE OF BEER ACT, 1795.

See Sale of Beer Act, 1795 (c. 113), ss. 14, 16. *Sale without license.*—See Sect. 1, sub-sect. 1, A. (d).

## SUB-SECT. 3.—UNDER SPIRITS ACT, 1880.

See Spirits Act, 1880 (c. 24), ss. 154, 155 (1), 156, 157.

## SECT. 11.—UNDER COLONIAL STATUTES.

See cases, *infra*.

14 O. W. N. 301.—CAN.

*m. ——— Control must be proved.*—R. v. DONIHUE (1921), 36 Can. Crim. Cas. 293.—CAN.

*n. ———*—R. v. WILLIAMS (1917), 27 Can. Crim. Cas. 264.—CAN.

*o. ———*—R. v. HANLEY (1918), 41 O. L. R. 177; 13 O. W. N. 220; 39 Can. Crim. Cas. 63.—CAN.

*p. ———*—R. v. MARTIN (1918), 41 O. L. R. 79; 13 O. W. N. 187; 29 Can. Crim. Cas. 189; 39 D. L. R. 635.—CAN.

*q. ——— Liquor on premises not private dwelling-house—Dwelling-house defined.*—R. v. MARK PARK (1921), 48 O. L. R. 623; 34 Can. Crim. Cas. 203; 19 O. W. N. 363.—CAN.

*aa. ———*—*Flat.*—R. v. BAIRD (1919), 45 O. L. R. 242; 16 O. W. N. 31.—CAN.

*bb. ——— Apartments in second story—Above ground not exclusively for living purposes.*—R. v. MAKER (1920), 48 O. L. R. 182; 19 O. W. N. 14; 51 D. L. R. 684.—CAN.

*cc. ——— Dwelling-house also place of business.*—R. v. HANNAH (1923), 40 Can. Crim. Cas. 7.—CAN.

*dd. ——— Rooms let to different persons.*—R. v. MARTEL (1920), 48 O. L. R. 347; 35 Can. Crim. Cas. 105; 19 O. W. N. 183.—CAN.

*ee. ——— "Duplex house."*—One section of what is commonly called "a duplex house" is a "private dwelling-house" within sect. 41 of the Act, & to have intoxicating liquor there is not an offence.—R. v. CARSWELL (1918), 42 O. L. R. 34; 13 O. W. N. 395; 43 D. L. R. 715.—CAN.

*ff. ——— Motor car.*—R. v. TUGMAN (1917), 40 O. L. R. 349.—CAN.

*gg. ——— Liquor on sleigh—For removal from dwelling-house.*—R. v. HAGEN (1920), 47 O. L. R. 384; 53 D. L. R. 479; 18 O. W. N. 145.—CAN.

*hh. ——— Liquor in suit case—In transit to dwelling-house.*—R. v. KOZAK (1920), 47 O. L. R. 378; 18 O. W. N. 134; 53 D. L. R. 309.—CAN.

*kk. ——— Liquor on truck—In transit to dwelling-house.*—R. v. CHAMPUS (1920), 48 O. L. R. 189; 19 O. W. N. 24.—CAN.

*ll. ——— In street.*—R. v. HAYTON (1920), 48 O. L. R. 494; 57 D. L. R. 532; 19 O. W. N. 338.—CAN.

*mm. ——— Effect of concealment in dwelling-house.*—R. v. GOWLING (1921), 64 D. L. R. 225; 37 Can. Crim. Cas. 66; 50 O. L. R. 142.—CAN.

*nn. ——— Question for magistrate.*—R. v. ROSARBI (1918), 14 O. W. N. 117; 29 Can. Crim. Cas. 297.—CAN.

*oo. ——— Rapid diminution of lawful stock—Presumption where no evidence of sale.*—R. v. FAULKNER (1920), 48 O. L. R. 500; 57 D. L. R. 549; 34 Can. Crim. Cas. 224; 19 O. W. N. 314.—CAN.

*pp. ——— Second offence.*—R. v. JOHNSON (1920), 48 O. L. R. 203.—CAN.

*qq. ———*—R. v. NEWTON (1920), 48 O. L. R. 403; 19 O. W. N. 219.—CAN.

*rr. ———*—R. v. MANNING (1921), 41 Can. Crim. Cas. 422.—CAN.

*tt. ——— Appeal.*—R. v. SILVERMAN (1922), 38 Can. Crim. Cas. 205; 23 O. W. N. 135.—CAN.

*aaa. ———*—R. v. MOORE (1917), 41 O. L. R. 372; 13 O. W. N. 315.—CAN.

*bbb. ———*—R. v. KAPLAN (1920), 47 O. L. R. 110; 52 D. L. R. 596; 17 O. W. N. 484.—CAN.

*ccc. ———*—R. v. FOXTON (1920), 48 O. L. R. 207; 19 O. W. N. 43.—CAN.

*ddd. ———*—R. v. KOBERNIK (1923), 39 Can. Crim. Cas. 364.—CAN.

*eee. ——— Carrying & soliciting orders for liquor—Liquor supplied from another province.*—R. v. McEVOY (1916), 38 O. L. R. 202.—CAN.

*fff. ———*—R. v. LYNCH-STANTON (1918), 41 O. L. R. 317; 13 O. W. N. 282.—CAN.

*ggg. ———*—R. v. TOYNE (1916), 38 O. L. R. 224.—CAN.

*hhh. ———*—R. v. THOMPSON (1917), 39 O. L. R. 108.—CAN.

*kkk. ——— Liquor prescribed by physician—Actual need.*—R. v. McLAREN (1917), 38 O. L. R. 416.—CAN.

*lll. ———*—R. v. RANKIN (1919), 45 O. L. R. 96; 15 O. W. N. 367.—CAN.

*mmm. ———*—R. v. McEwan (1920), 19 O. W. N. 149.—CAN.

*nnn. ——— Form of prescription.*—The name of the patient & the nature of the illness must be stated so that the bona fides may be tested.—R. v. WELFORD (1918), 42 O. L. R. 359; 14 O. W. N. 20.—CAN.

*ooo. ——— Sale of liquor by physician.*—R. v. CONNOLLY (1923), 39 Can. Crim. Cas. 70.—CAN.

*ppp. ——— Unlawful sale of liquor—Carrier delivering for such sale—Liability of carrier.*—R. v. McEwan (1918), 41 O. L. R. 324; 13 O. W. N. 310.—CAN.

*qqq. ——— Liquor in lawful transit—Package.*—Sect. 43 of the Act does not require that intoxicating liquor in course of lawful transit shall be in



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sealed packages. The requirement is that the vessel or package containing the liquor shall not be opened or broken & that the liquor shall not be drunk or used during the transit.—*R. v. MCGONAGAL* (1920), 48 O. L. R. 499; 19 O. W. N. 311; 57 D. L. R. 475.—**CAN.**

p. — *Question of fact for magistrate.*—*R. v. BARRY* (1921), 51 O. L. R. 407; 57 D. L. R. 389; 38 Can. Crim. Cas. 36.—**CAN.**

q. — *Order for confiscation—Motion to quash—Notice of motion within thirty days.*—*R. v. McDONALD* (1921), 36 Can. Crim. Cas. 259.—**CAN.**

r. — *Jurisdiction of magistrate.*—*R. v. BENDER* (1921), 51 O. L. R. 441; 57 D. L. R. 583; 39 Can. Crim. Cas. 72.—**CAN.**

t. — *Search warrant—Grounds for suspicion must be stated.*—*Re KOBERNIK* (1922), 39 Can. Crim. Cas. 48.—**CAN.**

a. — *Seizure in transit through province—Consignment as "pickles."*—*Re ONTARIO TEMPERANCE ACT, RENAUD'S APPLICATION* (1919), 44 O. L. R. 238; 15 O. W. N. 213.—**CAN.**

b. — *Appeal—Deposit of security for costs.*—*R. v. SZYNKORUK* (1922), 52 O. L. R. 520.—**CAN.**

c. — *Conviction for second offence—Who liable to imprisonment.*—Under sect. 58 of the Act it is not only a licensee who is liable to imprisonment upon conviction for a second or subsequent offence, but any person convicted of an offence against the Act upon proof of a prior conviction.—*R. v. SOVA* (1920), 48 O. L. R. 497; 57 D. L. R. 740; 34 Can. Crim. Cas. 276; 19 O. W. N. 310.—**CAN.**

d. — *Whether export rights restricted.*—*GRAHAM & STRANG v. DOMINION EXPRESS CO.* [1920] 48 O. L. R. 88; 18 O. W. N. 355.—**CAN.**

e. — *Temperance Act (N.S.), 1910—"Bring or cause to be brought" Person procuring liquor for himself.*—*R. v. PUBLICOVER* (1915), 49 N. S. R. 85.—**CAN.**

f. — *Keeping liquor for sale—Presumption of intended sale—Onus on accused to rebut.*—*R. v. HOAHE* (1915), 49 N. S. R. 110.—**CAN.**

g. — *Finality of magistrate's decision.*—*R. v. COLLIER* (1917), 51 N. S. R. 64; 35 D. L. R. 131.—**CAN.**

h. — *Date must be specified.*—*R. v. SMITH* (1917), 50 N. S. R. 198.—**CAN.**

k. — *In incorporated club.*—*R. v. FIELDING* (1918), 52 N. S. R. 98; 40 D. L. R. 246; 29 Can. Crim. Cas. 393.—**CAN.**

l. — *Liquors despatched within province—From unprohibited to prohibited area.*—The Act was expressly declared not in force in H. — *Held:* not an offence for pits, carrying on business in H., to send intoxicating liquors from the city into a part of the province in which the prohibitory part of the Act was in force.—*KELLY & GLASBEY, LTD. v. SOUVEN* (1916), 50 N. S. R. 96.—**CAN.**

m. — *Second offence—Inquiry as to previous conviction—When made.*—*R. v. SHATFORD* (1918), 51 N. S. R. 322; 38 D. L. R. 366; 28 Can. Crim. Cas. 284.—**CAN.**

n. — *Temperance Act (N.S.), 1918—Seizure of liquor—Seizure in transit—Before delivery to consignee.*—In reference to seizure of liquor in transit the Act does not extend to or authorise the seizure of liquor in possession of the govt. railway at one of its stations, before delivery to the person to whom it is consigned. The seizure of the liquor under such circumstances is illegal & an order for its destruction must be quashed.—*R. v. FIFTY GALLONS RUM* (1919), 52 N. S. R. 131.—**CAN.**

o. — *Reasonable belief of official—That liquor to be for sale.*—*R. v. MAGEE* (1921), 54 N. S. R. 310; 57 D. L. R. 470.—**CAN.**

aa. — *—*—*McGRATH v. SOUVEN & McLEOD*, [1921] W. W. R. 1075; 56 D. L. R. 117.—**CAN.**

bb. — *Keeping liquor for sale—Fine—When payable.*—*McDONALD v. SMITH*, [1923] 3 D. L. R. 242; 39 Can. Crim. Cas. 189; 56 N. S. R. 172.—**CAN.**

cc. — *Search warrant—Reasonable belief of official—Grounds need not be stated.*—Where it is proved on oath before a magistrate that there is reasonable cause to suspect that intoxicating liquor is stored in any premises or place & that such liquor is or has been dealt with contrary to the Act, a search warrant may be granted. It is not necessary that the grounds of suspicion should be made to appear, & the warrant is not bad if the grounds of suspicion are not stated in the information.—*PETRIE v. RIDEOUT*, [1923] 1 D. L. R. 585; 39 Can. Crim. Cas. 157; 56 N. S. R. 82.—**CAN.**

dd. — *Liquor License Act (Man.), 1902—Cancellation of license—Jurisdiction of county court judge.*—*Re SOMERVILLE* (1910), 19 Man. L. R. 355.—**CAN.**

ee. — *Unlawful consumption of liquor—Local option territory—Liquor purchased from other than licensee.*—*R. v. SPEED* (1910), 20 Man. L. R. 33.—**CAN.**

ff. — *Temperance Act (Man.), 1916—Soliciting orders within province—Liquor supplied outside.*—It is not an offence under the Act to take orders for liquor in M. provided the liquor is supplied from outside of M.—*Re MANITOBA TEMPERANCE ACT & GREAT WEST WINE CO.*, [1917] 1 W. W. R. 232.—**CAN.**

gg. — *Liquor prescribed by physician—"Actual need."*—*R. v. RITCHIE*, [1920] 2 W. W. R. 38; 51 D. L. R. 652; 30 Man. L. R. 297; 32 Can. Crim. Cas. 303.—**CAN.**

hh. — *Prescription in blank—Prescription of "Scotch."*—*R. v. LACHANCE*, [1920] 2 W. W. R. 624; 53 D. L. R. 313; 30 Man. L. R. 432.—**CAN.**

kk. — *Search of premises—Warrant.*—Sect. 12 of above Act gives the officers named therein the right to search without a warrant, except in those cases where sect. 113 must be invoked, viz. when the search is to be made in a private dwelling-house, & when power to break open doors is sought.—*R. v. GAHAN*, [1924] 3 W. W. R. 933.—**CAN.**

ll. — *Unlawful possession of liquor—What constitutes.*—If A. with his wagon for an agreed price, takes B. & his parcel, which is a case of whisky, & which B. puts under the wagon seat, to a place as directed by B., A. has no possession of the whisky & is not guilty of having or keeping liquor under sect. 49 of the Act, even for the time that B. leaves the wagon & the parcel in it, in order to look for the number of the house where it is to be delivered.—*R. v. STEIN*, [1919] 2 W. W. R. 959; 47 D. L. R. 571.—**CAN.**

mm. — *—*—*R. v. SEGAL*, [1920] 2 W. W. R. 882; 53 D. L. R. 472; 30 Man. L. R. 461.—**CAN.**

nn. — *Ignorance of accused.*—On a charge of unlawfully having liquor in a place other than the dwelling-house of accused, contrary to the Act, it must be shown that accused had the liquor in his possession, or charge, or control. Proof that liquor was brought upon his premises without his knowledge or consent, does not render him guilty of an offence.—*R. v. HOFFMAN*, [1917] 2 W. W. R. 839; 28 Man. L. R. 7.—**CAN.**

oo. — *Keeping for sale—Grounds for presumption of intention to sell—Onus on accused to rebut.*—*R. v. BRIDEN*, [1924] 1 W. W. R. 898.—**CAN.**

pp. — *Permit holder—Overact necessary.*—*R. v. CHAN*, [1924] 2 W. W. R. 895.—**CAN.**

qq. — *Forfeiture.*—*R. v. BLUMON*, [1922] 2 W. W. R. 756; 38 Can. Crim. Cas. 58; 32 Man. L. R. 208.—**CAN.**

rr. — *Liquor in legal place—Proof of offence—Onus on prosecution.*—*R. v. GALSKEY*, [1923] 4 D. L. R. 705.—**CAN.**

tt. — *Seizure permissible—But not forfeiture.*—*R. v. RHODES*, [1924] 2 D. L. R. 821; 42 Can. Crim. Cas. 61.—**CAN.**

aaa. — *Conviction charging alternative offences—Irregular.*—*R. v. ARMSTRONG*, [1920] 3 W. W. R. 977; 30 Man. L. R. 560; 34 Can. Crim. Cas. 174; 56 D. L. R. 725.—**CAN.**

bbb. — *Liquor License Act (N.B.), 1887—Appeal—Jurisdiction of appellate judge.*—On appeal from a conviction for selling liquor contrary to the Act the appellate judge has power to adjudicate on the evidence taken before the convicting magistrate; or, he may hear the evidence of witnesses other than those examined below, or the further evidence of the witnesses already examined.—*Ex p. ABEL* (1896), 34 N. B. R. 121.—**CAN.**

ccc. — *Conviction reviewable by appeal—Not by certiorari.*—The proper way to review a conviction for selling liquor contrary to the Act is by appeal & not by certiorari.—*Ex p. ROSS* (1895), 33 N. B. R. 80.—**CAN.**

ddd. — *First offence—Non-payment of fine—Whether hard labour alternative.*—A magistrate has no power to adjudge hard labour in default of payment of a fine imposed for a first offence for selling liquor without license under the Act. The ct. will, however, amend such a conviction.—*Ex p. NUGENT* (1895), 33 N. B. R. 22.—**CAN.**

eee. — *Enforcement of penalty.*—*Ex p. MELANSON* (1899), 28 N. B. R. 660.—**CAN.**

fff. — *Liquor License Act (N.B.), 1896—Finality of magistrate's decision.*—Certiorari is taken away in cases of convictions for selling without license by sect. 104 of the Act.—*Ex p. HEBERT* (1898), 34 N. B. R. 455.—**CAN.**

ggg. — *Disposal of liquor seized.*—It is not necessary for the magistrate to specify in his order any particular public hospital to which the proceeds derived from the sale of liquor seized, by reason of its being illegally kept for sale, are to be paid.—*R. v. McQUARRIE*, *Ex p. ROGERS* (1903), 36 N. B. R. 39.—**CAN.**

hhh. — *Liquor License Act (N.B.), 1903—Sale of liquor to minor—Form of conviction.*—*Ex p. DAVIS*, *Ex p. VANBUSHKIRK* (1908), 38 N. B. R. 526; 5 E. L. R. 159.—**CAN.**

kkk. — *—*—*R. v. WATHEN*, *Ex p. VANBUSHKIRK* (1908), 38 N. B. R. 529; 5 E. L. R. 159, 463.—**CAN.**

lll. — *Sale in prohibited house—By licensee.*—*R. v. DUGAS*, *Ex p. McLEARY* (1914), 43 N. B. R. 65.—**CAN.**

mmm. — *Finality of magistrate's decision.*—If the convicting magistrate has jurisdiction, there is no right to review a conviction for selling without license, contrary to sect. 62 of the Act.—*R. v. CARLTON*, *Ex p. McCREA* (1907), 3 E. L. R. 57; 38 N. B. R. 42.—**CAN.**

nnn. — *Defect in minute of conviction—Conviction unaffected.*—*R. v. DUGAS*, *Ex p. PAULIN* (1914), 43 N. B. R. 58.—**CAN.**

ooo. — *Amendment of conviction.*—*R. v. O'BRIEN*, *Ex p. CHAMBERLAIN* (1908), 38 N. B. R. 385; 4 E. L. R. 532.—**CAN.**

ppp. — *Conviction for first offence—Imprisonment in lieu of fine.*—*R. v. PLANT*, *Ex p. MORNHAULT*, *Ex p.*

**TARDIFF (1906), 37 N. B. R. 500; 2 E. L. R. 17.—CAN.**

**m. — Conviction for second offence — Absence of accused.**—*R. v. MATHESON, Ex p. SHILALA (1912), 11 E. L. R. 519; 41 N. B. R. 386.—CAN.*

**n. Intoxicating Liquor Act, 1916 (N.B.), 1916—Permitting drunkenness on premises.**—*R. v. OADY (1918), 45 N. B. R. 474; 41 D. L. R. 630.—CAN.*

**o. — Right to obtain & keep liquor — Physician.**—A physician regularly engaged in the practice of his profession has the right to obtain liquor from any licensee under the Act, & to have the same in his office in sufficient quantities to meet his professional requirements, & no limit is set upon the quantity that he may have for that purpose at one time.—*R. v. RITCHIE, Ex p. BAXTER (1919), 46 N. B. R. 224; 45 D. L. R. 41.—CAN.*

**p. — Having liquor for sale.—Beer license holder.—Prosecution of.**—*R. v. LIMERICK, Ex p. WOODS (1921), 62 D. L. R. 126; 35 Can. Crim. Cas. 398; 49 N. B. R. 141.—CAN.*

**q. — Whether appeal — Where pecuniary penalty provided.**—There is no appeal from a conviction under the Act in cases where the Act provides a pecuniary penalty as the mode of punishment in the first instance.—*R. v. DOHERTY (1918), 45 N. B. R. 461; 42 D. L. R. 102.—CAN.*

**r. — Whether conviction amendable.**—A conviction which does not show upon its face that it was made for some offence against the Act within the jurisdiction of the trial magistrate is not amendable under sect. 126.—*R. v. GESSNER, Ex p. MAILLET (1920), 48 N. B. R. 5.—CAN.*

**t. — Summons & warrant of arrest — Whether sworn information necessary.**—*R. v. SOMERS, Ex p. GORAYEB (1920), 48 N. B. R. 60; 53 D. L. R. 109; 33 Can. Crim. Cas. 235.—CAN.*

**u. — Seizure — Replevin.**—Replevin does not lie for goods in custodia legis, & where liquors were seized by an inspector under the Act, & before adjudication, replevin from him:—*Held*: the writ of replevin & the seizure thereunder must be set aside.—*WOODS v. FINLEY (1921), 48 N. B. R. 398.—CAN.*

**b. — Finally of magistrate's decision.**—Although certiorari is taken away by sect. 111 of the Act, where, in the opinion of the ct. of appeal, the evidence relied on to support a conviction is so palpably insufficient & inadequate, as to be valueless, the conviction will be quashed on certiorari as having been made without jurisdiction.—*R. v. STEVEK, Ex p. COHEN (1921), 62 D. L. R. 329; 35 Can. Crim. Cas. 363; 48 N. B. R. 367.—CAN.*

**c. — Sale for export.—Magistrate's discretion.**—*R. v. RITCHIE, Ex p. HAND (1922), 70 D. L. R. 78; 38 Can. Crim. Cas. 375.—CAN.*

**d. — Retail liquor license.—Sale without doctor's prescription.**—*R. v. BOUDREAU, (1924) 4 D. L. R. 959.—CAN.*

**e. — Temperance Act (Sask.), 1917—Violation by druggist's assistant.—Penalty.**—A druggist's clerk or assistant can only be convicted for violation of sect. 49 of above Act, & is therefore only liable to a penalty of \$100.—*Re KENNEDY, (1919) 3 W. W. R. 777.—CAN.*

**f. — Sale of liquor.**—It is a breach of sect. 27 of above Act for a person carrying on a liquor export business in S. to ship liquor from a point in S. to a firm in S. also carrying on a liquor export business there, on an order & payment therefor received from that firm sent from its place of business outside the province, although such liquor is required only for export from S.—*R. v. SHAW, (1920) 3 W. W. R. 611; 64 D. L. R. 577.—CAN.*

**g. — — By druggist.**—*R. v. SAUNDERSON, (1921) 1 W. W. R. 107; 34 Can. Crim. Cas. 81.—CAN.*

**h. — — Penalty.**—*R. v. LAWDEBT, (1920) 3 W. W. R. 632.—CAN.*

**k. — Soft drinks containing excessive alcohol.—Absence of mens rea immaterial.**—*R. v. PING YUEN, (1921) 3 W. W. R. 505.—CAN.*

**l. — Arrest without warrant.—When permitted.**—*R. v. DOYLE, (1921) 1 W. W. R. 281; 56 D. L. R. 322; 14 Sask. L. R. 51; 35 Can. Crim. Cas. 6; 57 D. L. R. 322.—CAN.*

**aa. — Returns & records of liquor exporter.**—*R. v. REGINA WINE & SPIRIT, LTD., R. v. PRAIRIE DRUG CO., LTD., (1921) 2 W. W. R. 757; 14 Sask. L. R. 320.—CAN.*

**bb. — Keeping for sale.**—*R. v. HENGARTNER, (1919) 3 W. W. R. 320.—CAN.*

**cc. — —.**—*R. v. SMITH, (1921) 2 W. W. R. 855; 14 Sask. L. R. 333.—CAN.*

**dd. — Analyst's certificate.**—*DANBY v. PRINCE ALBERT MINERAL WATER CO., (1922) 1 W. W. R. 945; 38 Can. Crim. Cas. 47; 15 Sask. L. R. 332.—CAN.*

**ee. — Temperance Act (Sask.), 1920—Conviction for second offence.—Provided evidence of previous conviction.**—*R. v. KENNEDY (1922), 39 Can. Crim. Cas. 62.—CAN.*

**ff. — Seizure & forfeiture.**—Where there is found liquor which is the subject-matter of an actual or intended violation of the Act, that liquor shall be liable to be forfeited, notwithstanding that the violation or the intended violation is not on the part of the actual owner of the liquor.—*Re REGINA WINE & SPIRIT, LTD., (1922) 1 W. W. R. 96; 67 D. L. R. 717; 15 Sask. L. R. 86.—CAN.*

**gg. — Keeping liquor in unlawful place.—Other than dwelling-house.—Cold storage.**—*R. v. REGINA (COLD STORAGE & FORWARDING CO., (1921) 2 W. W. R. 665.—CAN.*

**hh. — —.**—*R. v. RICHARDSON, (1924) 2 W. W. R. 340; 42 Can. Crim. Cas. 142.—CAN.*

**kk. — — Public automobile garage.**—*It. v. HILL, (1922) 2 W. W. R. 11; 65 D. L. R. 466; 37 Can. Crim. Cas. 230; 15 Sask. L. R. 345.—CAN.*

**ll. — Affidavit of merits.**—The affidavit of merits must comply strictly with the requirements of sect. 74 of the Act. A proper affidavit is a condition precedent to the right of appeal.—*It. v. THOMPSON, (1923) 1 W. W. R. 641; revid., (1923) 2 W. W. R. 935.—CAN.*

**mm. — Liquor Act (B.C.), 1910—Over-rides municipal bye-laws.**—*Re LEVY (1911), 16 B. C. R. 354.—CAN.*

**nn. — Government Liquor Act (B.C.), 1921—Order of interdiction.—Prevention of excessive drinking.**—*R. v. DAVIS (1922), 31 B. C. R. 453; 40 Can. Crim. Cas. 335.—CAN.*

**oo. — Liquor in prohibited parts of inn.—Liquor includes beer.**—*R. v. GOBLETT, (1923) 2 W. W. R. 461; (1923) 3 D. L. R. 298; 40 Can. Crim. Cas. 47; 32 B. C. R. 210.—CAN.*

**pp. — Warrant of commitment.—Validity of.**—A warrant of commitment made on a conviction for an alleged infraction of sect. 20 of above Act, which is not expressed in the terms of the sect. is bad.—*It. v. JONES, (1923) 2 W. W. R. 141; 32 B. C. R. 160.—CAN.*

**qq. — —.**—*R. v. SOMERS, (1923) 3 W. W. R. 813.—CAN.*

**rr. — Unlawful sale — What amounts to.**—*R. v. GOLD SEAL, LTD., (1922) 2 W. W. R. 1219; 38 Can. Crim. Cas. 1.—CAN.*

**tt. — Prohibition Act (B.C.), 1916—**

**Dwelling-house—What is.**—*R. v. SIT QUINN, (1918) 3 W. W. R. 316.—CAN.*

**aaa. — —.**—*R. v. KERR, (1921) 2 W. W. R. 561; 59 D. L. R. 627.—CAN.*

**bbb. — —.**—*R. (RENNER) v. HARWOOD (1921), 30 B. C. R. 121.—CAN.*

**ccc. — Illegal disposal of liquor.—Conveyance by automobile.—Forfeiture of automobile.**—*Re PROHIBITION ACT & TOSEY, (1921) 1 W. W. R. 869; 67 D. L. R. 340; 35 Can. Crim. Cas. 12.—CAN.*

**ddd. — Having liquor in unlawful place.—What constitutes "having."**—B. had liquor in an unlawful place. He engaged applt. to move it to another place. Applt. knew he was moving liquor. B. accompanied him during the removal:—*Held*: the word "have," as used in the Act, denotes possession, & it must be an actual physical possession, which applt. did not have. B. had possession & never parted with it.—*HIGATTINI v. DIXON, (1919) 1 W. W. R. 464.—CAN.*

**eee. — —.**—Where a joint occupant of a room in a hotel has a bottle of whisky therein under his control to such an extent that he may take a drink from it when he likes though it is kept in the coat of another occupant, he must be said to "have liquor" in a place other than a private dwelling-house contrary to sect. 11 of above Act.—*R. v. PERRY, (1920) 2 W. W. R. 881.—CAN.*

**fff. — — Ignorance of accused.**—Under sect. 11 of above Act accused should not be convicted if, though the fact of having the liquor be established, knowledge of having it is satisfactorily negatived.—*R. v. LACK DUCK, (1920) 1 W. W. R. 1051.—CAN.*

**ggg. — Unlawful sale.—Conviction for second offence quashed.—Amended to first offence.**—*R. v. MALINKA, (1919) 2 W. W. R. 378.—CAN.*

**hhh. — — Knowledge & consent of hotel-keeper.—Sale by employee.**—*NORTHERN CLUB & CAFE CO. v. WHIMSTER, (1919) 3 W. W. R. 411.—CAN.*

**kkk. — — Licensee selling over proof.—Mens rea.**—*R. v. MCKENZIE, (1921) 2 W. W. R. 627.—CAN.*

**lll. — Appeal.—Whether charge amendable.**—On appeal from a summary conviction on a charge under the Act of unlawfully having intoxicating liquor in a place of public entertainment:—*Held*: an amendment should not be allowed so as to make the charge one of having liquor in a place other than a private dwelling-house.—*It. v. CHUNG CHAN, (1918) 1 W. W. R. 398.—CAN.*

**mmm. — —.**—*R. v. LEAHY, (1920) 2 W. W. R. 95.—CAN.*

**nnn. — Affidavit of merit.—Whether required of corporate body.**—*FLATIKAD HOTEL CO., LTD. v. HEWAT, (1919) 1 W. W. R. 466.—CAN.*

**ooo. — —.**—*R. v. CANADIAN PACIFIC WINE CO., LTD., (1921) 2 W. W. R. 442.—CAN.*

**ppp. — Certificate of analyst.—Requirements of.**—*R. v. PLAXTON & MCINNIS (1920), 29 B. C. R. 15; 36 Can. Crim. Cas. 321.—CAN.*

**qqq. — Permitting drunkenness on premises.—Hotel-keeper's knowledge essential.**—Accused cannot be convicted on a charge that, being the owner or occupant of a hotel, he did "permit & suffer drunken persons to consume liquor therein" & did "permit & suffer drunken persons to assemble or meet therein" contrary to sect. 24 of the Act, where the consumption of liquor or meeting of persons was without any knowledge, connivance, carelessness or wilful blindness of accused.—*R. v. DOBIE, (1921) 1 W. W. R. 723; 57 D. L. R. 290; 35 Can. Crim. Cas. 10.—CAN.*



**Sect. 11.—Under Colonial Statutes.]**

**k.** — *Search of premises—Warrant* — *When necessary.* — **CANADIAN PACIFIC WINE CO. v. SUTHERLAND**, [1921] 1 W. W. R. 365. — **CAN.**

**l.** *Liquor Act (Alta.), 1916—Keeping liquor for sale—Presumption of intention to sell—Rebuttal.* — Apart from exceptional circumstances a direct denial by a householder having in his possession in his dwelling-house more liquor than the quantity considered reasonable under the Act is sufficient to rebut the presumption of his having the liquor for sale. — **R. v. BARR**, [1917] 2 W. W. R. 326; 28 Can. Crim. Cas. 93; 35 D. L. R. 102. — **CAN.**

**m.** — *Proof of offence.* — **Sect. 64** of the Act casts upon accused the *onus* of proving that the liquor in his possession was not kept for sale, even though the liquor was found in an omnibus belonging to a local common carrier for whom the accused was driver, & although the liquor was consigned to him & he was carrying it from the station to his own home. — **R. v. COLLINS**, [1917] 2 W. W. R. 170; 28 Can. Crim. Cas. 105; 9 Alta. L. R. 105. — **CAN.**

**n.** — *Location—Sufficiency of indication.* — **R. v. MARCHINEK**, [1922] 2 W. W. R. 809; 68 D. L. R. 370; 27 Can. Crim. Cas. 228. — **CAN.**

**p.** — *Omission of word "intoxicating."* — **R. v. NELSON**, [1922] 2 W. W. R. 381; 69 D. L. R. 180; 37 Can. Crim. Cas. 270. — **CAN.**

**q.** — *Unlawfully giving liquor.* — **R. v. SCOTT**, [1919] 1 W. W. R. 1064. — **CAN.**

**r.** — *Unlawfully offering liquor.* — It is the offering of the liquor itself that sect. 23 of the Act prohibits. A mere offer to sell liquor not there & then available, & as to the possession of which there is no evidence is not such an offer of the liquor. — **R. v. NORM**, [1922] 1 W. W. R. 350; 26 Can. Crim. Cas. 140. — **CAN.**

**t.** — *Unlawful possession of liquor—"Fermented liquor."* — There is no limitation placed by sect. 24 of the Act on the quantity of "fermented liquor" which a person may have in his dwelling-house. — **R. v. NEIDIG**, [1920] 1 W. W. R. 348. — **CAN.**

**u.** — *Liquor kept for export purposes.* — **Sect. 24** of the Act has no application once it is established that the liquor is kept *bond fide* for export purposes. In such case resort must be had to the Liquor Export Act for the prosecution of any alleged offence. — **R. v. BULMER**, [1920] 3 W. W. R. 762. — **CAN.**

**v.** — *Acquittal of selling liquor—Charge not barred.* — **R. v. DINER**, [1922] 1 W. W. R. 972; 63 D. L. R. 609; 37 Can. Crim. Cas. 75; 17 Alta. L. R. 387. — **CAN.**

**w.** — *Dwelling-house—What is.* — A house into which the owners take one person to eat & sleep remains a private dwelling-house within the Act. — **R. v. SCOTT**, [1917] 2 W. W. R. 317; 11 Alta. L. R. 163. — **CAN.**

**x.** — *Liquor prescribed by physician—"Actual need."* — The words "actual need" are not limited to a sickness existing at the moment, but also cover the case where in the *bond fide* opinion of the physician a prescription is justified as a proper precaution against, or relief from, ailments to which the patient is or is likely to be exposed. — **R. v. ROSE**, [1918] 3 W. W. R. 950; 14 Alta. L. R. 118. — **CAN.**

**y.** — *Sale by druggist—Conviction—Jurisdiction to hear appeal.* — **R. v. WRINFIELD**, [1919] 2 W. W. R. 586. — **CAN.**

**z.** — *Search warrant—Must specify*

*particular premises.* — **R. v. GIBSON**, [1919] 1 W. W. R. 614. — **CAN.**

**aa.** — *Issue subject to magistrate's discretion—Reasonable grounds for suspicion.* — **R. v. BROWN**, [1922] 3 W. W. R. 439; 69 D. L. R. 308; 28 Can. Crim. Cas. 149. — **CAN.**

**bb.** — *Before issuing a search warrant under sect. 79 a magistrate is bound to exercise a judicial discretion & to enable him to do so, he must be informed by an officer under oath of such facts & circumstances as will enable the magistrate to form his own opinion that there is a reasonable ground for belief that liquor is being kept for sale. The mere statement under oath of the officer's belief is sufficient.* — **R. v. MOORE**, [1922] 1 W. W. R. 629; 63 D. L. R. 472; 37 Can. Crim. Cas. 72; 17 Alta. L. R. 503. — **CAN.**

**cc.** — *Seizure of liquor—Right of bailie to recover—Where owner's right prima facie lawful.* — **GOTTSCHELE v. HUTTON**, [1922] 1 W. W. R. 69; 66 D. L. R. 499; 36 Can. Crim. Cas. 298; 17 Alta. L. R. 347. — **CAN.**

**dd.** — *Proof of intoxicating nature.* — **R. v. EDMONTON WINE & SPIRIT CO.**, [1922] 1 W. W. R. 348; 36 Can. Crim. Cas. 138. — **CAN.**

**ee.** — *Conviction for several offences—Several offences charged—Particulars of one only given.* — A conviction for offences against the Act based upon an information charging more than one offence but giving the particulars required by sect. 42 in respect to only one is bad. — **R. v. AITKEN**, [1917] 2 W. W. R. 781; 11 Alta. L. R. 573; 28 Can. Crim. Cas. 227; 37 D. L. R. 530. — **CAN.**

**ff.** — *Joint offence—Conviction may be several.* — **R. (LESLIE) v. MAKOVICH**, [1923] 2 W. W. R. 975. — **CAN.**

**gg.** — *Supplemented by Dominion order-in-council—Under which charge laid.* — **Dominion order-in-council**, No. 589, as supplementary of the provincial prohibition Acts has no application to a transaction which is a contravention of the above Act, & where the facts constitute an offence under the provincial law the charge must be laid thereunder & only the penalties thereby provided imposed. — **R. v. STONE**, [1918] 3 W. W. R. 1; 30 Can. Crim. Cas. 11. — **CAN.**

**hh.** *Liquor Act (Alta.), 1922—Liquor consumed on premises of sale—Forfeiture—Forfeiture must be specifically claimed.* — **R. v. McMICKEN**, [1923] 3 W. W. R. 879. — **CAN.**

**ii.** *Liquor Control Act (Alta.), 1924—"Guest room."* — An hotel-keeper who resides in his own hotel is not entitled to have liquor in the room occupied by him as his residence since such room is not a "guest-room" within the Act. — **R. v. ZAWISH**, [1924] 3 W. W. R. 569. — **CAN.**

**jj.** — *Appeal from magistrate's decision.* — An appeal lies from the dismissal by a magistrate of an information charging the unlawful keeping of liquor for sale contrary to the Act. A preventative officer of the Liquor Control Board or a member of the Alberta provincial police, who has laid such information, has a right to take such appeal. — **MAYLOR v. LESSARD**, [1924] 3 W. W. R. 873; [1925] 1 D. L. R. 239. — **CAN.**

**kk.** *Canada Temperance Act, 1878—Limitation of time for prosecution.* — **R. v. HOPPER** (1888), 27 N. B. R. 496. — **CAN.**

**ll.** — *Ex p. KENNEDY* (1888), 27 N. B. R. 493. — **CAN.**

**mm.** — *A conviction under the Act for selling intoxicating liquor "within three months previous to" the day the prosecution was commenced, is valid.* — **R. v. GALLANT** (1891), 31 N. B. R. 506. — **CAN.**

**nn.** — *Information must be laid*

*before two justices.* — It is imperative, under sect. 105 of the Act, that an information thereunder be laid before two justices, & that they both be named in the summons. — **R. v. RAMSAY** (1885), 11 O. R. 210. — **CAN.**

**oo.** — *R. v. ETTINGER* (1899), 32 N. S. R. 176. — **CAN.**

**pp.** — *Delay in issuing summons.* — Where an information under the Act was laid within three months after the offence, but no summons was issued thereon for a year & fourteen days after information laid:—*Held:* the delay in issuing summons did not deprive the magistrate of jurisdiction. — **R. v. PECK**, *Ex p. BEAL* (1910), 40 N. B. R. 320; 9 E. L. R. 501. — **CAN.**

**qq.** — *R. v. PECK*, *Ex p. O'NEILL* (1910), 40 N. B. R. 339; 9 E. L. R. 524. — **CAN.**

**rr.** — *One second offence only.* — There cannot be more than one "second" offence under the Act. — *Ex p. WILBUR* (1892), 31 N. B. R. 678. — **CAN.**

**tt.** — *Two offences—Third under amending Act—Conviction for third good.* — *Ex p. STAPLES* (1911), 40 N. B. R. 378. — **CAN.**

**aaa.** — *Whether conviction amendable—Penalty excessive.* — Under sects. 117 & 118 of the Act, the ct. has no power to amend the conviction when the penalty imposed is greater than the Act authorises; but each conviction is invalid. — **R. v. ROSE** (1882), 22 N. B. R. 309. — **CAN.**

**bbb.** — *R. v. GAVIN* (1897), 30 N. S. R. (18 R. & G.) 162. — **CAN.**

**ccc.** — *Uncertainty.* — **Re HICKY, R. v. BLAIR** (1884), 24 N. B. R. 72. — **CAN.**

**ddd.** — *A conviction stated that deft. had sold "spiruous or other intoxicating liquors," & the proof was a sale of brandy. The conviction was amended under sect. 118 of the Act by striking out the words "spiruous or other."* — **Re MCCARTHY, R. v. BLAIR** (1884), 24 N. B. R. 71. — **CAN.**

**eee.** — *Surplusage.* — *Ex p. RUSSELL* (1886), 25 N. B. R. 437. — **CAN.**

**fff.** — *Double offence.* — **Re DOYLE, R. v. DEWAR** (1891), 30 N. B. R. 248. — **CAN.**

**ggg.** — *Variance from minute of adjudication.* — *Ex p. CONWAY* (1892), 31 N. B. R. 405. — **CAN.**

**hhh.** — *Variance from information.* — **R. v. BENNETT** (1883), 3 O. R. 45. — **CAN.**

**kkk.** — *R. v. HODGINS* (1886), 12 O. R. 367. — **CAN.**

**lll.** — *TAYLOR v. MARSHALL* (1856), 3 N. S. R. (2 Thom.) 10. — **CAN.**

**mmm.** — *Conviction for first offence—Form of.* — **Re DWYER, R. v. SULLIVAN** (1884), 24 N. B. R. 149. — **CAN.**

**nnn.** — *Penalty.* — **R. v. KAY, Ex p. CORMIER** (1906), 2 E. L. R. 164; 38 N. B. R. 3. — **CAN.**

**ooo.** — *Mode of enforcing penalty.* — **R. v. WHITING** (1908), 43 N. S. R. 332. — **CAN.**

**ppp.** — *Imprisonment.* — An amendment to the Act, authorising imprisonment without the option of a fine for a first offence, applies to localities that had adopted the Act prior to the amendment. — **R. v. KAT, Ex p. LANDRY** (1907), 38 N. B. R. 332; 4 E. L. R. 221. — **CAN.**

**qqq.** — *Conviction as for first offence—Whether previous offence to be charged.* — It is not necessary to sustain a conviction as for a first offence under sect. 115 of the Act, that a previous conviction should be charged. — *Ex p. KELLY* (1889), 29 N. B. R. 130. — **CAN.**

**rrr.** — *Conviction for second offence—Accused not present at hearing.* — *Deft.* may be convicted of a second offence

under sect. 122 of the Act, though he is not present at the trial to be asked as to a previous conviction.—*Ex p. GROVES, Ex p. McDONALD* (1884), 24 N. B. R. 57.—CAN.

**h.** ———— *When inquiry made—As to previous conviction.*—*R. v. EDGAR* (1888), 15 O. R. 142.—CAN.

**k.** ———— *Imprisonment in default of distress.*—*R. v. DOYLE* (1886), 12 O. R. 347.—CAN.

**l.** ———— *Conviction for third offence—Proof of previous offences.*—*R. v. STEEVES, Ex p. GOGAN* (1915), 43 N. B. R. 285.—CAN.

**m.** ———— *Of similar nature.*—There is no power to punish as for a third offence under the Act unless there have been two prior convictions for offences of the same nature.—*R. v. CLARK* (1888), 15 O. R. 49.—CAN.

**n.** ———— *Conviction for fourth offence—Inquiry as to previous convictions.*—*R. v. O'HEARON* (1901), 34 N. S. R. 491.—CAN.

**o.** ———— *Several convictions—Though offences on same day.*—*Ex p. PERKINS* (1890), 30 N. B. R. 15.—CAN.

**p.** ———— *Conviction—Costs & charges included in.*—*R. v. FERRIS* (1889), 18 O. R. 476.—CAN.

**q.** ———— *Costs cannot be included in a conviction under the Act.*—*R. v. OAKES* (1889), 21 N. S. R. (9 R.) G. 481.—CAN.

**r.** ———— *A conviction under the Act may include the costs & charges of the commitment & conveying deft. to gaol in default of distress.*—*Ex p. SHEHAN* (1891), 29 N. B. R. 133.—CAN.

**s.** ———— *It is an excess of jurisdiction, in a conviction under the Act, to award costs other than those provided for by 52 Vict., c. 45, s. 2.*—*Ex p. BOURQUE* (1891), 31 N. B. R. 509.—CAN.

**t.** ———— *It is not an excess of jurisdiction in a conviction under the Act to award costs other than those provided for by 52 Vict., c. 45, s. 2.*—*Ex p. HOWARD* (1893), 32 N. B. R. 237.—CAN.

**u.** ———— *R. v. VANTASSEL* (1894), 34 N. S. R. 79.—CAN.

**v.** ———— *Ex p. RAYWORTH* (1896), 34 N. B. R. 74.—CAN.

**d.** ———— *First offence.*—In a conviction under the Act for a first offence of unlawfully selling intoxicating liquor, the costs of commitment & conveying deft. to gaol, if the fine & costs are not levied by distress, are in the discretion of the justice.—*Ex p. WHALEN* (1892), 29 N. B. R. 144.—CAN.

**e.** ———— *Finality of magistrate's decision.*—*R. v. WALLACE* (1883), 4 O. R. 127.—CAN.

**f.** ———— *R. v. ELI* (1886), 13 A. R. 526.—CAN.

**g.** ———— *The refusal by a justice to allow deft. to give evidence on the trial of an information under the Act, is a matter going to the justice's jurisdiction, & therefore a certiorari will lie to remove the conviction.*—*Ex p. LEGERE* (1888), 27 N. B. R. 292.—CAN.

**aa.** ———— *Qu.*—whether an appeal lies from a conviction under the Act.—*Re KELLY* (1888), 27 N. B. R. 653.—CAN.

**bb.** ———— *Certiorari having been taken away in proceedings for violation of the Act, a conviction for selling liquor will not be interfered with, though there is no evidence of the offence charged, the magistrate having jurisdiction by the Act over the subject-matter of the offence, & by the information, over the offence charged.*—*Ex p. DALEY* (1888), 27 N. B. R. 129.—CAN.

**cc.** ———— *R. v. BERRY* (1916), 38 O. L. R. 177.—CAN.

**dd.** ———— *R. v. CANTIN, R. v. WEBER* (1917), 39 O. L. R. 20.—CAN.

**ee.** ———— *Absence of magistrates—Meaning of.*—The word "absence" in sect. 105 of the Act did not necessarily mean actual absence from the place of trial, but would apply to a case where the original justices had, for some cause, become incapable of acting on the hearing.—*BYRNH v. ARNOLD* (1884), 24 N. B. R. 161.—CAN.

**ff.** ———— *Keeping liquor for sale—Presumption of intention to sell.*—The presumption of keeping liquor for sale created by sect. 119 of the Act arises only where appliances for the sale of liquor, together with liquor, are found in municipalities in which a prohibitory bye-law under the Act is in force.—*R. v. WALKER* (1887), 13 O. R. 83.—CAN.

**gg.** ———— *Evidence of.*—Dft. was charged with the offence of keeping liquor for sale. Evidence was given of the finding of certain of the appliances mentioned in sect. 119 of the Act:—*Held:* apart from the presumption created by that sect. upon the finding of such appliances, such finding was evidence of a keeping for sale, of the weight of which the magistrate was the proper judge.—*R. v. BRADY* (1886), 12 O. R. 358.—CAN.

**hh.** ———— *Evidence of—Actual sale.*—Evidence of a sale of intoxicating liquor will sustain a conviction for keeping liquor for sale.—*Ex p. GRIEVES* (1890), 29 N. B. R. 643.—CAN.

**kk.** ———— *Partners—Penally imposed severally.*—*Ex p. HOWARD & CRANGLE* (1885), 25 N. B. R. 191.—CAN.

**ll.** ———— *Charged altered from selling—in absence of accused.*—*Ex p. DOHERTY* (1895), 33 N. B. R. 15.—CAN.

**mm.** ———— *Charge altered to selling—in absence of accused.*—*R. v. KAY, Ex p. MELANCON* (1908), 38 N. B. R. 362; 4 E. L. R. 514.—CAN.

**nn.** ———— *Destruction on conviction.*—A conviction for selling does not authorise the magistrate to condemn liquors seized under a search warrant to be destroyed; sect. 109 of the Act only applied to convictions for keeping for sale.—*PATTON v. McDONALD* (1891), 30 N. B. R. 523.—CAN.

**oo.** ———— *R. v. HEFFERNAN* (1887), 13 O. R. 616.—CAN.

**pp.** ———— *Ex p. JONES* (1891), 31 N. B. R. 78.—CAN.

**qq.** ———— *Supplying liquor for sale.*—*ROSS v. COADE* (1907), 4 E. L. R. 51.—CAN.

**rr.** ———— *Sale of liquor—Absence of evidence of sale.*—There being no evidence that any beverage of an intoxicating character had been sold & therefore no evidence to support a conviction under the Act, for selling intoxicating liquors:—*Held:* the magistrates had no jurisdiction, & the conviction was quashed.—*R. v. BEARD* (1887), 13 O. R. 608.—CAN.

**ss.** ———— *No jurisdiction to impose hard labour.*—*R. v. WALSH* (1883), 2 O. R. 206.—CAN.

**aaa.** ———— *R. v. TUCKER* (1888), 16 O. R. 127.—CAN.

**bbb.** ———— *Liability of purchaser.*—*R. v. HEATH* (1887), 13 O. R. 471.—CAN.

**ccc.** ———— *A purchaser of intoxicating liquor, sold in violation of the Act, is not liable to be punished as an aider, abettor, counsellor or procurer, & may therefore be committed for contempt for refusal to testify as to such sale.*—*Ex p. BARKER* (1891), 30 N. B. R. 406.—CAN.

**ddd.** ———— *Destruction order—Necessity*

*for information & search warrant.*—An order for the destruction of liquor, without an information upon which to base a search warrant, is bad.—*R. v. DIBBLE, Ex p. KAVANAGH* (1896), 34 N. B. R. 1.—CAN.

**eee.** ———— *By whom executed.*—*Ex p. McCLEAVE* (1881), 20 C. L. T. 89.—CAN.

**fff.** ———— *R. v. LAWLOR, Ex p. DOYLE* (1916), 44 N. B. R. 244; 27 Can. Crim. Cas. 289.—CAN.

**ggg.** ———— *Location outside jurisdiction.*—*R. v. WOODLOCK* (1896), 29 N. S. R. (17 R. & G.) 24.—CAN.

**hhh.** ———— *Search warrant—Sunday execution invalid.*—A search warrant under the Act cannot be executed on Sunday.—*R. v. LAWLOR, Ex p. WILLIS* (1916), 44 N. B. R. 347; 27 Can. Crim. Cas. 383.—CAN.

**kkk.** ———— *When issued.*—Before any complaint a charge was made against deft., a search was issued & executed, & evidence obtained upon his premises, under which he was convicted:—*Held:* a search warrant under the Act is a proceeding to sustain a charge made for an offence committed against the Act, & not a proceeding taken upon which to found a charge to be made in case liquor is found on the premises.—*R. v. DOYLE* (1886), 12 O. R. 347.—CAN.

**lll.** ———— *TOWNSHEND v. COX, C. R.*, [1907] A. C. 26.—CAN.

**mmm.** ———— *Requisites of.*—*R. v. WALKER* (1887), 13 O. R. 83.—CAN.

**nnn.** ———— *GALLIHER v. PETERSON* (1887), 20 N. S. R. (8 R. & G.) 222; 8 C. L. T. 397.—CAN.

**ooo.** ———— *Source of information—Refusal to divulge in court.*—*R. v. SPROULE* (1887), 14 O. R. 375.—CAN.

**ppp.** ———— *Procedure—Effect of Liquor License Act, 1883.*—*Ex p. COLEMAN* (1885), 23 N. B. R. 374.—CAN.

**qqq.** ———— *Must be strictly adhered to.*—Under sect. 107 of the Act it is imperative upon the magistrate to adopt the procedure specially made for cases under the Act, the express provisions in that sect. taking the matter out of the ordinary course laid down in the Summary Convictions Act.—*R. v. SALTER* (1887), 20 N. S. R. (8 R. & G.) 206; 8 C. L. T. 380.—CAN.

**rrr.** ———— *Inspector's fees.*—*Ex p. MCCULLY* (1893), 32 N. B. R. 126.—CAN.

**ttt.** ———— *Parish court commissioners—Jurisdiction.*—A parish ct. court has jurisdiction to try offences under the Act.—*R. v. CLARKSON, Ex p. HAYES* (1910), 40 N. B. R. 363; 10 E. L. R. 16.—CAN.

**uuu.** ———— *Fines recoverable under—Disposal of.*—*Nembo:* the informer, under the Act, may be entitled to half of the fine.—*R. v. KLEMP* (1885), 10 O. R. 143.—CAN.

**vvv.** ———— *LEEDS & GRENVILLE UNITED COUNTRIES v. BROCKVILLE TOWN* (1911), 18 A. R. 648.—CAN.

**www.** ———— *Canada Temperance Act, 1908—"Carriage & transportation of liquor."*—*R. v. VERBEUR, [1922] 3 W. W. R.* 728; 69 D. L. R. 711; 38 Can. Crim. Cas. 233.—CAN.

**xxx.** ———— *"Transportation"—Distinguished from "exportation."*—*R. v. YARROW* (1922), 51 O. L. R. 509; 69 D. L. R. 565; 38 Can. Crim. Cas. 289.—CAN.

**yyy.** ———— *P. E. Island Prohibition Act—Confiscation of liquor.*—*MATTHEWS v. JENKINS* (1907), 3 E. L. R. 577.—CAN.

**zzz.** ———— *Intoxicating Liquor Act (N.I.), 1923—Licensed premises—What sold on.*—*R. v. BOYD, [1925] N. 99.*—IR.

**aaa.** ———— *Prohibited area—For transportation purposes.*—*R. v. TUNNHEIM, [1919] 1 W. W. R. 480.*—CAN.

**Sect. 11.—Under Colonial Statutes.]**

q. ————]—R. v. MOHMANUS, [1919] 3 W. W. R. 190.—CAN.

r. ————]—ROUX v. HEWAT, [1919] 1 W. W. R. 530.—CAN.

t. *Conveyance of liquor to local option area—Prohibited except to licensee.*—R. v. RITCHIE (1911), 21 Man. L. R. 255.—CAN.

a. *Keeping liquor for export—Whether prohibitable by provincial government.*—A provincial legislature has not the power to prohibit the keeping of liquor within the province for export to other provinces or foreign countries.—*Re HUDSON'S BAY CO. & HEFFERNAN*, [1917] 3 W. W. R. 187; 10 Sask. L. R. 322.—CAN.

b. *Tavern License—Excessive sale under.*—R. v. LAMPHIER & ORR (1908), 17 O. L. R. 244; 12 O. W. R. 685.—CAN.

c. *Cancellation of license—Jurisdiction.*—Liquor License Ordinance (Alta.), 1898, s. 57, confers upon a judge of the Supreme Ct. power to direct the cancellation of liquor licenses which have been obtained in violation of sect. 37, as amended by Liquor License Act, 1907, s. 14.—*FINNERTH v. RYLEY HOTEL CO.* (1910), 41 C. L. T. 194; 43 S. C. R. 646; (1911), 44 S. C. R. 321.—CAN.

d. *Patent medicine—Certified seller—Excess of alcohol.*—R. v. DRUGGIST SUNDRIES CO., LTD., [1917] 1 W. W. R. 681; 27 Can. Crim. Cas. 346.—CAN.

e. ————]—*Proof of right to sell.*—R. v. BELL & BARRON, LTD., [1922] 2 W. W. R. 511; 69 D. L. R. 95; 37 Can. Crim. Cas. 246.—CAN.

f. *Sale to prohibited persons.*—It is an offence to supply liquor to a prohibited person even though the liquor is not for the prohibited person's own consumption. Supply includes mere delivery.—*Ex p. JONES* (1906), 6 S. R. N. S. W. 313; 23 N. S. W. N. 93.—AUS.

g. ————]—*Indian—Quarter-breed.*—Def. was convicted for selling intoxicating liquor to an Indian. The alleged Indian was a quarter-breed, & there was nothing to show that def. knew or suspected that N. was reputed to belong to a particular band or followed the Indian mode of life.—*Held:* conviction quashed.—R. v. HUGHES (1906), 12 B. C. R. 290; 4 W. L. R. 431.—CAN.

h. ————]—*Authority of Indian agent to convict.*—R. v. McHUGH (1907), 13 B. C. R. 224; 7 W. L. R. 252.—CAN.

k. ————]—*Penalty.*—R. v. MCKENZIE (1884), 6 O. R. 165.—CAN.

l. ————]—R. v. MOAULEY (1887), 14 O. R. 613.—CAN.

m. ————]—R. v. GREEN (1888), 12 P. R. 373.—CAN.

n. ————]—*Ex p. HILL* (1891), 31 N. B. R. 84.—CAN.

o. ————]—R. v. GRAY (1906), 3 W. L. R. 504.—CAN.

p. ————]—R. v. GODIN (1921), 36 Can. Crim. Cas. 191.—CAN.

aa. *Coloured person.*—R. v. LAI WING (1912), App. D. 260.—S. AF.

bb. ————]—R. v. OPPERMAN (1915), T. P. D. 521.—S. AF.

cc. ————]—R. v. BURT (1913), C. P. D. 75.—S. AF.

dd. ————]—R. v. JACKSON (1917), App. D. 556.—S. AF.

ee. ————]—R. v. LIPSCHITZ, [1918] T. P. D. 203.—S. AF.

ff. ————]—RENAUD v. DURBAN CHIEF CONSTABLE (1921), 42 N. L. R. 354.—S. AF.

gg. *Notice by wife—Forbidding sale to husband.*—GLEASON v. WILLIAMS (1876), 27 C. P. 93.—CAN.

hh. ————]—AUSTIN v. DAVIS (1882), 7 A. R. 478.—CAN.

kk. ————]—NORTHOTE v. BRUNKER (1887), 14 A. R. 364.—CAN.

ll. ————]—THORNLEY v. REILLY (1890), 17 A. R. 204.—CAN.

mm. *Sale of liquor—On vessel on lake.*—R. v. MEIKLEHAM (1906), 11 O. L. R. 308; 6 O. W. R. 945.—CAN.

nn. ————]—*Near public works.*—BOND v. CONNOR (1889), 15 O. R. 716; 16 A. R. 398.—CAN.

oo. ————]—R. v. IRWIN (1908), 16 O. L. R. 454; 11 O. W. R. 728, 730.—CAN.

pp. ————]—*Without license—Liability of owner of premises.*—R. v. BRADLEY (1911), 20 O. W. R. 33; 3 O. W. N. 58; 19 Can. Crim. Cas. 110.—CAN.

qq. ————]—*Whether more than one person punished.*—R. v. MARTIN (1916), 33 W. L. R. 809; 9 W. W. R. 1317.—CAN.

rr. ————]—*Evidence of consumption on premises.*—In a prosecution for selling liquor without a license, once consumption of liquor on accused's premises is admitted, the magistrate must treat the evidence as conclusive of a sale & convict.—R. v. SIMULOK (1915), 31 W. L. R. 577.—CAN.

tt. ————]—*Proof of sale.*—TENEKIDIS v. R. (1906), T. S. 771.—S. AF.

aaa. ————]—*Right to analysis.*—R. v. STEPHENSON (1912), 23 O. W. R. 269; 4 O. W. N. 272; 8 D. L. R. 104.—CAN.

bbb. ————]—*Executory contract.*—R. v. LAWLESS (1912), 21 O. W. R. 247; 3 O. W. N. 669; 2 D. L. R. 105.—CAN.

ccc. ————]—*Soft drinks—Subterfuge.*—R. v. RICHARDSON (1891), 20 O. R. 514.—CAN.

ddd. ————]—*Summons—Whether six days' service.*—R. v. COLL (1851), 8 N. B. R. (3. All.) 48.—CAN.

eee. ————]—*Information not on oath—Effect of.*—R. v. MCCONNELL (1843), 6 O. S. 629.—CAN.

fff. ————]—*Information—Form of.*—R. v. HAZEN (1893), 20 A. R. 633.—CAN.

ggg. ————]—*Information vague.*—R. v. FERGUSON (1834), 3 O. S. 220.—CAN.

hhh. ————]—*Information defective.*—R. v. CAVANAGH (1877), 27 C. P. 537.—CAN.

kkk. ————]—*Non-appearance of informant—No objection made.*—*Ex p. GOLDING* (1879), 19 N. B. R. 47.—CAN.

lll. ————]—*Conviction under local option bye-law.*—R. v. LEACH (1912), 21 O. W. R. 919; 18 Can. Crim. Cas. 487.—CAN.

mmm. ————]—*Conviction for first offence—Penalty.*—R. v. HAZEN (1893), 20 A. R. 633.—CAN.

nnn. ————]—*Whether conviction amendable.*—*Ex p. BLACK* (1879), 5 V. L. R. 183.—AUS.

ooo. ————]—*Re WATTS, Re EMERY* (1870), 5 P. R. 267.—CAN.

ppp. ————]—*Conviction—Form of.*—On a conviction for selling liquor without a license, it is not necessary that the conviction should contain an adjudication of forfeiture of all liquor in deft.'s possession.—*Ex p. FINENMONGER* (1900), 21 N. S. W. L. R. 387; 17 N. S. W. W. N. 160.—AUS.

qqq. ————]—R. v. FRENCH (1843), 4 N. B. R. (2 Kerr) 121.—CAN.

rrr. ————]—*Ex p. CLIFFORD* (1854), 8 N. B. R. (3 All.) 16.—CAN.

ttt. ————]—*Ex p. FREEZE* (1856), 8 N. B. R. (3 All.) 395.—CAN.

aaa. ————]—R. v. KING (1860), 20 C. P. 246.—CAN.

bbb. ————]—R. v. STRACHAN (1869), 30 C. P. 182.—CAN.

ccc. ————]—R. v. QUEEN'S COUNTY J.J. (1875), 15 N. B. R. (3 Pug.) 485.—CAN.

ddd. ————]—R. v.

KING (1893), 25 N. S. R. (13 R. & G.) 488.—CAN.

eee. ————]—*Dismissal by police magistrate—Whether appeal.*—No appeal lies from an order of a police magistrate dismissing a charge of selling intoxicating liquor without a license, contrary to the Liquor License Ordinance (Alta.).—*Re McCALLUM v. HURRY* (1911), 17 W. L. R. 533; 3 Alta. L. R. 342.—CAN.

fff. ————]—*Jurisdiction in two justices—Effect of trial by one.*—GRAHAM v. MCARTHUR (1866), 25 U. C. R. 498.—CAN.

ggg. ————]—R. v. WILSON (1894), 2 Terr. L. R. 79.—CAN.

hhh. ————]—*Penalties—How recoverable.*—R. v. ARMSTRONG (1864), 11 N. B. R. (6 All.) 81.—CAN.

kkkk. ————]—*Imprisonment with hard labour—Conviction invalid.*—R. v. ALLBRIGHT (1881), 9 P. R. 25.—CAN.

lll. ————]—*Imprisonment in default of distress.*—R. v. HARTLEY (1890), 20 O. R. 481.—CAN.

mmmm. ————]—*Imprisonment in default of payment of costs.*—R. v. HARSHMAN (1878), 14 N. B. R. (1 Pug.) 317.—CAN.

nnnn. ————]—*On Sunday.*—R. v. RODDY (1877), 41 U. C. R. 291; 1 Cart. 709.—CAN.

oooo. ————]—*During prohibited hours.*—*Ex p. SEXTON* (1919), 19 S. R. N. S. W. 51; 36 N. S. W. W. N. 24.—AUS.

pppp. ————]—*When punishable by imprisonment.*—R. v. BLACK (1878), 43 U. C. R. 180.—CAN.

qqqq. ————]—*By licensed brewer in local option area—To person outside.*—R. v. WRIGHT (1915), 8 O. W. N. 56; 33 O. L. R. 237.—CAN.

rrrr. ————]—*By chemist—Consumption in shop.*—R. v. MCCAY (1893), 23 O. R. 442.—CAN.

ttt. ————]—*Omission to enter sale in book.*—The non-entry in a book of a lawful sale of liquor by a chemist does not constitute an absolute contravention of R. S. O., 1887, s. 194, but merely throws on def. the onus of clearly rebutting the presumption which the statute had raised against him.—R. v. ELBORNE (1892), 21 O. R. 504.—CAN.

aaaa. ————]—R. v. DOMINION DRUG STORES, LTD., [1919] 2 W. W. R. 413; 31 Can. Crim. Cas. 86.—CAN.

bbbbb. *Keeping for sale—Meaning of liquor.*—R. v. SCAYNETTI (1915), 34 O. L. R. 373; 9 O. W. N. 13.—CAN.

ccccc. ————]—*Evidence of.*—R. v. BORIN (1913), 5 O. W. N. 472; 29 O. L. R. 584.—CAN.

ddddd. ————]—The fact that a person charged with keeping liquor for sale testifies that the liquor found in his possession was kept for his own use & not for the purpose of sale does not necessarily disprove the statutory presumption arising from such possession. The justice is entitled to weigh the evidence.—R. v. MCKINLEY, [1917] 2 W. W. R. 1069.—CAN.

eeeee. *What amounts to.*—Keeping a place where beer is provided without charge, but where the visitors are permitted to deposit moneys in a "pot," which are used to renew the supply of beer, is keeping liquor for the purpose of sale.—*Re CORDRAY* (1916), 34 W. L. R. 1169.—CAN.

ffff. ————]—*Form of conviction & commitment.*—R. v. PRITTE (1878), 42 U. C. R. 612; 2 Cart. 606.—CAN.

gggg. ————]—R. v. LAND (1919), 52 N. S. R. 257.—CAN.

hhhhh. ————]—*Partners—Joint conviction (regular).*—R. v. SUTTON (1877), 49 U. C. R. 220.—CAN.

kkkkk. ————]—*Commencement of proceedings—Reasonable time for—What constitutes.*—LAWY v. HILL (1919), 52 N. S. R. 215.—CAN.

**g. — Seizure—Necessity for conviction & identification of liquor.**—*R. v. FONG QUING & FONG TOY* (1917), 51 N. S. R. 503; 39 D. L. R. 60; 20 Can. Crim. Cas. 61.—CAN.

**h. — Search warrant—Three signatories necessary.**—*R. v. SALTER* (1856), 8 N. B. R. (3 All.) 393.—CAN.

**i. — — — — —**—*Ex p. CALDWELL* (1856), 8 N. B. R. (3 All.) 393.—CAN.

**l. — Search of premises—Obstruction of officer.**—*R. v. HODGE* (1893), 23 O. R. 450.—CAN.

**m. — Formal demand for admittance sufficient.**—The right of search given by Liquor License Act, 1887, c. 194, may be exercised without any preliminary statement of the purpose for which the search is to be made. A formal demand of admittance is sufficient.—*R. v. SLOAN* (1891), 18 A. R. 482.—CAN.

**n. — Whether right to search person implied.**—In the absence of express authority to search the person such authority is not implied from the power given to search the premises, & the person searched is entitled to recover as for a common assault.—*R. v. PAINT* (1917), 51 N. S. R. 114; 36 D. L. R. 717.—CAN.

**o. — Description of place in warrant.**—*R. v. MCGARRY* (1893), 24 O. R. 52.—CAN.

**p. Seizure of liquor—By license inspector—Judicial authority necessary.**—*MONAGHAN & Co. v. MCLEAN* (1910), 9 E. L. R. 14.—CAN.

**q. — Order of police commissioner.**—*GELLER v. LOUGHRIN* (1911), 24 O. L. R. 18; 19 O. W. R. 318; 3 O. W. N. 1159; 18 Can. Crim. Cas. 461.—CAN.

**r. — Grounds for.**—*R. v. DRUMMOND, Ex p. GRIGG* (1878), 4 V. L. R. 146.—AUS.

**s. Destruction of liquor—Jurisdiction of magistrate to order—Information not laid by person making seizure.**—*R. v. CLARKE* (1919), 52 N. S. R. 406.—CAN.

**a. — Necessity for proof of forfeiture order.**—*BOND v. CONMEE* (1889), 16 A. R. 398.—CAN.

**b. — Mistake of police officers.**—*ING KON v. ARCHIBALD* (1908), 17 O. L. R. 484; 13 O. W. R. 592, 997; 14 Can. Crim. Cas. 201.—CAN.

**c. Ignorance of intoxicating nature of beverage—Immaterial.**—*R. v. SIDOWSKI* (1909), 7 E. L. R. 397.—CAN.

**d. Conviction for third offence—Statement of previous convictions—Form of.**—*R. v. MCLEAN* (1893), 25 N. S. R. (13 R. & G.) 449.—CAN.

**e. — Evidence of previous convictions.**—Previous convictions may be used as evidence upon which to base a conviction for a third offence against Liquor License Act, as often as such offence is charged & proved.—*R. v. BIGELOW* (1904), 36 N. S. R. 554.—CAN.

**f. Liquor License Act (N.S.), 1895—Regulation of conditions of sale—Screen clause.**—*R. v. POWER* (1890), 28 N. S. R. (16 R. & G.) 373.—CAN.

**aa. Shop license—Licensee selling less**

**than minimum quantity.**—*R. v. FAULKNER* (1867), 20 U. C. R. 539.—CAN.

**bb. — — — — —**—*R. v. FIRMIN* (1873), 33 U. C. R. 523.—CAN.

**cc. — — — — —**—*R. v. CUNERTY* (1894), 26 O. R. 51.—CAN.

**dd. Whether informer competent witness.**—The informer is a competent witness in cases arising under 34 Vict. c. 39 (O.).—*R. v. STRACHAN* (1869), 20 C. P. 182.—CAN.

**ee. — Informer license inspector.**—For an offence under Liquor License Act, 1887 (c. 194), the license inspector, who lays the information is a competent witness.—*R. v. FEARMAN* (1892), 23 O. R. 456.—CAN.

**ff. Appeal from magistrate's decision—When granted.**—The decision of magistrates upon matters of fact must be found to be perverse & inconsistent with any rational view of the evidence before a ct. of appeal will undertake to disturb them.—*HUNT v. OLDRIDGE* (1882), 6 Nfld. L. R. 426.—NFLD.

**gg. — Fresh evidence.**—*THOMEY v. FORWARD* (1886), 7 Nfld. L. R. 119.—NFLD.

**hh. Indorsement of conviction on license—Necessity for.**—*R. v. DUBLIN RECORDER & JJ.*, [1906] 40 I. L. T. 22.—IR.

**kk. Notice of intended prosecution—Necessity for.**—*WALSH v. DOHERTY* (1907), 6 C. L. R. 196.—AUS.

**ll. — — — — —**—*SWEENEY v. KELLY* (1908), 7 C. L. R. 30.—AUS.

## Part XIII.—Habitual Drunkards.

See Habitual Drunkards Act, 1879 (c. 10); Inebriates Act, 1898 (c. 60).

**805. Who is—Question of fact.**—The word "habitual" is not explained or defined in Habitual Drunkards Act, 1879 (c. 19), & it is in each case a question of fact whether drunkenness is only occasional or is habitual within the meaning of that Act.—*ROBSON v. ROBSON* (1904), 68 J. P. 416, D. C.

**806. — Person habitually drinking to excess—Unable to manage affairs when drunk—Capable when sober.**—*EATON v. BEST*, No. 808, *post*.

**807. — — — — —**—Justices are not entitled to find that a person is a habitual drunkard within the meaning of Habitual Drunkards Act, 1879 (c. 19), unless they are satisfied that by reason of the habitual intemperance the person charged is (1) dangerous at times to himself or herself or to others, or (2) is incapable of managing himself or herself & his or her affairs. (3) It is necessary to prove that, though a person may be excessively intemperate and violent at times, the acts of violence were brought about by reason of the intemperance.—*TAYLER v. TAYLER* (1912), 56 Sol. Jo. 572, D. C.

**808. — — — — — Dangerous when drunk.**—The expression "habitual drunkard" in Habitual Drunkards Act, 1879 (c. 19), s. 3, & Inebriates Act, 1898 (c. 60), s. 2 (1), applies to a person who habitually drinks to excess, & who is, when drunk, dangerous or incapable of managing himself or his affairs, even though when sober he is capable of managing himself & his affairs.—*EATON v. BEST*, [1909] 1 K. B. 632; 78 L. J. K. B. 425;

100 L. T. 494; 73 J. P. 113; 25 T. L. R. 244; 22 Cox, C. C. 68, D. C.

**809. — — — — — To himself & others.**—*TAYLER v. TAYLER*, No. 807, *ante*.

**810. — — — — — Acts of violence caused by intemperance—Necessity for proof.**—*TAYLER v. TAYLER*, No. 807, *ante*.

**811. Offences by—Jurisdiction of court—To order notice of conviction to police authority—Consent of defendant to be tried summarily.**—

(1) The register of the minutes or memorandum of convictions of a ct. of summary jurisdiction which has to be kept under Summary Jurisdiction Act, 1879 (c. 49), s. 22, by the clerk of the ct. is admissible in evidence to prove a previous conviction of deft. for a similar offence in the same ct. (2) The consent of deft. to be tried summarily under Inebriates Act, 1898 (c. 60), s. 2, is necessary before a magistrate can make an order under Licensing Act, 1902 (c. 28), s. 6 (1).—*POLICE COMR. v. DONOVAN*, [1903] 1 K. B. 895; 72 L. J. K. B. 545; *sub nom.* METROPOLIS POLICE COMR. *v. DONOVAN*, 88 L. T. 555; 67 J. P. 147; 52 W. R. 14; 19 T. L. R. 392; 47 Sol. Jo. 437; 20 Cox, C. C. 435, D. C.

*Annotation:—Generally, Mentd. Wing v. Epsom U. D. C.* (1904), 68 J. P. 259.

**812. — — — — — Proof of previous convictions.**—*POLICE COMR. v. DONOVAN*, No. 811, *ante*.

**813. — — — — — To order detention in reformatory—With additional sentence of imprisonment.**—Appl. was convicted of neglecting four children . . . & also of being a habitual drunkard. She

### PART XIII.

**805 I. Who is—Question of fact.**—

*R. v. MEEHAN*, [1905] 2 I. R. 577.—IR.

**i. Placing name on Indian list.**

*Who is competent to make request.*—*PUGGOTT v. FRENCH* (1910), 15 O. W. R. 852; 21 O. L. R. 87.—CAN.



was sentenced to twelve months' imprisonment with hard labour, to be followed by three years' detention in an inebriate reformatory:—*Held*: the sentence was too severe & it should be reduced to twelve months' imprisonment with hard labour, to be followed by twelve months' detention in a reformatory.—*R. v. PRINCE* (1908), 25 T. L. R. 197; 1 Cr. App. Rep. 252, C. C. A.

—*J*.—By Inebriates Act, 1898 (c. 60), s. 2 (1), "Any person who commits any of the offences mentioned in Schedule I. to this Act & who within twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, & who is a habitual drunkard shall be liable upon conviction on indictment or if he consents to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years in any certificated inebriate reformatory the

managers of which are willing to receive him":—*Held*: where a person is convicted on an indictment preferred against him under the above sect. a sentence of imprisonment with hard labour cannot be inflicted upon him in addition to the detention in a certified inebriate reformatory authorised by the sect.—*R. v. BRIGGS*, [1909] 1 K. B. 381; 78 L. J. K. B. 116; 100 L. T. 240; 73 J. P. 31; 25 T. L. R. 105; 53 Sol. Jo. 164; 21 Cox, C. C. 762; 1 Cr. App. Rep. 206, C. C. A.

815. — **Obtaining liquor—Proof of personal purchase of liquor.**—It is not necessary, for a man to be guilty of an offence under the statute that he should go into a public-house, & get the liquor himself. If that were so, he might stand outside & send a friend in for the liquor, & so evade the provisions of the Act altogether (*KENEDY, J.*).—*DERBYSHIRE v. DOWNES* (1905), Paterson's Licensing Acts, 35th ed. p. 400, D. C.

## Part XIV.—Sale of Intoxicating Liquor on Credit.

### SECT. 1.—SPIRITS.

#### SUB-SECT. 1.—TO WHAT SALES PROHIBITION APPLIES.

See Sale of Spirits Act, 1750 (c. 40), s. 12; Sale of Spirits Act, 1862 (c. 38), s. 1; Licensing Act, 1921 (c. 42), s. 8.

816. **Sale for purposes of resale—Whether applicable.**—Sale of Spirits Act, 1750 (c. 40), against selling liquors in quantities under the value of 20s. does not extend to liquors sold for the purpose of being sold again.—*JACKSON v. ATTRILL* (1793), Peake, 241, N. P.

Annotation:—*N.F. Hughes v. Done* (1841), 1 Q. B. 294.

817. — *J*.—Sale of Spirits Act, 1750 (c. 40), s. 12, which enacts that no action shall be maintained for any debt on account of spirituous liquors unless the debt be *bond fide* contracted at one time to the amount of 20s., applies to cases where the liquor is sold, not to be consumed by the purchaser, but to be sold again by such purchaser, being a publican, to his customers. To a declaration in debt for goods sold & delivered, *deft.* pleaded that the sum was claimed in respect of spirituous liquors supplied by *pltf.* to *deft.*, & not in respect of any other matter; & that no part of the sum or demand was *bond fide* contracted by *deft.* at any one time to the amount of 20s. or upwards:—*Held*: this plea showed a defence under the statute, though it did not expressly negative the supposition that the sum might be made up of claims upon sales originally exceeding 20s. each, but reduced below that amount by part payments.—*HUGHES v. DONE* (1841), 1 Q. B. 294; 4 Per. & Dav. 708; 10 L. J. Q. B. 65; 5 Jur. 837; 113 E. R. 1144.

818. **Claim partly for spirits—Not maintainable *qua* spirits.**—*GILPIN v. RENDLE* (1809), 1 Selwyn's N. P. 13th ed. p. 75, N. P.

Annotation:—*Reid. Hughes v. Done* (1841), 1 Q. B. 294.

819. — *J*.—*Pltf.*, in an action for

tavern bill, is not entitled to recover for any items under 20s. for spirits supplied to the guests, such sales being prohibited by Sale of Spirits Act, 1750 (c. 40), s. 12.—*BURNYEAT v. HUTCHINSON* (1821), 5 B. & Ald. 241; 106 E. R. 1181.

Annotation:—*Reid. Hughes v. Done* (1841), 1 Q. B. 294.

820. **Spirits mixed with water.**—A bill of exchange, part of the consideration for which is spirituous liquor sold in less quantities than of 20s. value, is totally void, although part of the consideration was money lent. Sale of Spirits Act, 1750 (c. 40), s. 12, making illegal the sale of spirits in less quantities than to 20s. value, unless paid for, extends to spirits mixed with water.—*SCOTT v. GILLMORE* (1810), 3 Taunt. 226; 128 E. R. 90.

Annotation:—*Reid. Galtskill v. Greathead* (1822), 1 Dow. & Ry. K. B. 359.

821. **Sale of different spirits—At same time—Total amount over twenty shillings—Recoverable.**—If a person sell two sorts of spirits at the same time, to an amount above 20s. he may recover the price, although the amount of each species of spirits be under 20s.—*OWENS v. PORTER* (1830), 4 C. & P. 367.

822. **Sale to resident guest—Not applicable.**—Sale of Spirits Act, 1750 (c. 40), s. 12, which prevents a person from recovering for spirits supplied to a smaller amount than 20s. at a time, does not apply to spirits supplied by a hotel keeper to a guest who is resident in his hotel.—*PROCTOR v. NICHOLSON* (1835), 7 C. & P. 67, N. P.

Annotation:—*Reid. Hughes v. Done* (1841), 1 Q. B. 294.

#### SUB-SECT. 2.—SECURITY FOR PAYMENT.

See Sale of Spirits Act, 1750 (c. 40), s. 12; Sale of Spirits Act, 1862 (c. 38), s. 1; Licensing Act, 1921 (c. 42), s. 8.

823. **Bill of exchange—Whether valid.**—*SCOTT v. GILLMORE*, No. 820, *ante*.

(1843), 6 O. S. 452.—*CAN.*

*o. — J*.—*SMITH v. MC* (1868), 7 N. S. R. 299.—*CAN.*

*d. — J*.—*HIGHETT v. McDONALD*, 3 N. Z. Jur. N. S. 102.—*N.Z.*

*e. Sale to innkeepers.*—The prohibition in 17 Vict. c. 15, s. 13, against selling liquor on credit, only applies to innkeepers & tavern keepers.—

*MCMAULEY v. LAWLER* (1860), 4 All. 600.—*CAN.*

PART XIV. SECT. 1, SUB-SECT. 2.  
823. **Bill of exchange—Whether valid.**—*SMYTH v. MCNEILL* (1864), 6 N. S. R. (2 Old.) 75.—*CAN.*

*f. Promissory note—Whether valid.*—*BENARD v. MCKAY* (1893), 9 Man. R. 166.—*CAN.*

#### PART XIV. SECT. 1, SUB-SECT. 1.

*a. Sale below twenty shillings value.*—24 Geo. 2, c. 40, disallowing the sale of spirituous liquors at one time of quantities of less value than 20s., to be consumed out of the shop, is not in force in this Province.—*LEITH v. WILLIS* (1836), 5 O. S. 101.—*CAN.*

*b. — J*.—*HEARTLY v. HEARNS*

**824.** ———.]—A bill of exchange accepted by an officer in the recruiting service, in payment of small quantities of spirits under the value of 20s. supplied by a publican to be used out of his house by recruits & others under the command of the acceptor, is valid, notwithstanding Sale of Spirits Act, 1750 (c. 40), s. 12.—*SPENCER v. SMITH* (1811), 3 Camp. 9, N. P.

**825.** ———.]—Pleas to a declaration upon a bill of exchange, with counts for goods sold: (1) that part of the consideration of the bill was spirituous liquors sold at different times, in quantities less in value than 20s.; (2) that pltf. & deft. had accounted together, & that the latter had given the former a bill of exchange for the amount of the goods mentioned in the common counts, which bill is still outstanding & unsatisfied; are issuable pleas, & cannot be treated as nullities, entitling pltf. to sign judgment as for want of a plea.—*GAITSKILL v. GREATHHEAD* (1822), 1 Dow. & Ry. K. B. 359.

**826.** ———.]—*SMITH v. SMITH* (1815), 6 L. T. O. S. 123.

**827. Double security—Bill & note—Recovery on one permitted.]**—A publican took from a person, who boarded & lodged in his house, a bill & a note, both at one time, for his score, part of which consisted of a demand for spirits, but not to the amount of either bill or note; money was also paid on account.—*Held*: in an action on the securities, although they were given at the same time, pltf. might recover on one of them, & also, he might apply the money paid in reduction of the demand for spirits, although such demand could not be recovered, in consequence of Sale of Spirits Act, 1750 (c. 40).—*CROOKSHANK v. ROSE* (1831), 5 C. & P. 19; *sub nom.* *CRUICKSHANKS v. ROSE*, 1 Mood. & R. 100, N. P.

—*Mentd.* *Seymour v. Pickett* (1905), 92 L. T.

#### SUB-SECT. 3.—APPROPRIATION OF PAYMENT.

See Sale of Spirits Act, 1750 (c. 40), s. 12; Sale of Spirits Act, 1862 (c. 38), s. 1; Licensing Act, 1921 (c. 42), s. 8.

**828. Debt partly for spirits—Right to appropriate payment to spirits.]**—Where parties having cross demands, settle & balance their accounts, though part of pltf.'s demand was one for which no action could be supported, the settlement of the accounts shall bind deft., so that he cannot set up that defence to an action for the balance.

Deft. when he settled the account made no objection to the demand for the liquors. . . . If the payer of money makes no appropriation of it, nor directs it to be placed to any particular account, the receiver of it may (*MANSFIELD, C.J.*).

*DAWSON v. REMNANT* (1806), 6 Esp. 24, N. P.  
*Annotations*:—*Rold.* *Wilson v. Way* (1837), 1 Jur. 637;  
*Laycock & Pickles* (1863), 4 B. & S. 497.

**829.** ———.]—*CROOKSHANK v. ROSE*, No. 827, *ante*.

**830.** ——— & to recover remainder of claim.]—Pltf., in an action of debt, proceeded for

£18, but delivered a particular of demand, containing items to the amount of £11 for spirits supplied in quantities not amounting to 20s. at a time, & £23 2s. for other articles. It appeared at the trial that deft. had paid pltf. £17, but there was no proof of any appropriation of the payment by either. The jury found that pltf. had appropriated £11 of the £17 already paid, to the demand for spirits, & they gave him a verdict for £17:—*Held*: such finding was not in contravention of Sale of Spirits Act, 1750 (c. 40), s. 12, which prohibits any recovery for spirituous liquors unless the debt shall have been contracted at one time to the amount of 20s.—*PHILPOTT v. JONES* (1834), 2 Ad. & El. 41; 4 Nev. & M. K. B. 14; 4 L. J. K. B. 65; 111 E. R. 10.

*Annotations*:—*Rold.* *Mills v. Fowkes* (1839), 5 Bing. N. C. 455; *Friend v. Young*, [1897] 2 Ch. 421. *Mentd.* *Smith v. Betty*, [1903] 2 K. B. 317; *Seymour v. Pickett*, [1906] 1 K. B. 715.

#### SUB-SECT. 4.—PLEADING.

See Sale of Spirits Act, 1750 (c. 40), s. 12; Sale of Spirits Act, 1862 (c. 38), s. 1; Licensing Act, 1921 (c. 42), s. 8.

**831. Claim composed of several sums under twenty shillings—Not necessary to show sums not reduced by part payment.]**—*HUGHES v. DONE*, No. 817, *ante*.

See, further, PLEADING.

#### SECT. 2.—BEER.

##### SUB-SECT. 1.—CONSUMED ON PREMISES.

See County Courts Act, 1888 (c. 43), s. 182; Licensing Act, 1921 (c. 42), s. 8.

##### SUB-SECT. 2. FOR PURPOSES OF RESALE.

**832. Sale to unlicensed person—For resale by licensed agent—Whether price recoverable from middleman.]**—A brewer, who supplies beer to a public-house, cannot charge any person as a primary debtor but the person licensed to keep the house; & if beer be so supplied on the credit of a person not licensed, the brewer cannot recover against such person, on the ground that it is a fraud on the excise.—*MEUX v. HUMPHRIES* (1828), 3 C. & P. 79; *Mood. & M.* 132, N. P.

*Annotations*:—*N.F.* *Brooker v. Wood* (1834), 5 B. & Ad. 1952. *Mentd.* *Armstrong v. Lewis* (1834), 2 Cr. & M. 274.

**833.** ———.]—The carrying on by A. of the business of retailing beer in a public-house in the name & by the agency of B., the person licensed by the magistrates, is not a fraud on the licensing system. A sale to A., therefore, for the purposes of such trade, is valid.—*BROOKER v. WOOD* (1834), 5 B. & Ad. 1052; 3 Nev. & M. K. B. 96; 3 L. J. K. B. 96; 110 E. R. 1081.

**834.** ———. No fraud on licensing system.]—*BROOKER v. WOOD*, No. 833, *ante*.

#### PART XIV. SECT. 1, SUB-SECT. 3.

**838 1. Debt partly for spirits—Right to appropriate payment to spirits.]**—*JOHNSTON v. LAW* (1843), 5 Duml. (Ct. of

Sess.) 1372; 15 Sc. Jur. 607.—*SCOT.*

#### PART XIV. SECT. 1, SUB-SECT. 4.

*g.* Action on note for price.—*Un-*

necessary to prove license.]—*MAULEY v. LAWLER* (1860), 9 N. B. R. (4 All.) 600.—*CAN.*



## Part XV.—War Legislation.

**835. Sale or supply—Hours of sale.]—Intoxicating Liquor (Temporary Restriction) Act, 1914 (c. 77), s. 1 (1),** provides that licensing justices may "by order direct that the sale or consumption of intoxicating liquor on the premises of any persons holding any retailers' license in the area, & the supply or consumption of intoxicating liquor in any registered clubs in the area, shall be suspended while the order is in operation, during such hours & subject to such conditions or exceptions (if any) as may be specified in the order: Provided that, if any such order suspends the sale, supply, or consumption of intoxicating liquor at an hour earlier than nine at night the order shall not have effect until approved by the Secretary of State."

Licensing justices made an order directing that "the sale or consumption of intoxicating liquor on the premises of persons holding retailers' licenses, & the supply or consumption of such liquor in registered clubs, shall be suspended in the evening of each day, after the hour of 10 o'clock until 6 a.m. on the following day being a week day, & 12.30 p.m. on the following day being a Sunday":—*Held*: the order did not suspend the sale, supply, or consumption of intoxicating liquor in registered clubs "at an hour earlier than 9 at night," within the meaning of the proviso to the above sub-sect., & took effect without the approval of the Secretary of State.—*LEE v. AYKROYD*, [1915] 2 K. B. 692; 84 L. J. K. B. 1831; 113 L. T. 451; 79 J. P. 381; 31 T. L. R. 445, D. C.

**836. ———.]—**By an order made on Oct. 23, 1914, by the Winchester licensing Justices under Intoxicating Liquor (Temporary Restriction) Act, 1914 (c. 77), s. 1 (1), it was directed that "the sale or consumption of intoxicating liquor on the premises of each & every person holding any retailers' license or licenses in the City of Winchester area shall be suspended while this order is in operation during the hours between nine & eleven o'clock in the afternoon of each & every day" from Oct. 23, 1914.

At 10 p.m. on June 12, 1915, while the order was in operation, six men were found on applt.'s licensed premises consuming intoxicating liquor, which had been sold to them by applt. All the six men were *bonâ fide* lodgers of applt. & were lodging in applt.'s premises, & the liquor had been supplied to them as such lodgers:—*Held*: Intoxicating Liquor (Temporary Restriction) Act, 1914 (c. 77), was intended to be a complete code as to the terms & conditions under which licensed premises were to be opened during the time that Act remained in force, & the exception in favour of lodgers in Licensing (Consolidation) Act, 1910 (c. 24), s. 61, could not be incorporated into it. The justices were empowered under the Act of 1914 to make an order as to the sale or consumption of intoxicating liquor, subject to such conditions or exceptions as might be specified in the order, & as the justices in the present case had not specified any exception in the order in favour of lodgers, therefore applt. had committed an offence in supplying intoxicating liquor to lodgers during hours when under the order the sale or consumption of intoxicating liquor was suspended.—*KING v. SIM* (1916), 85 L. J. K. B. 1621; 115

L. T. 124; 80 J. P. 324; 14 L. G. R. 882; 25 Cox, C. C. 464, D. C.

**837. ——— Price—Beer sold in "public bar."]**—By clause 15 of the Spirits (Prices & Description) No. 2 Order, 1918, "The expression 'public bar' means:—(a) Any bar on licensed premises, except such bar or bars in which, prior to Apr. 1, 1918, beer was not sold at (or at less than) the prices set out in the Beer (Prices & Description) Order, 1917 . . .":—*Held*: in the above clause "beer" does not mean beer without reference to gravity, but means beer of the gravities in respect of which two maximum prices were fixed in the Beer (Prices & Description) Order, 1917.—*BILLOWS v. EDWARDS* (1919), 89 L. J. K. B. 38; 122 L. T. 184; 83 J. P. 268; 36 T. L. R. 9; 17 L. G. R. 741, D. C.

**838. ——— Sale at excessive price—Specific gravity.]—***STEWART v. SIMPSON*, [1919] W. N. 122, D. C.

**839. ———.]—***FOWLE v. MONSELL* (1920), 90 L. J. K. B. 105; 124 L. T. 154; 85 J. P. 25; 36 T. L. R. 863; 18 L. G. R. 661, D. C.

**840. ——— Mode of sale—Credit.]—**By s. 8 (1) (a) of the Order made by the Central Control Board (Liquor Traffic) for the London Area, "No person shall either by himself or his servant or agent sell or supply in any licensed premises or club or dispatch therefrom any intoxicating liquor to be consumed either on or off the premises . . . unless it is paid for before or at the time when it is supplied or dispatched or taken away":—*Held*: under Defence of the Realm (Amendment No. 3) Act, 1915 (c. 42), s. 1, the above provision is not *ultra vires*, & means actual payment in some recognised form, such as cash, or notes, or some symbol for cash or notes, a mere promise to pay not being enough.—*WHITHAM & BUTTERWORTH v. LINDLEY* (1920), 37 T. L. R. 75, D. C.

**841. ——— Supply subsequent to sale.]—**The expression "supply" in an Order of the Central Control Board (Liquor Traffic) includes supply where there has been a previous sale, although by regulation 27 of Defence of the Realm (Liquor Control) Regulations, 1915, the word "supply" is defined as meaning "supply otherwise than by way of sale," provided that the act of supplying is not actually a part of the transaction of sale. Therefore where intoxicating liquor has been sold in licensed premises & appropriated to the purchaser during lawful hours, but handed over during prohibited hours, the offence of "supplying" in prohibited hours has been committed.—*HALL-DALWOOD v. EMERSON* (1917), 87 L. J. K. B. 296; 16 L. G. R. 107; *sub nom.* *EMERSON v. HALL-DALWOOD*, 118 L. T. 20; 82 J. P. 50; 34 T. L. R. 153; 26 Cox, C. C. 146, D. C.

**842. ———.]—***Resp.* was the holder of a license for the sale of intoxicating liquor, & under the orders made by the Central Control Board (Liquor Traffic) the hours during which intoxicating liquor might be supplied for consumption on the premises were between 12 noon & 2.30 p.m., & between 6 p.m. & 10 p.m. In preparation for a party which *resp.* was about to give in her private diningroom, which, though part of the licensed premises, was shut off from the part used for the accommodation of the public, *resp.*, between 6 &

## PART XV.

**835 i. Sale or supply—Hours of sale.]—***FINNEGAN v. HART*, [1916] S. C. (J.)

## 9.—SCOT.

**835 ii. ———.]—***MACKENNA v. SIM*, [1916] S. C. (J.) 34.—SCOT.

**h. ——— Extent of licensee's liability.]—***AULD v. DEVLIN*, [1918] S. C. (J.) 41.—SCOT.

10 p.m., took bottles of intoxicating liquor from the off license department & from the bar to the dining-room. At 11.15 p.m. the police entered the dining-room & found there resp. & also some members of the party, who were not resident in the house. On the sideboard there were glasses & bottles partly filled with intoxicating liquor. On the inspector saying to resp.: "You don't deny you have intoxicating liquor here for consumption," she replied that it was there for the members of the party if they wanted it. On an information against resp. for supplying liquor in contravention to the orders of the Board, the justices held that the act of supplying ceased when the different articles were brought up & placed in the room, & that it was not a continuous act, & they dismissed the information:—*Held*: as there was an invitation after hours to the non-resident guests to help themselves, & as they acted upon that invitation, there was a supply of intoxicating liquors after hours, & the justices ought to have convicted.—*ELLIS v. ADAMES* (1920), 90 L. J. K. B. 119; 123 L. T. 714; 85 J. P. 22; 36 T. L. R. 716; 18 L. G. R. 497; 26 Cox, C. C. 631, D. C.

**843. Treating.**—Regulation 7 of the Order of the Central Control Board (Liquor Traffic) made in 1915, under Defence of the Realm Act for the area of Cardiff, provided that "No person shall either by himself or by any servant or agent sell or supply any intoxicating liquor to any person in any licensed premises or any club to be consumed on the premises unless the same is ordered & paid for by the person so supplied, nor shall any person order or pay for or lend or advance money to pay for any intoxicating liquor wherewith any other person has been or is to be supplied to be consumed on the premises; nor shall any person consume in such premises or club, any intoxicating liquor which any other person has ordered or paid for or agreed to pay for or lent or advanced money to pay for."

On a summons against the licensee of a public-house for supplying intoxicating liquor to persons to be consumed on the premises evidence was given that a man who was sitting at a table with two women in the smoking room of the licensed house ordered, & paid for, five glasses of beer, which the wife of the licensee brought & placed on the table. After she had left the beer was drunk by the man & the two women & two other women. The magistrate dismissed the summons without the defence being gone into:—*Held*: the words "sell or supply" in the regulation were intended to cover the distribution of intoxicating liquor by the license holder, both by sale & otherwise than by sale, & the inference to be drawn from the facts proved in support of the summons was that the glasses of intoxicating

liquor were supplied to the women who consumed them & not to the man who paid for them.—*WILLIAMS v. PEARCE* (1916), 85 L. J. K. B. 959; 114 L. T. 398; 80 J. P. 229; 32 T. L. R. 285; 14 L. G. R. 564; 25 Cox, C. C. 362, D. C.

*Annotations*:—*Reid*, Thompson v. Davison, [1916] 1 K. B. 917; Emerson v. Hall-Dalwood (1917), 118 L. T. 20.

**844. — Liability of licensee & servant.**—By clause 7 of the London Liquor Order, "No person shall either by himself or by any servant or agent sell or supply any intoxicating liquor to any person in any licensed premises . . . for consumption on the premises unless the same is ordered & paid for by the person so supplied:—*Held*: a barmaid so supplying the liquor is liable under the clause as well as the license holder.—*KNAPP v. BEDWELL* (1916), 85 L. J. K. B. 1507; 115 L. T. 486; 80 J. P. 336; 32 T. L. R. 704; 14 L. G. R. 985, D. C.

**845. Output of beer—Barrelage certificate—To licensee of free house—House free for part of year only.**—*Pltf.*, the license holder of the magistrates & excise licenses of the "B. H." Inn, was during the three quarters from Apr. 1, 1915, the tied tenant of deft. brewers under a lease which expired on Dec. 31, 1915. During the remaining quarter of the standard year ending on Mar. 31, 1916, he continued to trade with defts. Subsequently *pltf.*, wishing to obtain beer from other brewers, required defts. under Output of Beer (Restriction) Act, 1916 (c. 26), s. 5 (1), to furnish him with the particulars & certificate of bulk & standard barrels of beer supplied to him by defts. during each quarter of the year ended Mar. 31, 1916. Defts. supplied the particulars for the quarter ended on Mar. 31, 1916, but refused to supply them for the preceding three quarters, during which *pltf.* had been bound to obtain his supply of beer from defts.:—*Held*: on the proper construction of the statute *pltf.* as the occupier of a free licensed house at the time he applied for the particulars was entitled to obtain the particulars & certificate for the whole of the standard year notwithstanding his house had been tied to defts. for three quarters of that year.—*FISHER v. RAWSON & Co.* (1917), 86 L. J. Ch. 519; 116 L. T. 210; 81 J. P. 97; 33 T. L. R. 256; 61 Sol. Jo. 368.

**846. Permit to take wine out of bond—Sale of permit illegal.**—A contract for the sale of a permit issued under Defence of the Realm (Consolidation) Regulations, 1914, authorising a particular person to take a specified quantity of wine out of bond is illegal as being contrary to public policy.—*SYKES v. BRIDGES, KLOUTH & Co.* (1919), 85 T. L. R. 464.

**Canteens.**—*See* No. 590, *ante*.

**843 i. Treating.**—*HACKETT v. LANDER* (1917), 36 N. Z. L. R. 947.—*N.Z.*

**843 ii.**—*SOUTAR v. HUTTON* (1915), 53 Sc. L. R. 550.—*SCOT.*

**843 iii.**—*BROWN v. M'KECHNIE*, [1916] S. C. (J.) 20.—*SCOT.*

**843 iv.**—*GAIR v. BREWSTER; SOUTAR v. HUTTON*, [1916] S. C. (J.) 38; [1916] 1 S. L. T. 388.—*SCOT.*

**846 i. Permit to take wine out of bond—Sale of permit illegal.**—*TREVAILION*

*WILLIAMSON v. DALION*, [1919] V. L. R. 129.—*AUS.*

**i. Premises open during prohibited hours—To eject a customer—No offence.**—*R. v. NICHOLSON* (1916), 50 L. L. T. 79.—*IR.*

**m. Prosecution for contravention of regulations—Production in court of copy of regulations—Whether necessary.**—*BRANDER v. MACKENZIE*, [1915] 52 Sc. L. R. 660; [1915] S. C. (J.) 47.—*SCOT.*

**n.**—*M'AVOY v. CAMERON*, [1917] S. C. (J.) 1.—*SCOT.*

*v. M'CONNELL*, [1917] S. C. (J.) 43.—*SCOT.*

**p. Consumption on premises of liquor obtained elsewhere.**—*M'ELPHINSTON v. BARLOW, M'ELPHINSTON v. MACLEAN*, [1917] S. C. (J.) 32.—*SCOT.*

**q. "Despatching" from premises—Fraudulent abstraction by servant.**—*HERRNOT v. AULD*, [1918] S. C. (J.) 10.—*SCOT.*

**r. Licensee taking liquor off premises during prohibited hours—For own use.**—*MACKENNA v. BRADY*, [1918] S. C. (J.) 37.—*SCOT.*

**k. Gratuitous distribution during prohibited hours—Licensee not liable.**—

## INVENTIONS.

*See* PATENTS AND INVENTIONS.

## INVENTORIES.

*See* BILLS OF SALE ; EXECUTORS AND ADMINISTRATORS ; VALUERS AND APPRAISERS.

## I.O.U.

*See* BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS.

## IRISH FREE STATE.

*See* DEPENDENCIES.

## ISLE OF MAN.

*See* DEPENDENCIES.

## JACTITATION.

*See* HUSBAND AND WIFE.

## JETSAM.

*See* ADMIRALTY ; SHIPPING AND NAVIGATION.

## JEWS.

*See* ECCLESIASTICAL LAW ; HUSBAND AND WIFE.

## JOINDER.

*See* COUNTY COURTS ; PRACTICE AND PROCEDURE.

## JOINT AND SEVERAL PROMISES.

*See* BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS ;  
CONTRACT ; GUARANTEE AND INDEMNITY.

## JOINT STOCK COMPANIES.

*See* COMPANIES.

## JOINT TENANCY.

*See* DESCENT AND DISTRIBUTION ; PERSONAL PROPERTY ; REAL PROPERTY AND  
CHATELS REAL.

## JOINTURE.

*See* HUSBAND AND WIFE ; PERSONAL PROPERTY ; REAL PROPERTY AND CHATELS REAL.

## JUDGE-ADVOCATE-GENERAL.

*See* ROYAL FORCES.

## JUDGMENT CREDITOR AND JUDGMENT DEBTOR.

*See* BANKRUPTCY AND INSOLVENCY ; EXECUTION.

## JUDGMENT SUMMONS.

*See* BANKRUPTCY AND INSOLVENCY.

# JUDGMENTS AND ORDERS.

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## Part I.—Definitions.

## SECT. 1.—JUDGMENT.

1. Decree for specific performance of payment of money.]—BEAUFORT (DUKE) v. PHILLIPS, No. 362, *post*.

*See, generally*, SPECIFIC PERFORMANCE.

2. In county court—Verbal order on default of appearance of defendant.]—A debtor summoned to a county ct. failed to appear, whereupon the judge verbally ordered that he pay the debt & costs “forthwith.” About five o’clock in the afternoon of the same day, the bailiff served the debtor with an order, under the seal of the ct., “to pay the debt & costs to the clerk of the ct., at his office, forthwith, etc. Attendance from ten till four.” Deft. having refused to pay, the bailiff took his goods in execution:—*Held*: the verbal order to pay was in effect a judgment, & therefore no service of the order was necessary before execution. *Semble*: where an order is made by the judge, & afterwards varied as to the time of payment, it must be drawn up & served before execution can issue.—ELY v. MOULE (1850), 5 Exch. 918; 1 L. M. & P. 799; Cox, M. & H. 408; 20 L. J. Ex. 29; 16 L. T. O. S. 239; 15 J. P. 670; 14 Jur. 1070; 155 E. R. 401.

*Annotation*:—*Reid*, Robinson v. Gell (1852), 12 C. B. 191.

3. —Consent order under Rivers Pollution Prevention Act, 1876 (c. 75).]—By sect. 3 of above Act it is made an offence to permit sewage to flow into a “stream” from a sewer constructed at the date of the passing of the Act without using the best practicable means to render the sewage harmless; & by sect. 20 the term “stream” is defined to include only such tidal waters as may be

determined by the Local Govt. Board by order. Jurisdiction is by the Act given to the county ct. to make an order restraining the further commission of the offence, & ordering the offenders to execute the necessary sewage works to render the sewage harmless, & to inflict penalties for disobedience to such order.

Proceedings having been taken in a county ct. under the Act against defts. for permitting sewage to flow into a certain river, & neglecting to use the best practicable means to render the sewage harmless, defts. consented to an order declaring them to have committed the alleged offence & ordering them to execute the necessary sewage works to prevent its continuance. At the of that order defts. were under the belief that the part of the river into which the sewage flowed was non-tidal. Subsequently defts., having been summoned for penalties for disobedience of the order, sought to show that the part of the river into which the sewage flowed was tidal water, & that as there had been no order of the Local Govt. Board declaring it to be a stream they had committed no offence:—*Held*: the order of the county ct. was equivalent to a judgment, & defts. were estopped from disputing that they had committed the alleged offence, or from contending that the order of the ct. in so far as it applied to the *locus in quo* was without jurisdiction.—RIBBLE RIVER JOINT COMMITTEE v. CROSTON URBAN DISTRICT COUNCIL, [1897] 1 Q. B. 251; 66 L. J. Q. B. 384; 45 W. R. 348, D. C.

*See, generally*, COUNTY COURTS, Vol. XIII., p. 504.

## PART I. SECT. 1.

a. Rule rescinding *ex parte* order extending time for service of petition.]—

DICKIE v. WOODWORTH (1883), 4 R. & G. 105; 8 S. C. R. 192.—CAN.

b. Order for payment of money or costs.]—The rules & orders at law for

the payment of money or costs constitute judgments & have all the force & effect of judgments at law.—GIBBONS v. CHADWICK (1893), 9 Man. L. R.

Sect. 1.—*Judgment.* Sect. 2.]

**4. Decision & report of Committee of Privileges.]**—The decision of the Committee of Privileges as to the advice it shall give Her Majesty upon one particular claim of peerage, does not resemble the decision of the House sitting as the tribunal of ultimate appeal upon a question of law in a suit between two adverse parties. It is in no sense a judgment, & cannot, therefore, be treated as a binding authority in another claim of peerage, even though the terms of the patents in the two cases may be like each other. The Crown cannot give to the grant of a dignity or honour a quality of descent unknown to the law.—*Re WILTES PEERAGE CLAIM* (1869), L. R. 4 H. L. 126, H. L.

*Annotations.*—*Consd.* Rhondda's Claim, [1922] 2 A. C. 339. *Mentd.* Buckhurst Peerage (1876), 2 App. Cas. 1.

**5. —.]**—There are, it is true, differences between the effect of the report of the Committee of Privileges & the judgment of a ct. of law. They are too obvious & too numerous to be set out here. In its essence, the main difference rests in the fact that the reports of the Committee of Privileges & the resolutions of the House taken upon them are in themselves merely the advice given to His Majesty upon the reference which he has made to the House. It is clear that the advice tendered in any one case cannot be pleaded, as it were, as a bar in law to a petition by another person for a right to another dignity, even though the circumstances attending the claim & the point of law arising upon it may be precisely the same. It is, therefore, open to all the other ladies who hold peerages in their own right successively to petition His Majesty to refer the matter to this House (LORD BIRKENHEAD, C.).—*RHONDDA'S (VISCOUNTESS) CLAIM*, [1922] 2 A. C. 339; 92 L. J. P. C. 81; 128 L. T. 155; 38 T. L. R. 759; 66 So. Jo. 630, H. L.

*See, generally, PEERAGES & DIGNITIES.*

**6. Interlocutory order for accounts — No declaration of rights.]**—An interlocutory order for accounts & inquiries containing no declaration of rights is not a judgment.—*McHENRY v. LEWIS* (1882), as reported in 47 L. T. 549, C. A.; *subsequent proceedings, sub nom. CONYBEARE v. LEWIS* (1883), 48 L. T. 527.

*Annotations.*—*Mentd.* Hymn v. Helm (1883), 24 Ch. D. 531; Peruvian Guano Co. v. Bockwoldt (1883), 23 Ch. D. 225; The Christiansborg (1885), 10 P. D. 141; Mutrie v. Binney (1887), 35 Ch. D. 614; The Reinbeck (1889), 60 L. T. 209; Logan v. Bank of Scotland (No. 2), [1906] 1 K. B. 141; Egbert v. Short, [1907] 2 Ch. 205; *Re Norton's Settlement*, Norton v. Norton, [1908] 1 Ch. 471; Carter v. Hungerford (1916), 59 Sol. Jo. 428; Cohen v. Rothfield, [1919] 1 K. B. 410.

**7. Whether order for foreclosure included.]**—An order for foreclosure absolute in respect of lands in Middlesex is not a judgment within Middlesex Registry Act, 1708 (c. 20), s. 18, & judgments Act, 1838 (c. 110), so as to require a memorial to be entered at the Middlesex Registry Office; & a direction to the Registrar of Deeds to that effect was refused.—*BURROWS v. HOLLEY* (1887), 35 Ch. D. 123; 56 L. J. Ch. 605; 56 L. T. 506; 35 W. R. 592.

*See, generally, MORTGAGE.*

**8. Decision in action of previously existing liability.]**—The decision of a div. ct. upon a case stated by the Comrs. of Inland Revenue under Stamp Act, 1870 (c. 97), s. 19, is an order & not a

judgment, & an appeal from such a decision to the Ct. of Appeal must be brought within twenty-one days.

A judgment is a decision in an action of a previously existing liability, & every other decision of a ct. is an order (LORD ESHER, M.R.).

A "decree" [of the Ch. Div.] is of course the equivalent term to a "judgment" in the Q. B. Div. (LINDLEY, L.J.).—*ONSLOW v. INLAND REVENUE COMRS.* (1890), 25 Q. B. D. 465; 59 L. J. Q. B. 556; 63 L. T. 513; 38 W. R. 728; 6 T. L. R. 454, C. A.

**9. Order declaring rights.]**—An "order declaring rights" is equivalent to a judgment; it is not a final but a preliminary & therefore interlocutory judgment.

The appeal comes to us from an "order declaring rights," which is equivalent to a judgment, not a final, but a preliminary judgment, & therefore interlocutory. As a matter of practice the judge will not determine the further question of fact until after the final decision of the Ct. of Appeal or the House of Lords, as the case may be (LORD ESHER, M.R.).—*MAORI KING (CARGO OWNERS) v. ALLEN* (1895), 1 Com. Cas. 104, C. A.

**10. Whether leave to sign judgment included.]**—An order giving liberty to sign final judgment under R. S. C., Ord. 14, is not equivalent to actual judgment for the purpose of giving priority to a creditor in an administration action to the other creditors of the debtor.—*Re GURNEY, CLIFFORD v. GURNEY*, [1896] 2 Ch. 863; 66 L. J. Ch. 32; 75 L. T. 332; 45 W. R. 92; 41 Sol. Jo. 67.

**11. —.]**—*Re DEBTOR, Ex p. DEBTOR* (No. 2621 of 1902), [1903] W. N. 6, C. A.

**12. Within Public Authorities Protection Act, 1893 (c. 61), s. 1 (b)—Consent order dismissing proceeding against local authority.]**—In an action against a county council an order was made in chambers by consent that the action be dismissed, & that pltf. pay to defts. their taxed costs of the action.—*Held*: defts. had obtained judgment within above sect.—*SHAW v. HERTFORDSHIRE COUNTY COUNCIL*, [1899] 2 Q. B. 282; 68 L. J. Q. B. 857; 81 L. T. 208; 63 J. P. 659; 15 T. L. R. 462, C. A.

*Annotations.*—*Refd.* Bostock v. Ramsey U. D. C., [1900] 2 Q. B. 616; Smith v. Northleach R. D. C., [1902] 1 Ch. 197; Gilbert v. Gosport & Alverstoke U. D. C., [1916] 2 Ch. 587.

**13. — Proceedings against local authority dismissed for want of prosecution.]**—An order dismissing an action for want of prosecution because pltf. has not given notice of trial within the time specified for so doing, with costs to be paid by pltf., is a "judgment" within above sect.—*GILBERT v. GOSPORT & ALVERSTOKE URBAN DISTRICT COUNCIL*, [1916] 2 Ch. 587; 86 L. J. Ch. 54; 115 L. T. 760; 81 J. P. 89; 60 Sol. Jo. 695; 15 L. G. R. 62.

*See, generally, PUBLIC AUTHORITIES.*

**14. Leave to issue execution.]**—*Held*: leave to issue execution under R. S. C., Ord. 42, r. 23, against the exor. of judgment creditor was not equivalent to a judgment against the creditor.—*STEWART v. RHODES*, [1900] 1 Ch. 386; 69 L. J. Ch. 174; 82 L. T. 337; 48 W. R. 354; 16 T. L. R. 203; 44 Sol. Jo. 259, C. A.

**Balance order under Companies Acts.]**—*See COMPANIES, Vol. X., pp. 919.*

**Judgment in rem.]**—*See Part II., Sect. 1, post.*

474; *affd.* 14 C. L. T. Occ. N. 9.—**CAN.**

**e. Order of master in liquidation of company.]**—*Semble*: an order made by the master in the liquidation

against a co. is a judgment.—*RISLER v. ALBERTA NEWSPAPERS, LTD.*, [1919] 1 W. W. R. 740.—**CAN.**

**d. Decree for alimony.]**—A decree for alimony is a judgment.—*FRANCIS v.*

WILKERSON, [1918] 2 W. W. R. 956.—**CAN.**

**e. Cross-judgments.]**—*ALLARDICE v. TANLEY* (1899), 18 N. Z. L. R. 85.—**N.Z.**

**Judgment in personam.**—See Part II., Sect. 1, *post*.  
**Interlocutory judgment.**—See Part II., Sect. 2, *post*.  
**Final judgment.**—See Part II., Sect. 2, *post*.  
**Decree.**—See Sect. 5, *post*.

## SECT. 2.—JUDGMENT OR ORDER.

**15. Within Judicature Act, 1925 (c. 49), s. 27 (1)—Decision in Probate Division on matters of fact.**—When a cause in the Probate Div. has been heard before a judge without a jury, the evidence being given *vidé voce*, the parties may . . . appeal from the decision of the judge, on the facts as well as the law, to the Ct. of Appeal.

Why does it not come within the sect. of Jud. Act which provides that the Ct. of Appeal shall have jurisdiction to determine appeals from any judgment or order of the High Ct. of Justice (JESSEL, M.R.).—SUGDEN v. ST. LEONARDS (LORD) (1876), 1 P. D. 154; 45 L. J. P. 49; 34 L. T. 369; 24 W. R. 479; 2 Char. Pr. Cas. 160, C. A.

**Annotations.**—*Re*fd. Krehl v. Burrell (1878), 10 Ch. D. 420. *Mentd.* Gould v. Lakes (1877), 43 L. T. 382; Gould v. Lakes (1880), 6 P. D. 1; Gardner v. Courthope (1886), 12 P. D. 14; Woodward v. Goulstone (1886), 11 App. Cas. 469; Harris v. Knight (1890), 15 P. D. 170; Clark v. Dixon (1891), 8 T. L. R. 11; Atkinson v. Morris, [1897] P. 40; Allan v. Morrison, [1900] A. C. 604; *Re* Sykes, Drake v. Sykes (1907), 23 T. L. R. 747; Gill v. Gill, [1909] P. 157; *Re*adv. Price, [1909] 2 K. B. 724; *In the Goods of* Phipps (1917), 86 L. J. P. 81; *Re* Jessop, [1924] P. 221 *In the Estate of* Templemore (1925), 69 Sol. Jo. 382.

*See, also, EXECUTORS*, Vol. XXIII., p. 282, Nos. 3493, 3494.

**16. — Decision upon case stated—Under Lands Clauses Consolidation Act, 1845 (c. 19).**—The Ct. of Appeal has jurisdiction to entertain an appeal from the decision of the High Ct. of Justice upon a special case stated by an umpire appointed under above Act, to assess the compensation for lands taken for the purposes of an undertaking, or injured by the execution of the works thereof.

I am clearly of opinion that the decision of the Q. B. Div. was an "order" within Jud. Act, 1873 (c. 66), s. 19 (BRAMWELL, L.J.).—*Re* BIDDER & NORTH STAFFORDSHIRE RY. CO. (1878), 4 Q. B. D. 412; 48 L. J. Q. B. 248; 40 L. T. 801; 27 W. R. 540, C. A.

**Annotations.**—*Mentd.* Jolley v. N. E. Ry., [1907] 1 K. B. 402; *Rugby Portland Cement Co. v. L. & N. W. Ry.*, [1908] 1 K. B. 925.

**17. — Under Quarter Sessions Act, 1849 (c. 45), s. 11.**—An appeal will lie to the Ct. of Appeal from the decision of the Q. B. Div. upon a case stated under above sect. in an appeal against a poor-rate; for the decision of the Q. B. Div. is an "order" within Jud. Act, 1873 (c. 66), s. 19.—PETERBOROUGH CORPN. v. WILSTHORPE OVERSEERS (1883), 12 Q. B. D. 1; 53 L. J. M. C. 33; 50 L. T. 189; 48 J. P. 373; 32 W. R. 548, C. A.

**Annotations.**—*Fold.* Dewsbury & Heckmondwike Waterworks Board v. Penistone Union Assmt. Com. (1886), 2 T. L. R. 375; *Lodge v. Huddersfield Corp.*, [1898] 1 Q. B. 859. *Re*fd. Holborn Grdns. v. Chertsey Grdns. (1885), 15 Q. B. D. 76. *Mentd.* West Bromwich School Board v. West Bromwich Overseers (1884), 13 Q. B. D. 929; Dewsbury & Heckmondwike Waterworks Board v. Penistone Union Assmt. Com. (1886), 17 Q. B. D. 384; *Mentd.* v. Kingston Union Assmt.

**18. — — — — —**—An appeal lies to the Ct. of Appeal from the decision of the Div. Ct. upon a case stated under above sect. on an appeal from an order of the justices to the quarter sessions, it not being a decision of the Div. Ct. on an appeal

from petty or quarter sessions within Jud. Act, 1873 (c. 66), s. 45, & it being an "order" within sect. 10 of that Act.—*HOLBORN GUARDIANS v. CHERTSEY GUARDIANS* (1885), 15 Q. B. D. 76; 54 L. J. M. C. 137; 53 L. T. 656; 33 W. R. 698; 1 T. L. R. 479; *sub nom.* CHERTSEY UNION v. HOLBORN UNION, 50 J. P. 36, C. A.

**Annotations.**—*Fold.* Dewsbury & Heckmondwike Waterworks Board v. Penistone Union Assmt. Com. (1886), 2 T. L. R. 375; *Lodge v. Huddersfield Corp.*, [1898] 1 Q. B. 859. *Re*fd. Tendring Union v. Woolwich Union, [1923] 1 K. B. 121. *Mentd.* Highworth & Swindon Union Grdns. v. Westbury-on-Severn Union Grdns. (1888), 20 Q. B. D. 597.

**19. — — — — —**—An appeal will lie without leave of the Div. Ct. from a judgment of that Ct. on a case stated by consent under above sect.—*DEWSBURY & HECKMONDWIKE WATERWORKS BOARD v. PENISTONE UNION ASSESSMENT COMMITTEE* (1880), 2 T. L. R. 375, C. A.; *subsequent proceedings*, 17 Q. B. D. 384, C. A.

**Annotation.**—*Fold.* *Lodge v. Huddersfield Corp.*, [1898] 1 Q. B. 859.

**20. — — — — — Although judgment entered at quarter sessions.**—The entry of judgment in an appeal at quarter sessions in accordance with the decision of a Div. Ct. on a case stated under above sect. does not prevent an appeal against the decision to the Ct. of Appeal under Jud. Act, 1873 (c. 66), s. 19.—*LODGE v. HUDDERSFIELD CORPN.*, [1898] 1 Q. B. 859; 67 L. J. Q. B. 571; 78 L. T. 582; 62 J. P. 515; 46 W. R. 482, C. A.

*See, generally, POOR LAW.*

**21. — — — — — Under Arbitration Act, 1889 (c. 49), s. 19.**—No appeal lies to the Ct. of Appeal in respect of an opinion of a div. ct. given on a case stated under above sect., such opinion being of a consultative character, & not in the nature of a judgment or order within Jud. Act, 1873 (c. 66), s. 19.—*Re* KNIGHT & TABERNACLE PERMANENT BUILDING SOCIETY, [1892] 2 Q. B. 613; 62 L. J. Q. B. 33; 67 L. T. 403; 57 J. P. 229; 41 W. R. 35; 8 T. L. R. 783; 4 R. 67, C. A.

**Annotations.**—*Distd.* *Re* KIRKLEATHAM L. B. & STOCKTON & MIDDLESBOROUGH WATER BOARD, [1893] 1 Q. B. 375. *Fold.* *Shrewsbury v. Shrewsbury* (1907), 23 T. L. R. 224. *Consd.* *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. of London*, [1912] A. C. 873. *Re*fd. *Barnard v. Tomson*, [1894] 1 Ch. 374; *Re* Holland S.S. Co., National S.S. Co. & Bristol Steam Navigation Co. (1906), 23 T. L. R. 59; *May v. Mills* (1914), 30 T. L. R. 287; *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198; *Coglad v. Newsum*, [1921] 2 A. C. 528; *A.-G. for Manitoba v. Kelly*, [1922] 1 A. C. 268. *Mentd.* *Sidney v. N. E. Ry.*, [1916] 2 K. B. 780; *Duff Development Co. v. Kelantan Government* (1925), 41 T. L. R. 375.

**22. S. P. SHREWSBURY v. SHREWSBURY** (1907), 23 T. L. R. 224, C. A.

**Annotation.**—*Mentd.* *Bayley v. Bayley*, [1922] 2 K. B. 227.

**23. — Rule absolute for prohibition.**—An appeal lies from the decision of the Div. Ct. on an application for a prohibition to a county ct.; for 19 & 20 Vict. c. 108, s. 42, relates to procedure only, & does not enact that the judgment of the Div. Ct. shall be final.

I am satisfied that the decision of the Div. Ct. as to this prohibition is not final. That decision is an order within Jud. Act, 1873 (c. 66), s. 19, & it is therefore the subject of an appeal (BAGGALLAY, L.J.).—*BARTON v. TITMARSH* (1880), 49 L. J. Q. B. 573; 42 L. T. 610; 28 W. R. 821, C. A.

**24. — Order settling form of conveyance.**—The order of a judge settling the form of a conveyance is subject to appeal.—*POLLOCK v. RABBITS* (1882), 21 Ch. D. 466; 47 L. T. 687; 31 W. R. 150, C. A.

**25. — Judgment on information brought under Parliamentary Oaths Act, 1866 (c. 19).**—A member of Parliament, who does not believe in the existence of a Supreme Being, & upon whom

**2. — Judgment or order. Sects. 3 & 4.]**

an oath has no binding effect as an oath but only as a solemn promise, is, owing to his want of religious belief, incapable by law of "making & subscribing" the oath of allegiance appointed by above Act, as amended by Promissory Oaths Act, 1868 (c. 72), & if he takes his seat & votes as a member, although he has gone through the form of making & subscribing the oath appointed by those statutes, he will be liable upon an information at the suit of the A.-G. to the penalty imposed by sect. 5 of above Act.

An information at the suit of the A.-G. to recover penalties under sect. 5 of above Act, from a member of Parliament for voting without having taken the oath of allegiance required by that statute, as amended by Promissory Oaths Act, 1868 (c. 72), is not a "criminal cause or matter" within Jud. Act, 1873 (c. 60), s. 47, & an appeal may be brought from any order or judgment therein of the High Ct. to the Ct. of Appeal.—*A.-G. v. BRADLAUGH* (1885), 14 Q. B. D. 667; 54 L. J. Q. B. 205; 52 L. T. 589; 49 J. P. 500; 33 W. R. 673, C. A.; *previous proceedings* (1884), 1 Cab. & El. 440.

*Annotations*.—*Reid. R. v. Hausmann* (1899), 73 J. P. 516; *Re Clifford & O'Sullivan*, [1921] 2 A. C. 570.

**26. — Certificate that validity of patent questioned in infringement action.**—By Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 31, in an action for infringement of a patent, the ct. or a judge may certify that the validity of the patent came in question:—*Held*: such a certificate is not a judgment or order against which an appeal lies to the Ct. of Appeal under Jud. Act, 1873 (c. 60), s. 19.—*HASLAM FOUNDRY & ENGINEERING Co. v. HALL* (1888), 20 Q. B. D. 491; 57 L. J. Q. B. 352; 59 L. T. 102; 36 W. R. 407; 4 T. L. R. 350; 5 R. P. C. 144, C. A.

*Annotation*.—*Reid. Acetylene Illuminating Co. v. United Alkali Co.*, [1902] 1 Ch. 494.

*See, now*, Patents & Designs Act, 1907 (c. 29), s. 35; & *generally*, PATENTS.

**27. — Decision as to sufficiency of notices under Law of Property Amendment Act, 1859 (c. 35), s. 29.**—Testator was a small farmer in the country. He had lived at the same place for forty years previously to his death, & had never been engaged in any other occupation than that of farming his own land, consisting of about fifty-two acres. After his death his exors. issued a notice inviting creditors & others to come in & make their claims against testator's estate. The notice was published once in each of three local newspapers, & once in the London Gazette, but it was not published in any other London newspaper. The notice fixed the period of a month from its date for the bringing in of claims, but it was not published till a day or two after its date. After the expiration of the notice the exors. distributed the estate among claimants of whose claims they had notice:—*Held*: as against claims of which they had not then any notice, the notice was sufficient to entitle the exors. to the protection given by above sect.

*Qu.*: whether an appeal lies against the decision of the judge on such a point.—*Re BRACKEN, DOUGHTY v. TOWNSON* (1889), 43 Ch. D. 1; 59 L. J. Ch. 18; 61 L. T. 531; 38 W. R. 48; 6 T. L. R. 11, C. A.

*See, now*, Trustee Act, 1925 (c. 19), s. 27.

**28. — Decision of point of law submitted under Local Government Act, 1888 (c. 41), s. 29.**—By above sect. if any question arises, or is about to arise, as to whether any business, power, duty, or liability is or is not to be transferred to any

county council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned, be submitted for decision to the High Ct. of Justice:—*Held*: the decision of the High Ct. upon a question submitted to it under above sect. is not a "judgment or order" within Jud. Act, 1873 (c. 60), s. 19, & no appeal lies from such decision.—*Ex p. KENT COUNTY COUNCIL & DOVER COUNCIL*, *Ex p. KENT COUNTY COUNCIL & SANDWICH COUNCIL*, [1891] 1 Q. B. 725; 65 L. T. 213; 55 J. P. 647; 39 W. R. 465; 7 T. L. R. 487; *sub nom. Re DOVER COUNCIL & KENT COUNTY COUNCIL*, *Ex p. DOVER COUNCIL*, *Re KENT COUNTY COUNCIL & SANDWICH COUNCIL*, *Ex p. KENT COUNTY COUNCIL*, 60 L. J. Q. B. 435, C. A.

*Annotations*.—*Reid. Re Knight & Tabernacle Permanent Bldg. Soc.*, [1892] 2 Q. B. 613. *Mentd. Re Herefordshire County Council & Leominster Town Council* (1894), 15 R. 77; *Thetford Corp. v. Norfolk County Council*, [1898] 2 Q. B. 468.

**29. — Order of Admiralty Division included.]**

—Jud. Act, 1873 (c. 60), s. 19, gives a right of appeal from any judgment or order of the High Ct., & therefore from an order of the Admir. Div. as from any other (BOWEN, L.J.).—*THE RECEPTEA*, [1893] P. 255; 62 L. J. P. 118; 41 W. R. 561; 37 Sol. Jo. 580; 1 R. 644; *sub nom. GORDON v. FRANCIS (J. R.) & Co.*, *THE S.S. RECEPTEA*, 69 L. T. 252 7 Asp. M. L. C. 359, C. A. *Annotations*.—*Mentd. Re London Scottish Permanent Bldg. Soc.* (1893), 63 L. J. Q. B. 112; *The Theresa* (1894), 11 R. 681; *Mowlem v. Dunne* (1912), 106 L. T. 611.

*See, generally*, ADMIRALTY, Vol. I., pp. 234, 235.

**30. — Order transferring action to commercial list.]**—An appeal will lie to the Ct. of Appeal against an order for entry of a cause in the commercial list if it be not a commercial cause.—*SEA INSURANCE Co. v. CARR*, [1901] 1 K. B. 7; 69 L. J. Q. B. 954; 83 L. T. 517; 49 W. R. 55; 17 T. L. R. 6; 45 Sol. Jo. 29; 9 Asp. M. L. C. 138; 6 Com. Cas. 11, C. A.

—*Order on application for habeas corpus.*—*See CROWN PRACTICE*, Vol. XVI., pp. 270, 271.

—*Order discharging order nisi for certiorari.*—*See CROWN PRACTICE*, Vol. XVI., pp. 476, 477, Nos. 3578, 3579.

**31. Within Appellate Jurisdiction Act, 1876 (c. 59)—Refusal to grant special leave to appeal—Time limited for appealing expired.]**—No appeal lies to this house from a refusal of the Ct. of Appeal to grant special leave to appeal from a judgment of the High Ct. in a case where the time limited by R. S. C., Ord. 58, r. 15, for appealing has expired. Such a refusal is not an order or judgment of the Ct. of Appeal within above Act, s. 3.—*LANE v. ESDALE*, [1891] A. C. 210; 64 L. T. 666; 40 W. R. 65; *sub nom. PAYNE v. ESDALE*, 60 L. J. Ch. 644, H. L.

*Annotations*.—*Consd. Re Housing of the Working Classes Act, 1890*, *Ex p. Stevenson*, [1892] 1 Q. B. 609. *Apd. R. v. Hertfordshire Appeal Tribunal* (1916), 86 L. J. K. B. 584.

**32. Within R. S. C., Ord. 41, r. 5—Citation in Probate Division.]**—I doubt whether the citation can be said to be a "judgment or order," but if so it was not indorsed as required by R. S. C., Ord. 41, r. 5 (BARNES, J.).—*EVANS v. EVANS* (1892), 67 L. T. 719.

**33. Judgment or order for payment into court—Distinguished from judgment or order for payment of money.]**—A judgment or order for payment of money into ct. is clearly distinguished from a judgment or order for the recovery by or payment of any money to a person, & different modes of enforcing payment are provided (CHITTY, J.).—



*Re GREER, NAPPER v. FANSHAWE*, [1895] 2 Ch. 217; 64 L. J. Ch. 620; 59 J. P. 441; 43 W. R. 547; 39 Sol. Jo. 503; 2 Mans. 350; 13 R. 598; *sub nom.* *Re GRIER, NAPPER v. FANSHAWE*, 72 L. T. 865. *Annotations*.—*Reid*. *Re Turnbull, Turnbull v. Nicholas*, [1900] 1 Ch. 180; *White, Son & Pill v. Stennings*, [1911] 2 K. B. 418.

### SECT. 3.—ORDER.

**34. General rule.**—*ONSLOW v. INLAND REVENUE COMRS.*, No. 8, *ante*.

**35. Whether included in judgment.**—The word "judgment" ought not to be construed as including "order" unless the legislature has said so (*FRY, L.J.*).—*Re COHEN, Ex p. SCHMITZ* (1884), 12 Q. B. D. 509; 53 L. J. Ch. 1168; 50 L. T. 747; 32 W. R. 812, C. A.

*Annotations*.—*Reid*. *Re Sanders, Ex p. Whinney* (1884), 13 Q. B. D. 476; *Re Riddell, Ex p. Strathmore* (1888), 20 Q. B. D. 318.

**36. Whether equivalent to judgment—Order for accounts in redemption action.**—*CLOVER v. WILTS & WESTERN BENEFIT BUILDING SOCIETY*, No. 45, *post*.

**37. Decision on case stated—Under Stamp Act, 1870 (c. 97), s. 19.**—*ONSLOW v. INLAND REVENUE COMRS.*, No. 8, *ante*.

**38. Order for issue of writ of habeas corpus—Whether order within Judicature Act, 1873 (c. 66), s. 19.**—On an application by the parent for a writ of *habeas corpus* in respect of a child, directed to the head of an institution for destitute children in which the child had been placed, it appeared that before the proceedings began he had without authority from the parent handed over the child to another person to be taken to Canada, & he alleged that he did not know the address of such person or where he or the child was. The Ct of Appeal affirmed an order absolute of the Q. B. Div. that the writ should issue:—*Held*: such an order is an order within above sect., & an appeal lies from it to the Ct. of Appeal.—*BARNARDO v. FORD, GOSSAGE'S CASE*, [1892] A. C. 326; 61 L. J. Q. B. 728; 67 L. T. 1; 56 J. P. 629; 41 W. R. 333; 8 T. L. R. 728; 36 Sol. Jo. 681; 1 R. 17, H. L.; *affg.* S. C. *sub nom.* *R. v. BARNARDO, GOSSAGE'S CASE* (1890), 24 Q. B. D. 283.

*Annotations*.—*Distd.* Secretary of State for Home Affairs v. O'Brien, [1923] A. C. 603. *Mentd.* Gordon v. Gordon, [1904] P. 163; R. v. Pinckney, [1904] 2 K. B. 84; R. v. Crewe (1910), 102 L. T. 760; R. v. Maidstone Prison Governor, *Ex p.* Maguire, [1925] 2 K. B. 265.

**39. Order dismissing action—By consent.**—

*SHAW v. HERTFORDSHIRE COUNTY COUNCIL*, No 12, *ante*.

**40.**—For want of prosecution.]—*GILBERT v. GOSFORD & ALVERSTOKE URBAN DISTRICT COUNCIL*, No. 13, *ante*.

**41. Order for foreclosure.**—*BURROWS v. HOLLEY*, No. 7, *ante*.

"Judgment or order."—*See Sect. 2, ante*.

Judgment & order distinguished.]—*See Sect. 4, post*.

Enforcement.]—*See Part XIII., Sect. 3, post*.

### SECT. 4.—JUDGMENT AND ORDER DISTINGUISHED.

**42. General rule.**—*ONSLOW v. INLAND REVENUE COMRS.*, No. 8, *ante*.

**43. For purpose of bankruptcy notice.**—Now, in legal language, & in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a "judgment" & an "order." No doubt the Orders under Jud. Act, 1873 (c. 66), provide that every order may be enforced in the same manner as a judgment, but still judgments & orders are kept entirely distinct. It is not said that the word "judgment" shall in other Acts of Parliament include an "order."

A final judgment is a judgment obtained in an action by which a previously existing liability of debt. to ptff. is ascertained or established (*COTTON, L.J.*).—*Re CHINERY, Ex p. CHINERY* (1884), 12 Q. B. D. 312; 53 L. J. Ch. 662; 50 L. T. 342; 32 W. R. 469, C. A.

*Annotations*.—*Apld.* *Re Sanders, Ex p. Whinney* (1884), 13 Q. B. D. 476. *Expld.* *Re Faithfull, Ex p. Moore* (1885), 14 Q. B. D. 627. *Consd.* *Re Riddell, Ex p. Strathmore* (1888), 20 Q. B. D. 512; *Re Howe Machine Co., Fontaine's Case* (1889), 41 Ch. D. 118. *Apld.* *Onslow v. I. R. Comrs.* (1890), 25 Q. B. D. 465. *Consd.* *Re Binstead, Ex p. Dale*, [1893] 1 Q. B. 199. *Apld.* *Re Owen, Ex p. Peters* (1900), 83 L. T. 572. *Reid.* *Re Cohen, Ex p. Schmitz* (1884), 12 Q. B. D. 509; *Re Arkell, Ex p. Arkell* (1889), 61 L. T. 90; *Re Bankruptcy Notice, Ex p. Official Receiver*, [1895] 1 Q. B. 609; *Pritchett & Young v. English & Colonial Syndicate* (No. 2) (1890), 43 Sol. Jo. 602; *Re G. J., Ex p. G. J.*, [1905] 2 K. B. 678; *Re Clark, Ex p. Pope & Owles*, [1914] 3 K. B. 1095. *Mentd.* *Re Ford, Ex p. Ford* (1886), 18 Q. B. D. 369; *Re Gardiner, Ex p. Coulson* (1887), 57 L. J. Q. B. 149; *Re Combined Weighing & Advertising Machine Co.* (1889), 43 Ch. D. 99; *Goissee v. Taylor*, [1905] 2 K. B. 658.

**44.**—In a suit by a husband against his wife for dissolution of the marriage on the ground of her adultery, a decree nisi for dissolution was made, the decree containing an order

### PART I. SECT. 3.

**1. Whether equivalent to judgment.**—An order of the ct. or of a judge is not for all purposes & to all intents a judgment.—*Re KERR v. SMITH* (1894), 24 O. R. 473.—*CAN.*

**2. Consent order.**—A consent order represents the agreement of the parties thereto & not the judgment of the ct. making the order.—*MEAGHER v. CANADIAN PACIFIC RY. CO.* (1912), 42 N. B. R. 46.—*CAN.*

**3.**—Where in an action a consent is received & an order is made staying all further proceedings on the terms contained therein, such an order is not a judgment or capable of being registered as such.—*JOYNT v. MAOCABE*, [1899] 1 I. R. 104.—*IR.*

**4.**—Order granting review of judgment.]—*AUBHOY CHURN MOHUNT v. SHAMANT LOOHUN MOHUNT* (1889), 1 L. R. 16 Calo. 788.—*IND.*

**5.**—Order refusing to enlarge time for appeal.]—*GOVINDA LAL DAS v. SHIBA DAS CHATTERJEE* (1908), 1 L. R. 33 Calo. 1323; 10 C. W. N. 288.—*IND.*

**6.**—In determining whether an order constitutes a judgment or not, the ct. must take into consideration the nature of the order & its effect upon the civil proceeding in which it was made.—*RULDU SINGH v. SANWAL SINGH* (1922), 1 L. R. 3 Lah. 188.—*IND.*

**7. Adjudication as to dividing fence.**—An adjudication as to the kind of fence to be erected between adjoining owners & the portion to be erected by each, is not an order.—*R. v. KERR, Ex p. PALMER* (1882), 8 V. L. R. 235.—*AUS.*

**8. Order for detention of ship.**—An order made for the detention of a ship is a judicial order.—*S.S. KALIBIA v. WILSON* (1910), 11 C. L. R. 689.—*AUS.*

**9. Order directing payment of money into court.**—An order for payment of money into ct., pending a reference to the master to take accounts, is an order.—*WHITEHEAD v. BUFFALO & LAKE HURON RY. CO.* (1889), 7 Gr. 678.—*CAN.*

**10. Order allowing service of ex juris writ.**—An order allowing service of an *ex juris* writ is a discretionary order.—*EMPIRE BREWING & MALTING CO. v. HALEY* (1891), 7 Man. L. R. 410.—*CAN.*

**11. Order directing payment of money to receiver.**—*COMMERCIAL BANK OF WINDSOR v. SCOTT* (1898), 30 N. S. R. (18 R. & G.) 401.—*CAN.*

**12. Ex parte order.**—*DENNY v. SAYWARD* (1895), 4 B. C. R. 212.—*CAN.*

**13.**—An order made on behalf of one party in the absence of the other party, duly served with notice of motion, is an *ex p.* order.—*STEWART v. BRAUN, Ex p. PATTERSON*, [1924] 5 D. L. R. 941; 2 W. W. R. 1103.—*CAN.*

**14. Order opening up judgment.**—An order opening up a judgment in favour of ptff. is operative from the moment it is pronounced, & is not such an order as does not become effective until it has been taken out & served.—*CROOME v. LEIR* (1913), 23 W. L. R. 713; 9 D. L. R. 809; 4 W. W. R. 80.—*CAN.*



*Sect. 4.—Judgment and order distinguished. Sect. 5. Part II. Sect. 1.]*

for the payment of petitioner's costs by co-resp. The decree was afterwards made absolute; the costs were taxed at £204, & an order was made that co-resp. should pay the amount within a specified time. He failed to comply with the order:—*Held*: there had not, within Bkpcy. Act, 1883 (c. 52), s. 4 (1) (g), been a "final judgment" for the amount, & petitioner could not issue a bkpcy. notice against co-resp. in respect of it.—*Re BINSTED, Ex p. DALE*, [1893] 1 Q. B. 199; 62 L. J. Q. B. 207; 68 L. T. 31; 41 W. R. 452; 9 T. L. R. 114; 37 Sol. Jo. 117; 9 Morr. 319; 4 R. 146, C. A.

*Annotations*:—*Apld. Re Owen, Ex p. Peters* (1900), 70 L. J. Q. B. 92. *Reid. Re Bankruptcy Notice, Ex p. Official Receiver*, [1895] 1 Q. B. 609; *Re Hallman, Ex p. Ellis & Collier*, [1909] 3 K. B. 430. *Mentd. Re Lynes, Ex p. Lester* (1893), 68 L. T. 739; *Ivimey v. Ivimey*, [1908] 2 K. B. 260; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Bulst*, [1910] P. 271.

45. Order for accounts in redemption action.]—Pltf. after issuing the writ in a redemption

action took out a summons for an account under R. S. O., Ord. 15, r. 1:—*Held*: the Order under the summons must be limited to preliminary accounts, & the usual terms of a final judgment for redemption ought not to be added without pltf.'s consent.

It is a mistake to imagine that an order under Ord. 15 was meant to be equivalent to a decree (*BACON, V.-C.*).—*CLOVER v. WILTS & WESTERN BENEFIT BUILDING SOCIETY* (1884), 53 L. J. Ch. 622; 50 L. T. 382; 32 W. R. 895.

46. For need of registration.]—*BURROWS v. HOLLEY*, No. 7, *ante*.

## SECT. 5.—DECREE.

47. Equivalent to judgment.]—*ONSLow v. INLAND REVENUE COMRS.*, No. 8, *ante*.

Decree nisi for dissolution of marriage—Whether "final judgment" within Bankruptcy Act, 1914 (c. 59), s. 1 (g).—*See BANKRUPTCY*, Vol. IV., p. 92, No. 830.

# Part II.—Classification.

## SECT. 1.—JUDGMENTS IN REM AND JUDGMENTS IN PERSONAM.

48. Judgment in rem.—Definition.]—To constitute a judgment in *rem*, the judgment must be a judgment of a competent ct. in respect of a *res* actually or constructively within the jurisdiction of the ct., & the judgment must determine the right to, or disposition of, such *res* in the control of the ct. (*WILLIAMS, L.J.*).—*FRACIS, TIMES & Co. v. CARR* (1900), 82 L. T. 698; 16 T. L. R. 405, C. A.; *on appeal, sub nom. CARR v. FRACIS, TIMES & Co.*, [1902] A. C. 176, H. L.

*Annotation*:—*Mentd. A.-G. for British Columbia v. A.-G. for Canada*, [1914] A. C. 153.

49. ———.]—It is by no means easy to find a satisfactory definition of a judgment in *rem*. In *Smith's Leading Cases* it is defined as "an adjudication pronounced, as its name indeed denotes, upon the status of some particular subject matter by a tribunal having competent authority for that purpose." There are, however, two classes of judgments in *rem*, one of which is conclusive against all the world, & the other of which is not conclusive, though admissible, in any other proceedings. Instances of the former class are adjudications by a competent ct. as to the existence of a marriage, or a condemnation of a prize in the Admiralty Ct. A familiar instance of the second is an inquisition in lunacy, which has always been allowed to be read in a subsequent suit between third parties as evidence of the lunacy, though it is not conclusive & may be traversed (*OOZENS-HARDY, M.R.*).—*HILL v. CLIFFORD, CLIFFORD v. TIMMS, CLIFFORD v. PHILLIPS*, [1907] 2 Ch. 236; 76 L. J. Ch. 627; 97 L. T. 266; 23 T. L. R. 601, C. A.; *on appeal*, [1908] A. C. 12, 15, H. L.

*Annotations*:—*Mentd. Bird v. Keep* (1918), 118 L. T. 633; *Law v. Chartered Institute of Patent Agents*, [1919] 2 Ch. 276.

### PART I. SECT. 5.

47 i. Equivalent to judgment.]—A decree directing a sale of certain property at the expiration of a year from the date of a master's report is, in effect, equivalent to a judgment. *Re LAW.—PORTE v. IRWIN* (1879), 8 P. R. 40.—*CAN.*

47 ii. ———.]—*COPE v. COPE* (1895), 26 O. R. 441.—*CAN.*

a. Whether orders included.]—The word "decree" does not include "orders," either original or appellate, upon matters arising in the course of a suit or in execution of a decree. *RUNJIT SINGH v. MEHRABAN KOER* (1878), 1 L. R. 3 Calc. 662; 2 C. L. R. 391.—*IND.*

d. Suit finally disposed of.]—Where the proceeding of the ct. finally disposes

50. ——— Order for removal of pauper.]—D. & E. were removed, by an order describing them as man & wife, with their six children, named in the order of removal, to W. The order was appealed against. Pending the appeal, the parish officers of W. instituted a suit in the Spiritual Ct., to dissolve the marriage as incestuous. After this, the order was confirmed; & subsequently, the Spiritual Ct. decreed the marriage incestuous, & void from the beginning to all intents & purposes. Pauper was born of the supposed marriage, before the order, but he was not named in it, & he was unemancipated, & had gained no settlement, when the order was made:—*Held*: the confirmation of the order, in these circumstances, was not conclusive proof of a derivative settlement of the pauper in W., on appeal against an order removing the pauper to W. after the decree of the Spiritual Ct., but on such appeal W. might show by the decree, that, since the first order, the marriage had become void *ab initio*, & the pauper illegitimate.

The judgment of the ct. of quarter sessions upon the former appeal decided directly the settlement of the persons included in the order; & this being a judgment in *rem*, was conclusive, not only between the parties, but against all the world (*per CUR.*).—*R. v. WYE (INHABITANTS)* (1838), 7 Ad. & El. 761; 3 Nev. & P. K. B. 6; 1 Will. Woll. & H. 128; 7 L. J. M. C. 18; 2 Jur. 298; 112 E. R. 856.

*Annotations*:—*Consd. R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780. *Reid. De Mora v. Concha* (1885), 29 Ch. D. 268; *Russell v. Russell*, [1924] A. C. 687. *Mentd. R. v. Sow* (1843), 4 Q. B. 93; *Heston Churchwardens & Overseers v. St. Bride Churchwardens & Overseers* (1853), 22 L. J. M. C. 65; *Barton Regis Union Grdns. v. Liverpool Churchwardens, etc.* (1878), 47 L. J. M. C. 62.

*See, generally, FORK LAW.*

51. ——— Order for sale of cargo.]—Pltfs. were the underwriters on a cargo of deals, valued

of the suit, so long as it remains upon the record, it is a decree.—*WILLIAMS v. BROWN* (1886), 1 L. R. 8 All. 108.—*IND.*

### PART II. SECT. 1.

a. Judgment in rem.—Judgment in adverse action under Mineral Act, s. 37.]

—A judgment in an adverse action under above sect. is not a judgment

in the policy at \$1,100, shipped on board the Prussian vessel "Augusta Bertha," from Omega to Messrs. S. at Hull. On Sept. 17 the vessel struck on the rocks on the coast of Norway. On Oct. 4 Messrs. S. gave notice of abandonment of the cargo as totally lost. Pltfs. accepted the abandonment & paid as for a total loss. On Sept. 23 the master had written to inform the owners of the cargo of the loss of the vessel. Before receiving an answer, the master & his agent took steps to cause an act of survey of the vessel & cargo to be held. On Sept. 27 the surveyors recommended, as best for all parties, that the vessel & cargo should be sold. At that time the cargo had been safely landed. The master & his agent then applied to an officer, called the sheriff & director of auctions, to appoint a day for the sale, which took place on Oct. 15. At the sale J., agent of the underwriters, publicly protested against the sale, but the officer presiding, deeming the proof of his authority insufficient, decided that the sale should proceed. The act of survey & public auction are judicial proceedings from which, by the law of Norway, appeals lie. J., as agent for the underwriters, then instituted in the superior ct. in Norway a suit against the master, his agent & the purchaser of the cargo, praying that the public auction should be disavowed, & that the purchaser should be compelled to deliver up the goods in specie. In Nov. 1853, judgment was given that the auction should be confirmed. The deals were forwarded by the purchaser to defts. in London who had made advances upon them, & who refused to deliver them up to pltfs. on a demand by them in Apr. 1853. The deals realised £1,470. There was evidence that, by the law of Norway, a sale by the master would transfer the property in the cargo:—*Held*: (1) assuming the judgment to be *in rem*, it was not necessary to plead it; & it was conclusive evidence on the plea that the goods were not the goods of pltfs.; (2) assuming the judgment not to be *in rem*, because pltfs. had sought their remedy in a foreign ct. of competent jurisdiction, they were conclusively bound by the judgment of such ct.—*CAMMELL v. SEWELL* (1858), 3 H. & N. 617; 27 L. J. Ex. 447; 32 L. T. O. S. 196; 4 Jur. N. S. 978; 157 E. R. 617; *on appeal* (1860), 5 H. & N. 728, Ex. Ch.

*Annotations*:—As to (1) *Refd.* Simpson v. Fogo (1863), 1 Hem. & M. 195; Castrique v. Imrie (1870), L. R. 4 H. L. 414. As to (2) *Consd.* Castrique v. Imrie (1870), L. R. 4 H. L. 414. *Refd.* Simpson v. Fogo (1860), 1 John. & H. 18; Meyer v. Ralli (1876), 45 L. J. Q. B. 741; Vadala v. Lawes (1890), 25 Q. B. D. 310; Alcock v. Smith, [1892] 1 Ch. 238; Dulaney v. Merry, [1901] 1 Ch. 238; *Mentd.* The Justyn (1862), 6 L. T. 553; Lloyd v. Guilbert (1865), L. R. 1 Q. B. 115; The Empire of Peace (1869), 39 L. J. Adm. 12; Eglinton v. Norman (1877), 46 L. J. Q. B. 557.

52. — *Order for sale of ship.*—We think that some points are clear. When a tribunal, no matter whether in England or a foreign country, has to determine between two parties & between them only, the decision of that tribunal, though in general binding between the parties & privies, does not affect the rights of third parties, & if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, & some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, & did not do

more than sell the litigant's interest, if any, in the thing. All proceedings in the Cts. of Common Law in England are of this nature, & it is every day's experience that where the sheriff, under a *fi. fa.* against A., has sold a particular chattel, B. may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff; & if this may be done in the cts. of the country in which the judgment was pronounced, it follows of course that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, & does in the exercise of that jurisdiction direct that the thing, & not merely the interest of any particular party in it, be sold or transferred, the case is very different (BLACKBURN, J.).—*CASTRIQUE v. IMRIE* (1870), L. R. 4 H. L. 414; 39 L. J. C. P. 350; 23 L. T. 48; 19 W. R. 1; 3 Mar. L. C. 454, H. L.; *affg.* S. C. *sub nom.* IMRIE v. CASTRIQUE (1860), 8 O. B. N. S. 405, Ex. Ch.

*Annotations*:—*Consd.* Minna Craig S.S. Co. v. Chartered Mercantile Bank of India, London & China, [1897] 1 Q. B. 55. *Refd.* Simpson v. Fogo (1860), 1 John. & H. 18; De Cosse Brissac v. Rathbone (1861), 6 H. & N. 301; Simpson v. Fogo (1863), 1 Hem. & M. 195; Godard v. Gray (1870), L. R. 6 Q. B. 139; Meyer v. Ralli (1876), 1 O. P. D. 358; The City of Mecca (1879), 5 P. D. 28; De Mora v. Concha (1885), 29 Ch. D. 298; Re Trufort, Trafford v. Blanc (1887), 36 Ch. D. 600; Alcock v. Smith, [1892] 1 Ch. 238; The Dictator, [1892] P. 304; Ballantyne v. Mackinnon, [1896] 2 Q. B. 455; Pemberton v. Hughes, [1899] 1 Ch. 781; Francis, Times v. Carr (1900), 82 L. T. 698. *Mentd.* The Justyn (1862), 6 L. T. 553; Ellis v. M'Henry (1871), L. R. 6 C. P. 228; Messina v. Petrocchino (1872), L. R. 4 P. C. 144; Taylor v. Ford (1873), 22 W. R. 47; Re Queensland Mercantile & Agency Co., Ex p. Australasian Investment Co., Ex p. Union Bank of Australia (1891), 61 L. J. Ch. 145; The Nautik, [1895] P. 121; Yates v. Kyffin, Taylor & Wark, [1899] W. N. 141; Calne v. Palao Steam Shipping Co., [1907] 1 K. B. 670; In the Estate of Crippen, [1911] P. 108.

53. — [—] Whilst a ship, owned by pltfs., an English co., was loading at Bombay for a voyage to Hamburg, her master was induced by fraud to sign bills of lading for goods which were never put on board. The bills of lading were indorsed for value without notice of the fraud to the defts., an English banking co. By the law of Germany non-delivery of the goods specified in a bill of lading entitles the holder of the bill to a lien upon the vessel. The ship sailed, & whilst she was at sea a petition was presented for the winding-up of pltf. co., & on the day on which the ship arrived at Hamburg a winding-up order was made. On the same day defts., who had in the meantime discovered the fraud, took proceedings in the German ct. at Hamburg to arrest the ship & to enforce their lien. The German ct. ordered the ship to be sold, declared defts. to be entitled to the lien claimed, & ordered that lien to be satisfied out of the proceeds of the sale. The liquidator of pltf. co. who had not appeared in the proceedings in the German ct., brought an action in England in the name of the co. against defts. to recover from them the amount which they had received under the German judgment as money had & received to pltfs.' use, seeking to make them liable as trustees of the money for the benefit of the general body of the co.'s creditors.—*Held*: the judgment of the German ct. being a judgment *in rem*, the money received by defts. under it was not subject to any trust in favour of the general body of the co.'s creditors, & the action was not maintainable.—*MINNA CRAIG S.S. CO. v. CHARTERED MERCANTILE BANK OF INDIA, LONDON &*

*in rem.*—*FRY v. BOTSFORD & MACQUILLAN, MACQUILLAN v. FRY* (1902), 9 B. C. R. 234.—*CAN.*

1. *Judgment in personam*—Effect of.]

—Judgments *in personam* in general bind only parties & their privies; but the relation established between them by a judgment is, in the absence of

fraud or collusion, conclusive against third parties.—*SHRINIVASA AITYANGAR v. ARAYAR SHRINIVASA AITYANGAR* (1910), L. L. R. 33 Mad. 483.—*IND.*

**Sect. 1.—Judgments in rem and judgments in personam. Sect. 2: Sub-sect. 1.]**

CHINA, [1897] 1 Q. B. 460; 66 L. J. Q. B. 339  
76 L. T. 310; 45 W. R. 338; 13 T. L. R. 241; 41  
Sol. Jo. 310, C. A.

See, generally, ADMIRALTY, Vol. I., pp. 158  
et seq.

54. — Adjudication as to evidence of  
marriage.]—HILL v. CLIFFORD, CLIFFORD v.  
TIMMS, CLIFFORD v. PHILLIPS, No. 49, ante.

See, generally, HUSBAND & WIFE.

55. — Condemnation of prize.]—HILL v.  
CLIFFORD, CLIFFORD v. TIMMS, CLIFFORD v.  
PHILLIPS, No. 49, ante.

See, generally, PRIZE LAW.

56. — Finding on inquisition in lunacy.]—  
HILL v. CLIFFORD, CLIFFORD v. TIMMS, CLIFFORD  
v. PHILLIPS, No. 49, ante.

See, generally, LUNATICS.

Foreign judgment.]—See CONFLICT OF  
LAWS, Vol. XI., p. 463, Nos. 1189–1191.

57. — Effect of—Distinguished from judg-  
ment in personam.]—The difference is pointed out  
clearly in *Smith's Leading Cases*, & some of the  
authorities there mentioned, between the pro-  
ceeding in rem, & the proceeding in personam in this  
respect; that the proceeding in rem binds every-  
body, binds third persons, not parties to the  
litigation (WOOD, V.-C.).—SIMPSON v. FOGO (1860),  
1 John & H. 18; 29 L. J. Ch. 657; 6 Jur. N. S.  
949; 8 W. R. 407; 70 E. R. 644; sub nom.  
LIVERPOOL BANK v. FOGGO, 2 L. T. 594; subsequent  
proceedings (1863), 1 Hem. & M. 195.

Annotations:—*Refd.* London & Mediterranean Bank v.  
Strutton (1869), 21 L. T. 415; *Castrique v. Imrie* (1870),  
L. R. 4 H. L. 414. *Mentd.* Liverpool Marine Credit Co.  
v. Hunter (1868), 3 Ch. App. 479; *Schibsbay v. Westenh-*  
*holz* (1870), L. R. 6 Q. B. 155; *Collins v. Hector* (1875),  
L. R. 19 Eq. 334; *Re Kloebe, Kannreuther v. Gelselbrocht*  
(1884), 51 L. J. Ch. 297; *Re Trufort, Trafford, v. Blanc*  
(1887), 36 Ch. D. 600.

58. — — — — —.]—CASTRIQUE v. IMRIE,  
No. 52, ante.

By way of estoppel.]—See ESTOPPEL,  
Vol. XXI., pp. 153 et seq.

Foreign judgment.]—See CON-  
FLICT OF LAWS, Vol. XI., pp. 463 et seq.

Judgment determining status of person.]—  
See Nos. 49, 50, ante; ESTOPPEL, Vol. XXI.,  
p. 153.

Judgment determining status of thing.]—  
See ESTOPPEL, Vol. XXI., pp. 153–156.

Judgment in personam—Foreign judgment.]—  
See CONFLICT OF LAWS, Vol. XI., p. 463, No. 1190.

59. — Effect of—Distinguished from judg-  
ment in rem.]—SIMPSON v. FOGO, No. 57, ante.

60. — — — — —.]—CASTRIQUE v. IMRIE,  
No. 52, ante.

By way of estoppel.]—See ESTOPPEL,  
Vol. XXI., pp. 143 et seq.

Foreign judgments.]—See  
CONFLICT OF LAWS, Vol. XI., pp. 459 et seq.

Actions in personam—In Admiralty.]—See  
ADMIRALTY, Vol. I., pp. 172 et seq.

**PART II. SECT. 2, SUB-SECT. 1.**

61. Final order—Test for—Final  
determination of rights of parties.]—A  
final order is one made on such an  
application or proceeding that for  
whichever side the decision is given,  
it will, if it stands, finally determine  
the matter in litigation.—*BANK*  
*OF VANCOUVER v. NORDLUND*, [1920] 28  
B. C. R. 342.—CAN.

62. — — — — —.]—An order  
is not a final order unless it finally  
disposes of the rights of the parties.—  
*RAMCHAND MANJIMAL v. GOVERDHANAS*  
*RATANCHAND* (1920), L. R.

47 Ind. App. 124.—IND.

a. — — — — —.]—Order on interpleader sum-  
mons.]—*R. v. DOTY* (1856), 13 U. C. R.  
398.—CAN.

b. — — — — —.]—*OLIPHANT v. LESLIE*  
(1865), 24 U. C. R. 398.—CAN.

c. — — — — —.]—*HUNTER v. VAN-*  
*STONE* (1882), 7 A. R. 750.—CAN.

1. — — — — —.]—Order on review—By judge  
of county court.]—An order of a judge  
of a county ct. in a case of review is  
final.—*Ex p. SIMPSON* (1882), 22  
N. B. R. 132.—CAN.

judge of Supreme

**SECT. 2.—WHETHER FINAL OR INTERLOCUTORY.**

**SUB-SECT. 1.—IN GENERAL.**

61. Decision of court as to—Conclusive.]—  
Where a ct. has treated one of its own proceedings  
as merely interlocutory & not final, that circum-  
stance is decisive of the nature of such proceeding.  
—*FERRIER v. HOWDEN* (1834), 4 Cl. & Fin. 25;  
7 E. R. 10, H. L.

— Jurisdiction of Court of Appeal.]—See  
Jud. Act, 1925 (c. 49), s. 68 (2).

62. Whether form conclusive.]—*GAMES v.*  
*BONNOR* (1884), 54 L. J. Ch. 517; 33 W. R. 64,  
C. A.

Annotations:—*Mentd.* *Re Nisbet & Potts' Contract*, [1905]  
1 Ch. 391; *Re Atkinson & Horsell's Contract*, [1912]  
2 Ch. 1.

63. Final for one purpose—Whether final for  
all purposes.]—*Re COMPTON, NORTON v. COMPTON*,  
No. 153, post.

64. — — — — —.]—In a High Ct. action, the  
judge, found for plff. with costs, directing that the  
amount recoverable should be ascertained by a  
referee. The referee awarded £83 10s., & upon  
application to affirm the award, the judge directed  
judgment to be entered for that amount, &, as the  
case had involved some complexity, he gave plff.  
costs upon the High Ct. scale. Deft. appealed,  
contending that the judgment as to the costs at  
the trial was final, & that, as the amount recovered  
was less than £100, plff. by County Courts Act,  
1919 (c. 73), s. 11, was only entitled to costs upon  
the county ct. scale.—*Held*: the judgment at  
the trial was partly final, &, as involving the  
reference to a referee, partly interlocutory; &  
therefore, until the making of the order upon the  
award ascertaining the damages, County Courts  
Act, 1919 (c. 73), s. 11, did not apply, & the ct.  
had jurisdiction to make an order as to the scale  
of costs, according to the discretion given by  
proviso (i) to the sect.—*LIGHT v. WILLIAM WEST*  
*& SONS, LTD.*, [1920] 2 K. B. 238; 95 L. J. K. B.  
557; 134 L. T. 693; 42 T. L. R. 311; 70 Sol. Jo.  
404, C. A.

65. Final order—Test for—Final determina-  
tion of rights of parties.]—Without at present  
settling what is an interlocutory order, the ct. has  
determined that all summonses which finally  
settle the rights of parties, such as summonses  
under winding-up orders or in administration suits,  
will be heard by the full Ct. of Appeal (*JAMES, L.J.*).  
—MEMORANDUM (1875), 1 Ch. D. 41, C. A.

Annotation:—*Expld.* *Pheysey v. Pheysey* (1879), 12 Ch. D.  
305.

66. — — — — —.]—A limited co. gave, in  
1875, a mtge. to its bankers for its account current,  
by covenant to surrender its copyhold works, &  
by the mtge. deed the co. became tenant to the  
bankers at the rent of £5,000. No surrender of  
the copyholds was made. On July 16, 1877, the  
bankers sent an auctioneer to distrain for £10,000,  
being two years' rent. The auctioneer on the  
same day, saw the managing director of the co.,  
gave him formal notice of distraint, & by arrange-

*Court.*—*SMITH v. KINNIE* (1890), 30  
N. B. R. 226.—CAN.

a. — — — — —.]—*HALLETT v.*  
*ALLEN* (1907), 38 N. B. R. 349; 4  
E. L. R. 184.—CAN.

b. — — — — —.]—*Winding-up order.*—A  
winding-up order is a final order.—*Re*  
*FLORIDA MINING CO., LTD.* (1901), 8  
B. C. R. 388.—CAN.

c. — — — — —.]—*Peremptory order.*—A per-  
emptory order should be seldom made,  
& when made should in most cases  
be treated as largely in terrorem.  
When the time comes to have it acted  
upon, the fact that it has been made

ment with him employed two workmen of the co. to keep possession of the chattels distrained. On July 18 the co. requested the bankers not to proceed to an immediate sale, to which the bankers assented, & the two men remained in possession. On July 19 a petition was presented for winding up the co.; & on July 28 a winding-up order was made. By arrangement with the liquidator, the men went out of possession in Oct., & in Nov. the bulk of the chattels was sold by the liquidator without prejudice to the rights of the bankers, & realised less than £5,000. The Vice-Chancellor held that under Jud. Act, 1873, s. 10, the rights of the parties were the same as in bkpcy.; that the attornment clause was intended to give the mtgees. a remedy in the event of bkpcy., & was a fraud on the bkpt. laws; that, moreover, a seizure by a secured creditor by a distress not perfected by sale before the bkpcy. was void as against the general body of creditors; & that the proceeds of sale belonged to the liquidator:—*Held*: the order of the Vice-Chancellor was not an interlocutory order; & the proper notice of appeal was a fourteen days' notice; but a four-days notice having been given, the ct. allowed it to be amended.

The rules appear to contemplate two classes of orders: final orders which determine the rights of the parties & orders which do not determine the rights. We are of opinion that the order now under appeal belongs to the former class & that a fourteen days' notice was necessary (JESSEL, M.R.).—*Re STOCKTON IRON FURNACE CO.* (1879), as reported in 10 Ch. D. 335, C. A.

*Annotations*:—*Reid*, Shubrook v. Tufnell (1882), 30 W. R. 740; *Re Lewis, Lewis v. Williams* (1886), 31 Ch. D. 623; *Re Gardner, Long v. Gardner* (1894), 71 L. T. 412. *Mentd.* *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181; *Re Crumlin Viaduct Works Co.* (1879), 48 L. J. Ch. 537; *Re Bowes, Ex p. Jackson* (1880), 14 Ch. D. 129; *Re Kitchin, Ex p. Punnett* (1880), 16 Ch. D. 226; *Re Betts, Ex p. Harrison* (1881), 18 Ch. D. 127; *Re Knight, Ex p. Volsky* (1882), 21 Ch. D. 442; *Re Willis, Ex p. Kennedy* (1888), 21 Q. B. D. 384; *Green v. Marsh*, [1892] 2 Q. B. 330; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.* (1896), 75 L. T. 508.

67. ————]—*SALAMAN v. WARNER*, No. 136, *post*.

68. ————]—In the case of an interlocutory order it is generally possible to restore parties to their original position by payment of costs or otherwise; final orders are intended to, & do as a rule, determine the rights of the parties. An order to refer an action in an interlocutory order is not a final order (ALVERSTONE, C.J.).—*NEALE v. GORDON LENNOX (LADY)*, [1902] 1 K. B. 838; 71 L. J. K. B. 536; 86 L. T. 574; 50 W. R. 487; 18 T. L. R. 390; 46 Sol Jo. 319; *on appeal*, [1902] 1 K. B. 845, C. A., [1902] A. C. 465, H. L.

Ch. 812; *Newen, Carruthers v. Newen*, 638; *Welsh v. Roe* (1918), 87 L. J. K. B. 520; *Shepherd v. Robinson*, [1919] 1 K. B. 474.

69. ————]—*BOZSON v. ALTRINCHAM URBAN DISTRICT COUNCIL*, No. 137, *post*.

70. ————]—*May be made on interlocutory application*.—The time for appealing from an order which is final though made on an interlo-

cutory application is one year.—*A-G. v. GREAT EASTERN RY. CO.* (1879), as reported in 48 L. J. Ch. 428; 27 W. R. 759, C. A.; *on appeal* (1880), 5 App. Cas. 473, H. L.

*Annotations*:—*Mentd.* *A-G. v. Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch. D. 752; *Guinness v. Land Corp. of Ireland* (1882), 23 Ch. D. 349; *L. & N. W. Ry. v. Price* (1883), 11 Q. B. D. 485; *Small v. Smith* (1884), 10 App. Cas. 119; *Woulcock v. River Dee Co.* (1885), 10 App. Cas. 354; *Harris v. De Pinna* (1886), 33 Ch. D. 238; *Henderson v. Bank of Australasia* (1888), 40 Ch. D. 170; *Johns v. Balfour* (1889), 1 Meg. 191; *Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aislewood* (1889), 44 Ch. D. 412; *Foster v. L. C. & D. Ry.*, [1895] 1 Q. B. 711; *A-G. v. L. & N. W. Ry.*, [1900] 1 Q. B. 78; *L. C. C. v. A-G.*, [1902] A. C. 165; *A-G. v. Mersey Ry.* (1907), 51 Sol. Jo. 624; *Re Kingsbury Collieries & Moore's Contract*, [1907] 2 Ch. 259; *Peel v. L. & N. W. Ry.*, [1907] 1 Ch. 5; *Metropolitan Water Board v. Solomon* (1908), 77 L. J. Ch. 517; *A-G. v. West Gloucestershire Water Co.*, [1909] 2 Ch. 338; *Amalgamated Soc. of Railway Servants v. Osborne*, [1910] A. C. 87; *Vacher v. London Soc. of Compositors*, [1912] 3 K. B. 547; *Re Woking Urban Council (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300; *Dundee Harbour Trustees v. Nicol*, [1915] A. C. 550; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *It. v. Bedfordshire County Council, Ex p. Soar*, [1920] 2 K. B. 465; *A-G. v. Fulham Corp.*, [1921] 1 Ch. 440; *A-G. v. Westminster City Council*, [1924] 2 Ch. 416; *Douchar v. Gas Light & Coke Co.*, [1925] A. C. 691.

Time for appeal, *see, now*, R. S. C., Ord. 58, r. 3; PRACTICE.

71. ————]—*Order of Divisional Court—On case stated by arbitrator*.—An arbitrator, under an order of reference, stated a case for the opinion of the ct., which provided that, if the opinion of the ct. should be one way the case was to be referred back to the arbitrator; if the other way judgment was to be entered for deft. with costs. A div. ct. decided in favour of plffs., & referred the case back to the arbitrator. Deft. appealed:—*Held*: (1) an appeal could be brought from the order; (2) it was a final order, & the appeal must be entered in the general & not in the interlocutory list.—*SHUBROOK v. TUFNELL* (1882), 9 Q. B. D. 621; 46 L. T. 749; 30 W. R. 740, C. A. *Annotations*:—*As to* (2) *Fold*, *Bozson v. Altrincham U. C.* (1903), 72 L. J. K. B. 271. *Distd.* *Isaacs v. Saltsstein*, [1916] 2 K. B. 139. *Consd.* *Re Cogstad & Newsum*, [1921] 2 A. C. 528.

72. Final judgment—Determination of previously existing right or liability.—*Re CHINERY, Ex p. CHINERY*, No. 43, *ante*.

73. ————]—A final judgment means a judgment obtained in an action by which the question whether there was a pre-existing right of plff. against deft. is finally determined, in favour either of plff. or of deft. (LORD ESHER, M.R.).—*Re RIDDELL, Ex p. STRATHMORE (EARL)* (1888), 20 Q. B. D. 512; 57 L. J. Q. B. 259; 58 L. T. 838; 36 W. R. 532; 4 T. L. R. 329; 5 Morr. 59, C. A. *Annotations*:—*Consd.* *Salaman v. Warner*, [1891] 1 Q. B. 734. *Reid*, *Re Hinstead, Ex p. Dale*, [1893] 1 Q. B. 109; *Taylor v. Itce*, [1894] 1 Ch. 413.

74. ————]—*Final adjudication after litis contestatio*.—To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio*, & a final adjudication between the parties (SELBORNE, L.C.).—*Re FAITHFULL, Ex p. MOORE* (1885), 14 Q. B. D. 627; 54

should be considered as a very serious element in deciding as to whether it should be modified when the actually existing facts are explained. But it cannot be considered as irrevocable. The ct. cannot & ought not to consider itself as finally divested of any power in the matter.—*CURRIE v. CANADIAN NATIONAL RY.*, [1924] 2 D. L. R. 1101; 2 W. W. R. 196.—*CAN.*

g. ————]—*Order of remand determining part of case*.—An order of remand which determines only a part of the case & leaves other matters still to

be determined is not a final order.—*RAJ NATH DAS v. SOHAN BIBI* (1909), 1 L. R. 31 All. 545.—*IND.*

f. ————]—*NURI MIAH v. GANER SUGAR WORKS, LTD. (CAWNPORE)* (1915), 1 L. R. 38 All. 150.—*IND.*

t. ————]—*Order for writ of prohibition*.—An order for a writ of prohibition is final.—*BARKER v. MARKS* (1888), 6 N. Z. L. R. 529.—*N.Z.*

a. ————]—*Order as to maintenance of child*.—*KLEIN v. TUTTY* (1915), 34 N. Z. L. R. 1084.—*N.Z.*

74i. Final judgment—Final adjudication after litis contestatio.—A judgment is final when it does, if allowed to stand, finally dispose of the rights of the parties, regardless of what might have happened if it had been made the other way.—*ALEXANDER HAMILTON INSTITUTE v. CHAMBERS*, [1921] 3 W. W. R. 520.—*CAN.*

74 ii. ————]—*UMABAI v. VITHAL* (1908), 1 L. R. 33 Bom. 293.—*IND.*

b. ————]—*On interpleader issue*.—An interpleader issue was tried by the

**Sect. 2.—Whether final or interlocutory: Sub-sects. 1, 2, A. (a), (b), (c), (d), (e) & (f).]**

L. J. Q. B. 190; 52 L. T. 376; 33 W. R. 438; 1 T. L. R. 263; 2 Morr. 52, C. A.

*Annotations:—*Consid. *Re Riddell, Ex p. Strathmore* (1888), 20 Q. B. D. 612. *Mentd. Re Henderson, Ex p. Henderson* (1888), 20 Q. B. D. 509; *Re Alexander, Ex p. Alexander*, [1892] 1 Q. B. 216; *Re Binstead, Ex p. Dale*, [1893] 1 Q. B. 199; *Taylor v. Roe*, [1894] 1 Ch. 413; *Re G. J.*, *Ex p. G. J.*, [1905] 2 K. B. 678; *Re Debtor* (No. 837 of 1912), [1912] 3 K. B. 242.

**75. — May be subject to appeal.]—“Final”** as applied to the judgment on the trial of an action does not mean a judgment not open to appeal, but merely “final” as opposed to an “interlocutory” judgment. A judgment on the trial of an action operates as an estoppel between the parties when bringing a subsequent action raising a contention which is in substance *res judicata* & not the less so because that judgment is liable to be reversed on appeal (COZENS-HARDY, L.J.). —*HUNTLY (MARCHIONESS) v. GASKELL*, [1905] 2 Ch. 656; 75 L. J. Ch. 66; 93 L. T. 785; 22 T. L. R. 20, C. A.

**76. Interlocutory order—Under Judicature Act, 1925 (c. 49), s. 45 (1)—Any order other than final judgment.]—**The words “interlocutory order” in Jud. Act, 1873 (c. 66), s. 25 (8), are not confined in their meaning to an order made between writ & final judgment, but mean an order other than final judgment in an action, whether such order be made before judgment or after.—*SMITH v. COWELL* (1880), 6 Q. B. D. 75; 50 L. J. Q. B. 38; 43 L. T. 528; 29 W. R. 227, C. A.

*Annotations:—*Mentd. *Manchester & Liverpool District Banking Co. v. Parkinson* (1888), 22 Q. B. D. 173; *Holmes v. Millage*, [1893] 1 Q. B. 551; *Morgan v. Hart*, [1914] 2 K. B. 183.

**77. — Test for—Further proceedings necessary.]—**STANDARD DISCOUNT CO. v. LA GRANGE, No. 99, post.

**78. — — — — —.]—(1)** Where any further step is necessary to perfect an order or judgment, it is not final but interlocutory (BAGGAILAY, L.J.).

(2) *Semble*: As regards R. S. C., Ord. 58, r. 15, no distinction exists between interlocutory orders & interlocutory judgments.—*COLLINS v. PAD-DINGTON VESTRY* (1880), as reported in 5 Q. B. D. 368, C. A.

*Annotations:—*As to (1) *Reid, Shubbrook v. Tufnell* (1882), 9 Q. B. D. 621; *Isaacs v. Salbstein*, [1916] 2 K. B. 139.

judge of the Div. Ct., who decided that the goods did not belong to plaintiffs.—*Held*: the decision of the judge was final.—*KEANE v. STEDMAN* (1861), 10 C. P. 435.—CAN.

**c. — Judgment for scisin of dower.]—**Judgment for scisin of dower is final & conclusive.—*CAMERON v. GILCHRIST* (1877), 7 P. R. 184.—CAN.

**d. — Action on building contract—Reference to experts.]—**SHAW v. ST. LOUIS (1883), 8 S. C. R. 385.—CAN.

**e. — Refusal to admit as attorney of court.]—**Appeal from the refusal of the Supreme Ct. (N.S.) to admit applt. as an attorney of the ct.—*Held*: the judgment sought to be appealed from was not a final judgment.—*Re CAHAN* (1892), 21 S. C. R. 100.—CAN.

**f. — Judgment for taxed costs.—In action for alimony.]—**In an action for alimony pltf. recovered judgment against deft. for taxed costs, & in the usual form for alimony:—*Held*: the judgment, so far as it related to the costs, was a final judgment, whatever might be the case with regard to the payments of alimony.—*ALDRICH v. ALDRICH* (1893), 23 O. R. 374; *affd.*, 24 O. R. 124.—CAN.

**g. — Order granting or refusing application to set aside judgment by default.]—**Qu. : whether the order on

appeal from an order in chambers granting or refusing an application by deft. to set aside a judgment by default & let him in to defend, is a final judgment.—*O'DONOHUE v. BOURNE* (1897), 27 S. C. R. 654.—CAN.

**h. — Order for amount indorsed on writ of summons—Judgment by default.]—**FAWCETT v. NORTON (1906), 2 E. L. R. 146.—CAN.

**k. — Order setting aside order for postponement of foreclosure proceedings.]—**A judgment setting aside an order for the postponement of foreclosure proceedings & directing that such proceedings should be continued is not a final judgment.—*Re CUSHING SULPHITE FIBRE CO.* (1906), 37 S. C. R. 173.—CAN.

**l. — Reference to assess damages.]—**WENGER v. LAMONT (1909), 41 S. C. R. 603.—CAN.

**m. — Order for leave to sign judgment.]—**An order for leave to sign judgment is not a final judgment.—*CHESELY v. BENNER* (1912), 12 E. L. R. 266; 10 D. L. R. 679; 47 N. S. R. 20.—CAN.

**n. — Where leave to enter judgment on assessment of damages.]—**Where the order for judgment at the trial was that pltf. recover his damages to be assessed, & have leave to enter judgment for the

Generally, *Mentd. Carter v. Stubbs* (1880), 43 L. T. 746; *Kettlewell v. Watson* (1883), 52 L. J. Ch. 818; *Re Tippet, Ex p. Tippet* (1885), 2 Morr. 229; *Bradshaw v. Warlow* (1886), 54 L. T. 438; *Brown v. Dorset* (1886), 34 W. R. 776; *R. v. Kettle* (1886), 17 Q. B. D. 761; *Cusack v. L. & N. W. Ry.*, [1891] 1 Q. B. 347; *Re Coles & Ravenshear*, [1907] 1 K. B. 1; *Cogstad v. Newsum*, [1921] 2 A. C. 528.

**79. — — — — —.]—BOZSON v. ALTRINCHAM URBAN DISTRICT COUNCIL**, No. 137, post.

**80. — — — — —.]—No final decision of matters in dispute.]—**BLAKEY v. LATHAM, No. 94, post.

**81. — — — — —.]—Possibility of restoring parties to original position.]—**NEALE v. GORDON LENNOX (LADY), No. 68, ante.

**Distinction between judgments & orders.]—**See generally, Nos. 43, 45, ante.

**— For calculating time for appeal.]—**See No. 78, ante.

**SUB-SECT. 2.—FOR CALCULATING TIME FOR APPEAL.**

**A. Under R. S. C., Ord. 58, r. 15.**

(a) *In General.*

See Sub-sect. 1, ante.

(b) *Order on Interpleader Issue.*

**82. General rule.]—**An appeal from the decision of a judge on an interpleader issue tried by him without a jury must, under R. S. C., Ord. 58, r. 15, be brought within twenty-one days.—*MCNAIR & CO. v. AUDENSHAW PAINT & COLOUR CO.*, [1891] 2 Q. B. 502; 60 L. J. Q. B. 770; 65 L. T. 292; 40 W. R. 36; 7 T. L. R. 741, C. A.

*Annotation:—*Apld. *Re Gardner, Long v. Gardner* (1894), 71 L. T. 412.

**83. Declaration as to ownership.]—**Two actions having been brought relating to a cargo, an interpleader issue was directed to try the question to whom it belonged. It was tried by the Master of the Rolls, who made an order finding in favour of defts., & declaring them to be entitled to the cargo. Subsequently an order was made in the actions directing the proceeds of the cargo, which were in ct., to be paid to defts.:—*Held*: the former order was an interlocutory order, from which an appeal could not be brought after twenty-one days.—*MCANDREW v. BARKER* (1878), 7 Ch. D. 701; 47 L. J. Ch. 340; 37 L. T. 810; 26 W. R. 317, C. A.

*Annotations:—*Follid. *McNair v. Audenshaw Paint & Colour*

amount so assessed with costs, & there was no further consideration reserved & no provision for confirmation by the ct. & nothing left to be dealt with judicially by the ct.:—*Held*: the judgment was clearly a final judgment disposing of the rights of the parties in the action.—*BURT v. DOMINION IRON & STEEL CO.* (No. 2) (1916), 49 N. S. R. 465.—CAN.

**o. — Judgment of Court of Appeal—As to whether document a promissory note.]—**O'GRADY v. LECOMTE, [1919] 1 W. W. R. 339; 57 S. C. R. 563; 44 D. L. R. 756.—CAN.

**77 i. Interlocutory order.—As to: Further proceedings necessary.]—**Unless an order finally disposes of the matter in dispute, no matter in which way it has been made, it is an interlocutory order.—*CHARBONNEAU v. PAGOT*, [1917] 1 W. W. R. 1327.—CAN.

**p. — Order for payment of money in Probate Court.]—**GREENWOOD v. CHESELY (1893), 25 N. S. R. (13 R. & G.) 203.—CAN.

**q. — Order deciding point of law.]—**The order deciding a point of law raised by the pleadings, & the order dismissing the action consequent on the decision of the point of law are both interlocutory.—*EDISON GENERAL*



Co., [1891] 2 Q. B. 502. *Reid*. *Kreil v. Burrell* (1878), 10 Ch. D. 420; *Collins v. Paddington Vestry* (1880), 3 Q. B. D. 368; *Hamlyn v. Betteley* (1880), 50 L. J. Q. B. 1; *Re Gardner, Long v. Gardner* (1894), 71 L. T. 412. *Mentd*. *Re Blyth & Young* (1880), 13 Ch. D. 416; *Carter v. Stubbs* (1880), 50 L. J. Q. B. 4; *Re New Callao* (1882), 22 Ch. D. 484.

(c) *Finding of Fact by Judge.*

**84. On trial in Chancery Division.]—**An action for an injunction to restrain deft. from building so as to interfere with a right of way claimed by pltf., which right was disputed, came on for trial, with witnesses, no issues of fact having been directed. After the examination had been concluded, the Master of the Rolls stated that he found a verdict for pltf. as to the right of way, & directed the action to stand over in order to give the parties an opportunity of coming to an arrangement. Upon the action coming on again, a mandatory injunction was granted; the order reciting that the ct. had found pltf. entitled to the right of way. Def., after the expiration of twenty-one days from the time when the verdict had been given, appealed from the order:—*Held*: the finding that pltf. was entitled to the right of way could not now be questioned, for deft. ought to have moved the Ct. of Appeal for a new trial within twenty-one days from the verdict being given. R. S. C., Ord. 39, r. 1A, did not apply to trials before a judge of the Ch. Div., but where a judge of that Div. had definitely found a verdict on a matter of fact, such verdict was equivalent to an interlocutory order, which could only be appealed from within twenty-one days.—*KREIL v. BURRELL* (1878), 10 Ch. D. 420; 48 L. J. Ch. 252; 39 L. T. 461; 43 J. P. 142; 27 W. R. 234, C. A.; *subsequent proceedings* (1879), 11 Ch. D. 146, C. A.

*Annotations*:—*Distd*. *Dollman v. Jones* (1879), 12 Ch. D. 553. *Expld*. *Lowe v. Lowe* (1879), 10 Ch. D. 432. *Consd*. *Potter v. Cotton* (1879), 5 Ex. D. 137. *Reid*. *Jones v. Hough* (1879), 5 Ex. D. 115. *Mentd*. *Burke v. Rooney* (1879), 4 C. P. D. 226; *Gaskin v. Balls* (1879), 13 Ch. D. 324; *Holland v. Worley* (1884), 26 Ch. D. 578; *Greenwood v. Hornsey* (1886), 33 Ch. D. 471; *Martin v. Price*, [1894] 1 Ch. 276; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; *Allport v. Security Co.* (1895), 13 R. 420; *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Westmoreland v. New Sharlston Colliery Co.* (1898), 79 L. T. 716.

**85. — Where issues of fact settled at commencement of trial.]—**When in an action in the Ch. Div., tried by a judge of that Div. without a jury, definite issues of fact are settled at the commencement of the trial, then, whether the judge delivers his finding on the facts & his judgment on the whole case on separate days or at one time, his finding of fact is an interlocutory order, & must be appealed from within twenty-one days. But, if no definite issues of fact are settled at the commencement of the trial, the finding of fact as well as the judgment on the whole case may be appealed from at any time within a year.—*LOWE v. LOWE* (1879), 10 Ch. D. 432; 48 L. J. Ch. 383; 40 L. T. 236; 27 W. R. 309, C. A. *Annotations*:—*Reid*. *Dollman v. Jones* (1879), 41 L. T. 258; *Jones v. Hough* (1879), 5 Ex. D. 115; *Potter v. Cotton* (1879), 5 Ex. D. 137.

**86. — Where issues of fact not settled at commencement of trial.]—***LOWE v. LOWE*, No. 85, *ante*.

(d) *Order in Administration Action.*

**87. Order on claim by creditor—Final as between parties to summons.]—**After an action had been brought for the administration of a testator's estate the extrix. carried on testator's trade with his assets, & incurred a trade debt for which the creditor brought an action & obtained judgment & execution, under which he seized some of

testator's assets. The sheriff interpleaded, & the proceeds of the sale were paid into ct. in the administration action. The creditor took out a summons in the administration action claiming the proceeds of the sale, but his claim was refused:—*Held*: the order, although finally determining the rights of the parties, was an interlocutory order under R. S. C., Ord. 58, r. 15, & an appeal must be brought within twenty-one days.—*PREYSEY v. PREYSEY* (1879), 12 Ch. D. 305; 41 L. T. 607, C. A.

*Annotation*:—*Folld*. *Re Lewis, Lewis v. Williams* (1886), 31 Ch. D. 623.

**88. —.]—***Re COMPTON, NORTON v. COMPTON*, No. 153, *post*.

— *For purpose of notice of appeal.]—*See No. 133, *post*.

**89. Order as to costs—Order for taxation—& payment out of fund in court.]—**In an administration action, by next of kin against administratrix, the conduct of which had been given to a creditor, an order was made on the application of the administratrix by the judge personally in chambers, directing the taxation of the costs of pltf. deft. & the creditor, & the application of the funds in ct. in payment of a debt, & then *pro tanto* of the costs when taxed, priority being given to the costs of deft. Liberty was also given to any of the parties to apply in Chambers as to the getting in of an outstanding asset, & generally:—*Held*: this was an interlocutory order, & a notice of motion in ct. to vary it, given after the expiration of twenty-one days, was too late.—*Re LEWIS, LEWIS v. WILLIAMS* (1886), 31 Ch. D. 623; 54 L. T. 198; 34 W. R. 420, C. A.

—.]—*See, generally*, No. 101, *post*.

**90. Order for application for funds in court.]—***Re LEWIS, LEWIS v. WILLIAMS*, No. 89, *ante*.

**91. Order on further consideration—Part of fund remaining in court—Liberty to apply.]—**An order made in Chambers on further consideration in an administration action, leaving part of the fund to be dealt with thereafter & reserving liberty to apply is not a final order.—*Re JOHNSON, MANCHESTER & LIVERPOOL BANKING Co. v. BEALES, JOHNSON v. HOOLEY* (1880), 42 Ch. D. 505; 59 L. J. Ch. 99; 61 L. T. 160; 37 W. R. 765.

*Annotation*:—*Apprvd*. *Re Giles, Giles & Personal Advance Co. v. Mitchell* (1890), 43 Ch. D. 391.

**92. Order for interim payment to annuitant.]—**In the course of an action to administer the estate of a deceased testatrix, in which further consideration had been adjourned, pltf's., the exors. & trustees of the will, took out a summons asking that they might be at liberty to make certain payments, out of moneys in their hands, to one of the annuitants, on account of his interest under the will. The order was made:—*Held*: the order was interlocutory & not final; & therefore an appeal from it, not being brought within fourteen days, was too late, & must be dismissed with costs.—*Re GARDNER, LONG v. GARDNER* (1894), 71 L. T. 412, C. A.

(e) *Order of Divisional Court.*

**93. Decision on case stated—Under Stamp Act, 1870 (c. 97), s. 19.]—***ONSLOW v. INLAND REVENUE COMRS.*, No. 8, *ante*.

*Distinction between judgments & orders.]—*See Nos. 43, 45, *ante*.

*For calculating time of appeal.]—*See No. 78, *post*.

(f) *Order Supplemental to Declaration of Rights of Parties.*

**94. Order working out rights of parties.]—**An appeal by pltf. from a judgment dismissing his



**Sect. 2.—Whether final or interlocutory: Sub-sect. 2, A. (f), (g), (h), (i) & (j), & B.]**

action having been dismissed with costs, pltf. moved for liberty to set off against the costs payable to deft. L. under that order certain costs payable to pltf. by L. partly in that action & partly in another action between the same parties. G. claimed a lien upon these costs for his costs as L.'s solr. in the first-mentioned action. An order was made allowing the set-off. G. appealed:—*Held*: as regards time for appealing, the order was interlocutory & not final, being only an order for working out the rights given by a final judgment.

Any order which does not deal with the final rights of the parties, but merely directs how the declarations of right already given in the final judgment are to be worked out is interlocutory, just as an order made before judgment is interlocutory where it gives no final decision on the matters in dispute (COTTON, L.J.).—**BLAKEY v. LATHAM** (1889), 43 Ch. D. 23; 38 W. R. 193, C. A.

*Annotations*:—**Apld.** Norton v. Norton (1908), 99 L. T. 709. **Mentd.** Williams v. Nye (1890), 7 R. P. C. 62; *Re Bassett*, *Ex p.* Lewis (1895), 65 L. J. Q. B. 144; *Hassell v. Stanley*, [1890] 1 Ch. 607; *Savage v. Harris* (1896), 13 R. P. C. 364; *Goodfellow v. Gray*, [1899] 2 Q. B. 498; *David v. Rees*, [1904] 2 K. B. 435; *Bake v. French* (1907), 76 L. J. Ch. 299; *Reid v. Cupper*, [1915] 2 K. B. 147; *Puddophatt v. Leith* (No. 2), [1916] 2 Ch. 168.

**95.** —[Where the judgment in a partition action gave liberty to any person, interested to the extent of one moiety or upwards of the property to apply for a sale, & it was ordered that, if a sale of any part of the property should not be requested, a partition should be made of such of the property as to which a sale should not be so requested by the judge in Chambers amongst the persons entitled, an order on a summons taken out in the action directing partition of the hereditaments & premises remaining unsold was held to be an interlocutory & not a final order, being an order for working out the rights of the parties.—**NORTON v. NORTON** (1908), 99 L. T. 709, C. A.]

**96. Order construing will.—To determine parties interested in compensation fund in court.**—A petition having been presented for payment out of ct. of a fund paid in as purchase-money of a devised estate, the ct., on June 18, made an order declaring the construction of the will & directing inquiries as to the persons interested. An application was made on behalf of some of the parties who were resident in America to extend the time for appealing to four weeks from July 8, in order to allow time for the persons acting for them under a power of attorney to consult them as to appealing:—*Held*: as the order was a final one, the case, though within the letter was not within the spirit of R. S. C., Ord. 58, r. 9, requiring an appeal to be brought within twenty-one days, & the extension of time ought to be granted.—*Re JACQUES* (1881), 18 Ch. D. 392; *sub nom.* *Re JACQUES, Ex p.* CARLISLE CORPN., 45 L. T. 297, C. A.]

**97. Preliminary order declaring rights.**—**MAORI KING (CARO OWNERS) v. ALLEN**, No. 9, *ante*.

**98. Order in partition action.—Partitioning unsold property in specie.**—**NORTON v. NORTON**, No. 95, *ante*.

(g) *Order on Summons under R. S. C., Ord. 14.*

**99. General rule.**—An order giving pltf. leave to sign final judgment under R. S. C., Ord. 14, r. 1, is an interlocutory order, & an appeal from such order must therefore be brought to the Ct.

of Appeal within twenty-one days.—**STANDARD DISCOUNT CO. v. LA GRANGE** (1877), 3 C. P. D. 67; 47 L. J. Q. B. 3; 37 L. T. 372; 26 W. R. 25, C. A.]

*Annotations*:—**Dbtd.** A.-G. v. G. E. Ry. (1879), 27 W. R. 759. **Apld.** Collins v. Paddington Vestry (1880), 5 Q. B. D. 368. **Expld.** Blakey v. Latham (1889), 43 Ch. D. 23; *Salaman v. Warner*, [1891] 1 Q. B. 734. **Refd.** Lewis, *Lewis v. Williams* (1886), 31 Ch. D. 623; *Re Gardner, Long v. Gardner* (1894), 71 L. T. 412.

**100.** —Order giving leave to sign judgment & judgment distinguished.]—*Re* DEBTOR, *Ex p.* DEBTOR (No. 2621 of 1902), [1903] W. N. 6, C. A.]

*See, generally, PRACTICE.*

(h) *Order as to Costs.*

**101. Final decree silent as to costs.**—An addition made to a decree upon motion, giving directions as to costs as to which the decree itself was silent, is a portion of the decree, & therefore can be examined in an appeal from the decree, & is not an interlocutory order within R. S. C., Ord. 58, r. 15.—**THE CITY OF MANCHESTER** (1880), 5 P. D. 221; 49 L. J. P. 81; 42 L. T. 521; 4 Asp. M. L. C. 261, C. A.]

*Annotations*:—**Consd.** Bew v. Bew, [1899] 2 Ch. 467. **Fold.** Forbes-Smith v. Forbes-Smith, [1901] P. 258. **Refd.** Rotch v. Crosbie (No. 2) (1909), 54 Sol. Jo. 30; *Lever v. Masbro' Equitable Pioneer Soc.* (1912), 106 L. T. 472. **Mentd.** Adlington v. Conyngham, [1898] 2 Q. B. 492.

**102. Application to vary.**—At the trial of an action the jury found for pltf. for a sum exceeding the amount which defts. had paid into ct.; the judge thereupon gave judgment for pltf. without costs. The High Ct. afterwards made an order that pltf. should have their costs. Defts. applied to the Ct. of Appeal to annul the order of the High Ct. after the time had elapsed for appealing against an interlocutory order:—*Held*: the order of the High Ct. was made on an appeal from a final judgment, & the application to the Ct. of Appeal was not too late, but the High Ct. had no jurisdiction to entertain an appeal from a final judgment, & the order giving pltf. their costs must be annulled.—**MARSDEN v. LANCASHIRE & YORKSHIRE RY. CO.** (1881), 7 Q. B. D. 641; 50 L. J. Q. B. 318; 44 L. T. 239; 29 W. R. 580, C. A.]

*Annotations*:—**Consd.** Huxley v. West London Extension Ry., *Hughes v. Merrett*, *Wood v. Madge* (1886), 17 Q. B. D. 373. **Fold.** Forbes-Smith v. Forbes-Smith, [1901] P. 258.

**103. Order directing review of taxation.**—An appeal from an order directing a review of taxation must be brought within twenty-one days.—*Re* WATSON, *Ex p.* PHILLIPS (1887), as reported in 19 Q. B. D. 234; 56 L. J. Q. B. 619; 57 L. T. 215, C. A.]

**104. Order allowing set-off.**—**BLAKEY v. LATHAM**, No. 94, *ante*.

**105. Order for taxation.**—*Re* LEWIS, LEWIS v. WILLIAMS, No. 89, *ante*.

**In divorce suit.—Whether interlocutory order requiring leave to appeal.**—*See* No. 127, *post*.  
*See, also, Nos. 129, 138, post.*

(i) *Order Dismissing Action.*

**106. Action frivolous & vexatious.—Statement of claim struck out.**—An order made under R. S. C., Ord. 25, r. 4, striking out the statement of claim in an action & dismissing the action as frivolous & vexatious is an interlocutory & not a final order within R. S. C., Ord. 58, r. 15, for the purposes of appeal.—*Re* PAGE, HILL v. FIADGATE, [1910] 1 Ch. 489; 79 L. J. Ch. 482; 102 L. T. 388; 54 Sol. Jo. 305, C. A.]

*Compare Nos. 114, 128, post.*

**107. On point of law.]—**BOZSON v. ALTRINCHAM URBAN DISTRICT COUNCIL, No. 137, *post*.

**108. Order for security for costs not comply with.]—**An order dated Apr. 25, 1904, directed *pltf.*, a resident abroad, to give security for costs by July 1, 1904, & if not so given the action to be dismissed. Security was not given & the action was dismissed. *Pltf.* appealed from the order of dismissal on the ground of a mistake & asked for an extended time to furnish security. Notice of appeal was given within three months of Apr. 25. The order appealed from was held an interlocutory order & the appeal was not heard. STEWART v. ROYDS (1904), 118 L. T. Jo. 176. *Annotation:—**Apld.* *Re* PAGE, HILL v. FLADGATE, [1910] 1 Ch. 489.

(j) Other Orders.

**109. Overruling demurrer.]—**An order overruling a demurrer is not an interlocutory order within R. S. C., Ord. 58, r. 15.—TROWELL v. SHENTON (1878), 8 Ch. D. 318; 26 W. R. 837. C. A.

*Annotations:—**Refd.* *Re* Croasdel & Cammell, Laird (1906), 75 L. J. K. B. 769. *Mentd.* *Re* Holland, Gregg v. Holland, [1902] 2 Ch. 360.

*Compare* No. 146, *post*.

**110. Order for new trial.]—**An order absolute for a new trial is an interlocutory order, an appeal from which must be brought within twenty-one days from the date thereof, under R. S. C., Ord. 58, r. 15.

Where a party failed to appeal from such interlocutory order within twenty-one days, under the mistaken belief that such order was final, & that an appeal might be brought at any time within twelve months:—*Held*: such mistake was not a circumstance which would justify the *ct.* in enlarging the time for appealing after the expiration of the twenty-one days under R. S. C., Ord. 58, r. 6.—HIGHTON v. TREHERNE (1878), 48 L. J. Q. B. 167; 27 W. R. 245. C. A.

**111. Refusal by registrar in bankruptcy to summon first meeting of creditors.]—**On an appeal from the refusal by the registrar of an application of the debtor for leave to summon a fresh first meeting of his creditors the objection was taken that the appeal was out of time. *Appl't's solr.* deposed that he had mistaken the effect of the rules & was of opinion that the time for appealing run from the date of the perfecting of the order, instead of the date when it was pronounced:—*Held*: the order appealed from was in the nature of an interlocutory order, & as no harm could be done to any one the time would now be extended.—*Re* TIPPETT, *Ex p.* TIPPETT (1885), 2 Morr. 229, C. A.

**112. Order nisi for foreclosure.]—**Under R. S. C., Ord. 58, r. 15, an order in the ordinary form of a foreclosure judgment, made under R. S. C., Ord. 15, is, for the purpose of an appeal from it, to be treated as a final order, & it can be appealed from at any time within a year, & the appeal can be heard though, since the notice was served, the foreclosure has been made absolute.—SMITH v. DAVIES (1886), 31 Ch. D. 595; 55 L. J. Ch. 496; 54 L. T. 478, C. A.; *previous proceedings* (1884), 28 Ch. D. 650.

*Annotations:—**Mentd.* Blake v. Harvey (1885), 29 Ch. D. 827; Bissett v. Jones (1886), 32 Ch. D. 635; Horton v. Bosson (1899), 80 L. T. 435.

**113. Stay of proceedings—Against one of several defendants.]—**An order staying proceedings against one of several *defts.* in an action is an interlocutory order, & no appeal from it to the *Ct.* of Appeal can be brought after the expiration of twenty-

one days.—HIND v. HARTINGTON (MARQUIS) (1890), 6 T. L. R. 267, C. A.

*Annotation:—**Consd.* *Re* PAGE, HILL v. FLADGATE, [1910] 1 Ch. 489.

**Refusing to remove name from list of contributories.]—***See* No. 130, *post*.

**114. Order striking out statement of claim—Disclosing no ground of action.]—**An order striking out a statement of claim on the ground that it discloses no cause of action is an interlocutory, not a final order; & consequently it must be appealed from within twenty-one days.—JONES v. INSOLE (1891), 64 L. T. 703; 39 W. R. 629, C. A.

**115. — Action dismissed as frivolous & vexatious.]—***Re* PAGE, HILL v. FLADGATE, No. 106, *ante*.

—*Compare* No. 128, *post*.

**116. Order setting aside arbitration award—For misconduct of arbitrator.]—**Where, in an *arbn.* held under a submission to *arbn.* contained in an agreement, the arbitrator made his award in the form of a special case, but a *Div. Ct.* subsequently made an order setting the award aside on the ground of misconduct on the part of the arbitrator:—*Held*: the order so made was an interlocutory & not a final order.—*Re* CROASDELL & CAMMELL, LAIRD & CO., LTD., [1906] 2 K. B. 509; 75 L. J. K. B. 769; 95 L. T. 441; 54 W. R. 620; 22 T. L. R. 759; 50 Sol. Jo. 682, C. A. *Annotations:—**Consd.* *Re* JEROME, [1907] 1 Ch. 115. *Refd.* *Kuf v.* Pauwels, [1919] 1 K. B. 660.

*B. Under R. S. C., Ord. 58, r. 15A—Order on Further Consideration.*

**117. Construction of rule.]—**The *ct.* is of opinion that R. S. C., Ord. 58, must be construed strictly, & that it does not apply to a motion to vary a report (*per Cur.*).—SAUNDERS DAVIES v. BAILLIE, [1907] W. N. 237, C. A.

**118. With order to vary certificate.]—**Where an order on an interlocutory application & an order on further consideration are made at the same time are included in one order, an appeal from the order on the interlocutory application must nevertheless be brought within twenty-one days, although such order in effect determines the issue in the cause.—CUMMINS v. HERRON (1877), 4 Ch. D. 787; 46 L. J. Ch. 423; 36 L. T. 41; 25 W. R. 325, C. A.

*Annotations:—**Apld.* Standard Discount Co. v. De La Grange (1877), 37 L. T. 372. *Refd.* *McAndrew v.* Barker (1877-8), 7 Ch. D. 701; *Kreih v.* Burrell (1878), 39 L. T. 461.

**119. —.]—**Goods seized in execution were claimed by the trustees of a settlement made by debtor. A decree was made in an interpleader suit directing an inquiry whether the settlement was a valid settlement of the goods, & who were entitled to them. The chief clerk certified that the settlement was invalid, & the judgment creditor entitled. By an order made on further consideration & on adjourned summons to vary the certificate, the *ct.* declared the settlement valid, & ordered the certificate to be varied accordingly, & directed the proceeds of the goods to be paid to the trustees:—*Held*: the substantial part of this order was an order to vary the certificate, which was an interlocutory order, & an appeal brought after twenty-one days was too late.—WHITE v. WITT (1877), 5 Ch. D. 589; 46 L. J. Ch. 560; 37 L. T. 110; 25 W. R. 435, C. A. *Annotation:—**Apld.* Standard Discount Co. v. La Grange (1877), 3 C. P. D. 67.

**120. —.]—**Where an order was made on the further consideration of a cause, & another order, separate in form, was made the same day dismissing a summons to vary the certificate on

**Sect. 2.—Whether final or interlocutory: Sub-sect. 2, B.; sub-sects. 3 & 4.]**

which the order on further consideration was made, & the two orders were separately drawn up on consecutive days:—*Held*: there was in substance only one order, & consequently, R. S. C., Ord. 58, r. 15A, applied, & the time for appealing would be the same as the time for appealing against the order on further consideration. The object of that rule was to get rid of the anomaly of having two different periods of time for appealing where a summons to vary & further consideration were heard together.—*MARSLAND v. HOLE* (1888), 40 Ch. D. 110; 59 L. T. 593; 37 W. R. 81, C. A.

121. —[*SAUNDERS DAVIES v. BAILLIE*, No. 117, *ante*.]

122. Order in administration action—Part of fund remaining undealt with.—*Re JOHNSON, MANCHESTER & LIVERPOOL BANKING CO. v. BEALES, JOHNSON v. HOOLEY*, No. 91, *ante*.

**SUB-SECT. 3.—FOR NEED FOR LEAVE TO APPEAL.**

*See* Jud. Act, 1925 (c. 49), s. 31 (1) (i).

123. Order in administration action—Adjusting loss from breach of trust.—*CHILLINGWORTH v. CHAMBERS*, [1895] W. N. 136.

124. —Claim by creditor to administer.—*Re ABDY, RABBETT v. DONALDSON*, [1895] W. N. 12, C. A.

125. Order for commission to take evidence.—*EDISON-BELL PHONOGRAPH CO., LTD. v. HOUGH* (1895), 98 L. T. Jo. 374, C. A.

126. Order dismissing motion to commit—Whether within exception as to liberty of the subject.—By Jud. Act, 1894 (c. 16), s. 1 (1) (b), no appeal lies without the leave of the judge or of the Ct. of Appeal from an interlocutory order made by a judge dismissing a motion to commit. Such an order is not within the exception contained in (1), of that sect.—*BOWDEN v. YOXALL*, [1901] 1 Ch. 1; 70 L. J. Ch. 5; 83 L. T. 419; 49 W. R. 247; 17 T. L. R. 43; 45 Sol. Jo. 59, C. A.

*See, now*, Jud. Act, 1925 (c. 49), s. 31 (1) (i).

127. Order as to costs in Divorce Court.—A suit for judicial separation was brought by the wife, & a suit for divorce was brought by the husband, to which A. was made a co-*resp.* These suits were consolidated by an order of the ct., & at the trial the wife's suit was withdrawn & a decree *nisi*, which was afterwards made absolute, was pronounced in the husband's suit with costs against co-*resp.* On taxation of the costs the question was raised whether the husband's costs

of the wife's suit ought to be taxed against co-*resp.*, & the registrar referred the question to the judge, who decided that they ought, holding that by virtue of the consolidation order the two suits became one, & he therefore had jurisdiction to order co-*resp.* to pay the husband's costs of the wife's suit under Matrimonial Causes Act, 1857 (c. 85), s. 34. Co-*resp.* appealed from this decision without obtaining leave to appeal:—*Held*: the appeal lay without leave, the order not being an interlocutory order within Jud. Act, 1894 (c. 16), s. 1 (1) (b).—*FORBES-SMITH v. FORBES-SMITH & CHADWICK*, [1901] P. 258; 70 L. J. P. 61; 84 L. T. 789; 50 W. R. 6; 17 T. L. R. 587; 45 Sol. Jo. 595, C. A.

128. Order striking out statement of claim—As frivolous & vexatious.—An order striking out a statement of claim as disclosing no reasonable cause of action & dismissing the action as frivolous & vexatious is an interlocutory order, & leave to appeal is necessary, & this is so though an injunction is claimed.—*BRIGHT & CO., LTD. v. RIVER PLATE CONSTRUCTION CO., LTD.* (1901), 17 T. L. R. 708, C. A.

—[*Compare* Nos. 106, 114, *ante*.]

129. Order dismissing summons to review taxation.—An order dismissing a summons to review the taxation of a solr.'s bill of costs under Solicitors Act, 1843 (c. 73), is not final, but interlocutory, & leave to appeal from such an order is necessary under Jud. Act, 1894 (c. 16), s. 1.—*Re JEROME*, [1907] 2 Ch. 145; 76 L. J. Ch. 432; 96 L. T. 866; 51 Sol. Jo. 485, C. A.

*Compare* No. 138, *post*; & *see* Sub-sect. 2, A. (h), *ante*.

Orders & decrees of county court judge—Admiralty jurisdiction.—*See* ADMIRALTY, Vol. I., pp. 231, 232, Nos. 1570 *et seq.*

**SUB-SECT. 4.—TO DETERMINE LENGTH OF NOTICE OF APPEAL.**

*See* R. S. C., Ord. 58, r. 3.

130. Order in winding-up of company—Refusal to remove name from list of contributories.—A contributory, on Mar. 29, being twenty-one days from the pronouncing of a refusal to remove his name from the list, gave fourteen days' notice of appeal. On Apr. 1, conceiving that he ought to have given only a four-day notice, he withdrew his notice of appeal, & on the following day gave a four-day notice of appeal. On the hearing of the appeal, the objection was taken that it was too late:—*Held*: the time ought to be extended.—*Re AMBROSE LAKE TIN & COPPER CO., TAYLOR'S*

**PART II. SECT. 2, SUB-SECT. 3.**

r. Judgment dismissing application to expunge trade mark from register.]

—A judgment of the Supreme Ct. of a state dismissing an application to expunge a trade mark from the register is a final judgment from which an appeal lies to the High Ct. without leave.—*ASHITON & PARSONS, LTD. v. GOULD* (1909), 7 C. L. R. 598.—*AUS.*

t. Order declaring applicant ineligible to be appointed judge.—Appl. presented to the Full Ct. of the Supreme Ct. of Queensland a commission purporting to appoint him a judge of the Supreme Ct. & asked to be sworn in. The Full Ct. made a formal order declaring that applt. was not entitled to be sworn in & that he was not eligible to be appointed a judge of the Supreme Ct.:—*Held*: neither leave nor special leave to appeal should be granted, the determination of the Supreme Ct. not being in "judgment"

within Judiciary Act, 1903–1905, s. 35, & if it were in judgment, not being interlocutory.—*Re MCCAWLEY* (1918), 24 C. L. R. 345.—*AUS.*

a. Order of divisional court affirming chamber order.—An appeal lies to the Ct. of Appeal from an order of a div. ct. dismissing an appeal from an order of a judge in chambers, dismissing an appeal from an order of the master in chambers, dismissing a motion in an action for the recovery of land; but only upon leave to appeal being obtained.—*BOURNE v. O'DONOHUE* (1896), 17 P. R. 274.—*CAN.*

b. Order declaring director an officer of company.—An order declaring that a director is an officer of a co. is interlocutory & no appeal lies without leave.—*POWELL-REES v. ANGLO-CANADIAN MORTGAGE CORPN.* (1912), 27 O. L. R. 274; 4 O. W. N. 219; 3 D. L. R. 994.—*CAN.*

c. Judgment settling liability &

leaving some matters for reference].—*DUNN & EASTERN TRUST CO. v. EATON* (1912), 12 E. L. R. 360; 9 D. L. R. 303; 47 S. C. R. 205.—*CAN.*

d. —[*SECURITY LUMBER CO. v. LEIBRAND & POIL*, [1923] 3 D. L. R. 230; 2 W. W. R. 216; *affg.*, [1923] 1 D. L. R. 515.—*CAN.*

e. Judgment settling liability & leaving inquiry as to damages—Effect of 3 & 4 Geo. 4, c. 51, s. 1.—The above sect. allows a judgment which settles liability & leaves an inquiry as to damages to follow to be treated as a final judgment.—*WINDSOR, ESSEX & LAKE SHORE RAPID RY. v. NELLES*, [1915] A. C. 355.—*CAN.*

f. Order granting interim interdict.—Orders granting interim interdicts are not interlocutory orders & leave to appeal is unnecessary.—*PRINGLE v. UNION GOVERNMENT*, [1923] C. P. D. 374.—*S. AF.*

CASE (1878), 8 Ch. D. 643; 47 L. J. Ch. 696, 701; 38 L. T. 587, 590; 26 W. R. 601, 604, C. A.

131. — **Determining interests of parties.**—*Re STOCKTON IRON FURNACE CO.*, No. 66, *ante*.

132. **Order discharging rule for new trial.**—*WILKS (TRUSTEE, ETC.) v. JUDGE*, [1880] W. N. 98, C. A.

133. **Order in administration action—On claim of creditor.**—Within twenty-one days from the date of an order allowing a creditor's claim in an administration action deft. gave a four-day notice of appeal. After the time for appealing had expired resp. wrote to say that the notice was bad, as it ought to have been a fourteen days' notice. Applt. thereupon gave notice of motion for leave to amend his notice of appeal by substituting the fourteen days' period for that of four. At this time more than fourteen days from the service of the notice of appeal had passed:—*Held*: the notice of appeal was bad, for it ought to have been a fourteen days' notice, & leave to amend it in the way proposed ought not to be given after the fourteen days, but as applt. had given a distinct notice of appeal in proper time, the time for appealing ought to be extended.

The notice was wrong, because in my opinion the order was a final order (COTTON, L.J.).—*Re CHOSLEY, MUNNS v. BURN* (1887), 34 Ch. D. 604; 56 L. J. Ch. 509; 35 W. R. 291, C. A.

*Compare* No. 87, *ante*, No. 153, *post*.

134. **Order of Divisional Court—On appeal from county court—Upon interpleader issue.**

An order made by the Q. B. Div. upon an appeal from the judgment of a county ct. on an interpleader issue affirming such judgment is a final order within R. S. C., Ord. 58, r. 3.—*HUGHES v. LITTLE* (1886), 18 Q. B. D. 32; 56 L. J. Q. B. 96; 55 L. T. 476; 35 W. R. 36; 3 T. L. R. 14, C. A.

*Annotations*.—*Expld. & Distd. McNair v. Audenshaw Paint & Colour Co.*, [1891] 2 Q. B. 502. *Mentd. Cook v. Taylor* (1887), 3 T. L. R. 800; *Pulbrook v. Ashby* (1887), 56 L. J. Q. R. 376; *Stevens v. Marston* (1890), 60 L. J. Q. B. 192; *Re Hill, Official Receiver v. Ellis* (1895), 2 Mans. 208; *De Braam v. Ford* (1899), 69 L. J. Ch. 82.

*See, generally*, INTERPLEADER, Vol. XXIX., pp. 510, 511.

135. **Order in bankruptcy.**—On appeal from an order made in the county ct. the preliminary objection was taken that the appeal could not be heard on the ground that fourteen days' notice had been given, & the order appealed from being an interlocutory order, the notice of appeal must be a four-day notice in accordance with R. S. C., Ord. 58, r. 3. The ct. refused to allow the objection & decided to hear the appeal, there being considerable doubt as to the nature of an interlocutory order in bkpcy.—*Re MILES, Ex p. TURNBULL* (1889), 6 Morr. 213, D. C.

136. **Order dismissing action—On point of law.**—(1) An order dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial under R. S. C., Ord. 25,

rr. 2 & 3, is not a final order within R. S. C., Ord. 58, r. 3.

(2) A final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation.—*SALAMAN v. WARNER*, [1891] 1 Q. B. 734; 60 L. J. Q. B. 624; 39 W. R. 547, C. A.

*Annotations*.—*As to* (1) *Folld. Jones v. Insole* (1891), 61 L. T. 703. *Reid. Re Binstead, Ex p. Dale*, [1893] 1 Q. B. 199. *As to* (2) *Appld. Re Reeves*, [1902] 1 Ch. 29. *N.F. Bozson v. Altrincham U. D. C.* (1903), 72 L. J. K. B. 271. *Consd. Isaacs v. Salbstein*, [1916] 2 K. B. 139. *Reid. Re Gardner, Long v. Gardner* (1894), 71 L. T. 412; *Cogstad v. Newsam*, [1921] 2 A. C. 528. *Generally, Mentd. Andrews v. Mockford*, [1896] 1 Q. B. 372.

137. — *—*—*—*—In an action for damages for failure to carry out a contract an order was made that the action should be transferred to the non-jury list. "Questions of liability & breach of contract only to be tried. Rest of case, if any, to go to the Official Referee." At the trial an order was made dismissing the action, on the ground that there was no contract binding on defts.:—*Held*: this order was a final order within R. S. C., Ord. 58, rr. 3 & 15. The test as to whether an order should be considered final or interlocutory is this: if the order finally disposes of the rights of the parties it ought to be treated as final; if, on the other hand, further proceedings are necessitated, it ought to be treated as interlocutory (*LORD ALVERSTONE, C.J.*).—*Bozson v. ALTRINCHAM URBAN DISTRICT COUNCIL*, [1903] 1 K. B. 547; 72 L. J. K. B. 271; 67 J. P. 397; 51 W. R. 337; 19 T. L. R. 266; 47 Sol. Jo. 316; 1 L. G. R. 639, C. A.

*Annotations*.—*Appld. Isaacs v. Salbstein*, [1916] 2 K. B. 139. *Reid. Re Holland S.S. Co., National S.S. Co. & Bristol Steam Navigation Co.* (1906), 23 T. L. R. 59; *Cogstad v. Newsam*, [1921] 2 A. C. 528.

138. **Order on originating summons by client against solicitor—For delivery & taxation of bill of costs.**—Upon an originating summons taken out by a client against his solr. for the delivery of a bill of costs & taxation, the order, whether allowing or refusing the application, finally determines the question between the parties, & is a final order for the purpose of an appeal within R. S. C., Ord. 58, r. 3.—*Re REEVES (HERBERT) & Co.*, [1902] 1 Ch. 29; 71 L. J. Ch. 70; 85 L. T. 495; 50 W. R. 252; 46 Sol. Jo. 50, C. A.

*Annotations*.—*Appld. Haydon v. Cartwright*, [1902] W. N. 163. *Folld. Re Jerome*, [1907] 2 Ch. 145. *Appld. Re Jackson*, [1915] 1 K. B. 371. *Reid. Cogstad v. Newsam*, [1921] 2 A. C. 528; *Re Wingfields*, [1923] 2 K. B. 112.

*See, also*, No. 129, *ante*, & *generally*, Sub-sect. 2, A. (h).

139. — **For delivery of list of securities held & cash account.**—*HAYDON v. CARTWRIGHT*, [1902] W. N. 163, C. A.

*Annotation*.—*Folld. Re Marchant*, [1908] 1 K. B. 998.

—*—*—*See, generally*, SOLICITORS; & *compare* No. 129, *ante*.

## PART II. SECT. 2, SUB-SECT. 4.

136 i. **Order dismissing action—On point of law.**—An order dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial is not a final order.—*WARD & Co. v. CLARK, CLARK & HENNIAR* (1895), 4 B. C. R. 71.—*CAN.*

*f.* — *On item selected by plaintiff.*—In an action by exors. against applt. to recover certain sums of money due to their estate, the judge at the request of pttfs. selected one of the items & adjudicated on the evidence taken that the action in respect thereof be dismissed:—*Held*: this was a final judgment, & no appeal therefrom lay after the expiration of

twenty days.—*MCDONALD v. BELCHER*, [1904] A. C. 429.—*CAN.*

*h.* **Order after reference to ascertain damages.**—*ROBLEE v. RANKIN* (1884), 11 S. C. R. 137.—*CAN.*

*k.* —*—*—*Re v. CLARKE & BARBER* (1893), 21 S. C. R. 656.—*CAN.*

*l.* —*—*—*Held*: the time for appealing ran from the date when the judgment sought to be appealed from was pronounced by the judge, & not from the date when the registrar inserted the amount of damages as ascertained by him.—*LAURSEN v. JACKINSON* (1913), 23 W. L. R. 1; 9 D. L. R. 758; 3 W. W. R. 717; 18 B. C. R. 682.—*CAN.*

*m.* **Order dismissing motion to set**

*aside interlocutory judgment.*—An order of a county ct. judge dismissing a motion to set aside an interlocutory judgment entered in default of appearance is an interlocutory order, & an appeal therefrom must be brought within fifteen days.—*CHILLIWACK EVAPORATING & PACKING CO., LTD. v. CHUNG*, [1918] 1 W. W. R. 870; 25 B. C. R. 90.—*CAN.*

*n.* **Motion for new trial—Order refusing new trial.**—*Semble*: a motion for a new trial is an interlocutory motion, & an order thereon refusing a new trial is interlocutory also, & notice of appeal must be given within thirty days.—*FRIEDLANDER v. BLACK'S ESTATE (OFFICIAL ASSIGNEE)* (1888), 6 N. Z. L. R. 512.—*N.Z.*

**Sect. 2.—Whether final or interlocutory: Sub-sects. 4 & 5, A.]**

**140. Order setting aside arbitration award—For misconduct of arbitrator.]—***Re CROASDELL & CAMMELL, LAIRD & Co., LTD., No. 116, ante.*

**SUB-SECT. 5.—FOR PURPOSE OF HEARING OF APPEAL.**

**A. In General.**

**141. General rule.]—**When there is no joint contract or relation of principal & agent, an unsatisfied judgment against one person for the price of goods sold is not a bar to a subsequent action against another person for the price of the same goods. The test of whether an appeal is final or interlocutory is the nature of the order immediately under appeal. Where therefore, on appeal from a final judgment of a county ct., the Div. Ct. made an order for a new trial:—*Held*: an appeal from the Div. Ct. to the Ct. of Appeal was an appeal from an interlocutory order & was rightly entered in the interlocutory list.—*ISAACS & SONS v. SALBSTEIN*, [1916] 2 K. B. 139; 85 L. J. K. B. 1433; 114 L. T. 924; 32 T. L. R. 370; 60 Sol. Jo. 444, C. A.

**142. Decision on case stated by arbitrator—Decision of Divisional Court.]—***SHUBROOK v. TUFNELL*, No. 71, *ante*.

**143. — Decision of High Court.]—**Arbitrators stated a special case in which the question for the opinion of the ct. was thus stated "Whether our construction of the contracts upon the two points above stated is correct. If both points are correctly decided, this our award is to stand. If either or both points is or are wrongly decided, the matter is to be remitted to us to give effect to the true construction, of the contract in our interim & final awards. The costs of the special case are referred to the ct." :—*Held*: the special case was stated under Arbitration Act, 1889 (c. 49), s. 19, & not under sect. 7, & therefore an appeal would not lie to the Ct. of Appeal from the decision of the High Ct.

I think that in its present shape, this is a final & not an interlocutory appeal; but it is not necessary to decide that point (*COLLINS, M.R.*).—*Re HOLLAND S.S. Co. & BRISTOL STEAM NAVIGATION Co.* (1906), 95 L. T. 769; 23 T. L. R. 59; 51 Sol. Jo. 65, C. A.

*Apld.* *Corstad v. Nowsum*, [1921] 2 A. C. 528. *Reid. Larrinaga v. Soc. Franco-Americaine des Phosphates de Medulla* (1922), 92 L. J. K. B. 45.

**144. Whether by Divisional Court or Court of Appeal—Order on originating summons—Directing payment of money.]—**An appeal will not lie direct to the Ct. of Appeal against an order of a judge at chambers made upon an originating summons & directing deft., a solr., to pay to pltf. a sum of money specified in the summons, the matter not being one of practice & procedure within Jud. Act, 1894 (c. 16), s. 1 (4); such an order is a final, & not an interlocutory, order.—*Re MARCHANT*,

[1908] 1 K. B. 998; 77 L. J. K. B. 695; *sub nom. Re MARCHANT, Ex p. FRAREY*, 98 L. T. 823; 24 T. L. R. 375; 52 Sol. Jo. 316, C. A.

*Annotations*—*Consd.* *Yonge v. Toynbee*, [1910] 1 K. B. 215; *Haxby v. Wood Advertising Agency* (1913), 109 L. T. 946. *Apld.* *Re Jackson*, [1915] 1 K. B. 371. *Mentd.* *United Mining Finance Corp. v. Becher*, [1910] 2 K. B. 296.

**145. — Order on summons to set aside agreement as to costs.]—**Where a summons is taken out at chambers under Attorneys & Solicitors Act, 1870 (c. 28), s. 8, to set aside two agreements with regard to payments for a solr.'s services, & for delivery of a bill of costs, the matter is not one of "practice & procedure" within Jud. Act, 1894 (c. 16), s. 1 (4), & an appeal from the order of a judge at chambers lies to the Divisional Ct., & not direct to the Ct. of Appeal.

It seems to me that, if one applies to the present case [the] judgment of *VAUGHAN WILLIAMS, L.J.* [in *Re Marchant*, No. 144, *ante*] & the decision of the Ct. of Appeal in *Re Reeves (Herbert) & Co.*, No. 138, *ante*, the order now before us is a final order (*HORRIDGE, J.*).—*Re JACKSON*, [1915] 1 K. B. 371; 84 L. J. K. B. 548; 112 L. T. 395; 31 T. L. R. 109; 59 Sol. Jo. 272, D. C.

**146. Judgment on demurrer.]—**An application was made that the trial of a cause should be postponed until after the decision of the House of Lords on an appeal from the judgment of the judge ordinary, on a demurrer:—*Held*: as the judgment on the demurrer was an interlocutory matter, which could have been decided by the judge ordinary sitting alone, the appeal from his decision lay to the full ct., & not to the House of Lords, & consequently postponement of the trial refused.—*PAGANI v. PAGANI* (1866), L. R. 1 P. & D. 223; 35 L. J. P. & M. 87; 14 L. T. 706; 15 W. R. 23.

*Compare* No. 109, *ante*.

**147. Order construing will.]—**This is a final order, & the appeal ought not to have come on among appeals from orders on interlocutory motions, but as you are here we will hear you (*JESSEL, M.R.*).—*Re EMMET'S ESTATE, EMMET v. EMMET* (1880), as reported in 13 Ch. D. 484, C. A.

*Annotations*:—*Mentd.* *Re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197; *Re Knapp's Settlement, Knapp v. Vassall*, [1895] 1 Ch. 91; *Re Stephens, Kilby v. Betts*, [1904] 1 Ch. 322; *Re Canney's Trusts, Mayers v. Strover* (1910), 101 L. T. 905; *Re Faux, Taylor v. Faux* (1915), 84 L. J. Ch. 873.

**148. Decree for specific performance.]—***GAMES v. BONNOR* (1884), 54 L. J. Ch. 517; 33 W. R. 64, C. A.

*Annotations*:—*Mentd.* *Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391; *Re Atkinson & Horsell's Contract*, [1912] 2 Ch. 1.

**149. Refusal to set aside award—Or remit to umpire.]—**An appeal from a refusal to set aside an award or remit it to the umpire for consideration is analogous to an application for a new trial, & ought to be set down in the interlocutory, & not in the final, list of appeals.—*Re DELAGOA BAY RY. Co. & TANCRED* (1889), 61 L. T. 343; 37 W. R. 578, C. A.

**150. Applications under Companies Acts—Compulsory winding-up order.]—**It will be convenient that appeals from compulsory winding-up

part of the action only, it is a final judgment in a judicial proceeding & an appeal will lie.—*SHIELDS v. PEAK* (1882), 8 S. C. R. 579.—*CAN.*

**146 vi. —.]—**An order allowing a demurrer to a pleading is a final order for the purpose of an appeal.—*A-G. OF BRITISH COLUMBIA v. CANADIAN PACIFIC RY. Co.* (1888), 1 B. C. R., pt. 2, 330.—*CAN.*

**146 vii. —.]—***SHAW v. CANADIAN PACIFIC RY. Co.* (1889), 16 S. C. R. 703.—*CAN.*

**PART II. SECT. 2, SUB-SECT. 5.—A.**

**146 i. Judgment on demurrer.]—**On appeal brought from a judgment overruling demurrers to some of the counts of a declaration only, while rehearing was pending upon an order to enter final judgment on the whole case upon the verdict rendered:—*Held*: as the judgment on the demurrers was not a final judgment the appeal must be quashed for want of jurisdiction.—*BANK B.N.A. v. WALKER*, *Cass. Dig.* 2nd ed. 214, 425, 670.—*CAN.*

**146 ii. —.]—***REID v. RAMSAY, Cass. Dig.* 2nd ed. 420.—*CAN.*

**146 iii. —.]—**An order setting aside a demurrer as frivolous & irregular is not a final appealable judgment.—*KANDICK v. MORRISON* (1877), 2 S. C. R. 12.—*CAN.*

**146 iv. —.]—***WESTERN COUNTIES RY. Co. v. WINDSOR & ANNAPOLIS RY. Co.* (1879), *Cout.* 11.—*CAN.*

**146 v. —.]—**Although a judgment may be a decision on a demurrer to



orders shall be treated as interlocutory & not as final appeal (VAUGHAN WILLIAMS, L.J.).—*Re NAVAL, MILITARY & CIVIL SERVICE CO-OPERATIVE SOCIETY OF SOUTH AFRICA, LTD.*, [1903] W. N. 120, C. A.

### 151. — Refusal to sanction reduction of

**151 i.** *Appeal from order for new trial.*—Where a new trial has been ordered upon the ground that the answer given by the jury to one of the questions is insufficient to enable the ct. to dispose of the interest of the parties on the findings of the jury as a whole, no appeal will lie from such order, which is not a final judgment.—*BARRINGTON v. SCOTTISH UNION & NATIONAL INSURANCE CO., ROYAL INSTITUTION FOR ADVANCEMENT OF LEARNING, INTERVENANTS* (1891), 18 S. C. R. 615.—CAN.

**152 ii.** —.]—*ACCIDENT INSURANCE CO. OF NORTH AMERICA v. McLACHLAN* (1891), 18 S. C. R. 627.—CAN.

**152 iii.** —.]—A judgment ordering a new trial is not a final judgment, nor is it appealable.—*CANADIAN PACIFIC RY. CO. v. CORBAN MANUFACTURING CO.* (1893), 22 S. C. R. 132.—CAN.

**152 iv.** —.]—*AINSLIE MINING & RY. CO. v. McDOUGALL* (1908), 40 S. C. R. 270.—CAN.

**152 v.** —.]—*NEWMAN v. BRADSHAW*, [1917] 2 W. W. R. 743.—CAN.

**o.** *Order dismissing motion for judgment.*—An order in the county ct. dismissing an application by plff. for summary judgment is not in its nature final & an appeal does not lie therefrom.—*FISKEN v. STEWART*, 17 C. L. T. Occ. N. 82.—CAN.

**p.** *Order enlarging sine die motion to dismiss.*—An order of the county ct. enlarging sine die until after the happening of a named event, a motion by deft. to dismiss an action for want of prosecution is not in its nature final & is not appealable.—*SLATER v. TRADER*, 17 C. L. T. Occ. N. 83.—CAN.

**q.** *Judgment quashing interim injunction.*—A judgment quashing an interim injunction is not a final judgment from which an appeal will lie.—*STANTON v. CANADA ATLANTIC RY. CO.*, Cass. Dig. 2nd ed., 430.—CAN.

**r.** *Order staying proceedings.*—An order absolutely to stay proceedings in a suit is a final decision, & may be appealed from.—*HANINGTON v. STEWART* (1873), 14 N. B. R. (1 Pug.) 242.—CAN.

**t.** —.]—*MARITIME BANK OF DOMINION OF CANADA v. STEWART* (1891), 20 S. C. R. 105.—CAN.

**a.** *Order of superior court—Upon its own officers.*—An order by a superior ct. exercising its summary jurisdiction over its own immediate officers is a final order from which an appeal will lie to the Supreme Ct. of Canada.—*WILKINS v. GEDDES* (1879), 3 S. C. R. 203.—CAN.

**b.** *Order to draw & strike jury—To appraise land & property appropriated.*—*Re PRYTOU RAILWAY DAMAGERS* (1880), 13 N. S. R. (1 R. & G.) 448.—CAN.

**c.** *Rule to open judgment by default.*—A rule to open judgment by default is not a final judgment & not appealable.—*CUMMINGS v. GLADWIN* (1883), 4 R. & G. 168; Cass. Dig. 245.—CAN.

**d.** *Order setting aside judgment.*—*SCHROEDER v. ROONEY* (1885), 11 A. R. 673.—CAN.

**e.** —.]—*O'DONNELL v. GUINANE* (1897), 28 O. R. 389.—CAN.

**f.** —.]—*BRENNEN (M.) & SONS MANUFACTURING CO. LTD. v. THOMPSON* (1915), 8 O. W. N. 206; 33 O. L. R. 465.—CAN.

**g.** —.]—If a default judgment is signed for an amount beyond what

is justified by any allegations in the statement of claim, deft. is entitled to have it set aside *ex debito justitiae*. In circumstances such as above the order setting aside the judgment is in its nature final, & appealable.—*WAGITT v. LITTLE* (No. 2) (1923), 20 Alta. L. R. 47; [1924] 1 W. W. R. 112.—CAN.

**h.** *Interpleader issue—To try title to property taken under execution.*—An interpleader issue to try the title to property taken under execution on a final judgment in the suit in which it is issued is not an interlocutory order, & is appealable.—*WHITING v. HOVEY* (1885), 12 A. R. 119; 14 S. C. R. 515.—CAN.

**k.** *Order as to cancellation of bond—For security of costs.*—*HATELY v. MERCHANTS DESPATCH CO.* (1886), 12 A. R. 610.—CAN.

**l.** *Order setting aside an order for leave to issue writ out of jurisdiction.*—An order setting aside an order for leave to issue a writ for service out of the jurisdiction is a final order, & no appeal lies therefrom to the Div. Ct.—*FULLER v. YERKA* (1887), 1 B. C. R., pt. 2, 330.—CAN.

**m.** *Order for leave to sign judgment.*—An order for leave to sign judgment is in its nature final & appealable.—*BANK OF MINNESOTA v. PAGE* (1887), 14 A. R. 347.—CAN.

**n.** *Constructive contempt—Appeal from decision of provincial court.*—The decision of a provincial ct. in a case of constructive contempt is not a matter of discretion in which an appeal is prohibited. The Supreme Ct. has jurisdiction to entertain such an appeal from the judgment of the Ct. of Appeal of the province, not only as a final judgment in an action or suit, but also as a final judgment in a matter or other judicial proceeding.—*Re O'BRIEN* (1888), 16 S. C. R. 197.—CAN.

**aa.** *Order striking out jury notice.*—An order made in chambers in a county ct. action, striking out a jury notice, is in its nature an interlocutory order, & not appealable.—*McPHERSON v. WILSON* (1890), 13 P. R. 339.—CAN.

**bb.** *Order of judge in chambers—Writ specially endorsed.*—The order of a judge in chambers that plff. should be at liberty to sign final judgment in an action commenced by a writ of summons specially endorsed, although affirmed on appeal to the Full Ct., is not a final judgment, & no appeal to the Supreme Ct. will lie therefrom.—*RURAL MUNICIPALITY OF MORRIS v. LONDON & CANADIAN LOAN & AGENCY CO., LTD.* (1891), 12 C. L. T. Occ. N. 68.—CAN.

**cc.** —.]—*On appeal from master in chambers.*—An order of a judge in chambers, made upon appeal from an order of the master in chambers, allowing summary judgment to be entered, is an interlocutory order, but an appeal lies from it to a div. ct.—*BANK OF TORONTO v. KELTY* (1896), 17 P. R. 250.—CAN.

**dd.** *Petition to quash seizure—Judgment on appeal.*—A judgment of the Ct. of Q. B. for Lower Canada reversing a judgment of the Superior Ct., which quashed on petition a seizure before judgment, & ordering that the hearing of the petition contesting the seizure should be proceeded with in the Superior Ct. at the same time as the hearing of the main action, is not a final judgment appealable to the Supreme Ct.—*MOLSON v. BARNARD* (1891), 18 S. C. R. 622.—CAN.

*capital.*—*Re ALLSOPP & SONS, LTD.* (1903), 51 W. R. 644; 47 Sol. Jo. 671, C. A.

*Annotations.*—*Mentl. Re Welsbach Incandescent Gas Light Co.*, [1904] 1 Ch. 87; *Re House Property & Investment Co.* (1912), 106 L. T. 949.

**152.** *Appeal from order for new trial.*—*ISAACS & SONS v. SALBSTEIN*, No. 141, ante.

**ee.** *Decision on application to set aside writ of summons served out of jurisdiction.*—*MARTIN v. MOORE* (1891), 18 S. C. R. 634.—CAN.

**ff.** *Order for taxation of bill of costs.*—The ct. has no jurisdiction to entertain an appeal from a decision of the Ct. of Appeal upon appeal from an order for taxation of a solr.'s bill of costs, at the instance of a third party, such decision not being a final judgment.—*McGUGAN v. McGUGAN* (1892), 21 S. C. R. 267.—CAN.

**gg.** *Appeal from referee's report—Refusing set-off to plaintiff's claim.*—A judgment of the Ct. of Appeal affirming that of the Div. Ct. which affirmed the report of the referee refusing a set-off to plff.'s claim is not a final judgment from which an appeal lies to the Supreme Ct. of Canada.—*McDOUGALL v. CAMERON, BICKFORD v. CAMERON* (1892), 21 S. C. R. 379.—CAN.

**hh.** *Proceedings for contempt of court.*—In proceedings for contempt of ct. by attachment until sentence is pronounced, there is no final judgment from which an appeal could be brought.—*ELLIS v. R.* (1893), 22 S. C. R. 7.—CAN.

**kk.** *Order setting aside award & giving leave to apply for further directions.*—An order setting aside an award, & giving leave to apply for further directions is not a final order, & the Div. Ct. has jurisdiction to entertain an appeal from it.—*WOOD v. GOLD* (1894), 3 B. C. R. 281.—CAN.

**ll.** *Judgment on petition for leave to intervene.*—No appeal lies to the Supreme Ct. from the judgment of the Ct. of Q. B. on a petition for leave to intervene in a cause, the proceedings being interlocutory only.—*HAMEL v. HAMEL* (1896), 26 S. C. R. 17.—CAN.

**mm.** —.]—*CONNOLLY v. ARMSTRONG* (1901), 35 S. C. R. 12.—CAN.

**nn.** *Refusal to grant trial by jury.*—A judgment of the Ct. of Q. B. for Lower Canada, affirming a judgment of the Superior Ct., by which deft.'s application to have the issues tried by a jury was refused. Deft. took an appeal to the Supreme Ct. of Canada, whereupon plff. moved to quash:—*Held:* the decision complained of was an interlocutory judgment only, & no appeal could lie.—*DEMERES v. BANK OF MONTREAL* (1897), 27 S. C. R. 197.—CAN.

**oo.** *Variation of judgment—By Court of Review.*—Where the Ct. of Review has varied a judgment, by increasing the damages, the judgment rendered in the ct. of first instance is not thereby confirmed so as to give an appeal direct to the Supreme Ct. of Canada.—*SIMPSON v. PALLISER* (1898), 29 S. C. R. 6.—CAN.

**pp.** *Order giving leave to amend particulars.*—An order of a county ct. judge at the trial of an action giving plff. leave to amend his particulars of claim & providing that deft. should have fifteen days to put in a dispute note to the amended claim, & that, in default of such being put in, judgment might be signed for plff. for the full amount claimed, is a final order or judgment from which an appeal may be taken to the Ct. of Q. B.—*BRENCHLEY v. MCLEOD* (1899), 12 Man. L. R. 647.—CAN.

**qq.** *Dismissal of petition for rescission of commission.*—The judgment of the Ct. of Review affirming a judgment of the Superior Ct. dismissing a



**Sect. 2.—Whether final or interlocutory: Sub-sect. 5, B.; sub-sects. 6, 7 & 8.]**

**B. Admission of Fresh Evidence.**

See R. S. C., Ord. 58, r. 4.

**153. Order on summons by creditor in administration action.]—**Although an order made on a summons by a creditor in an administration action is considered as if interlocutory for the purpose of determining the time within which an appeal must be brought, for other purposes it is a final order, & therefore fresh evidence cannot be given on the appeal without the special leave of the ct.—*Re COMPTON, NORTON v. COMPTON* (1884), 27 Ch. D. 392; 51 L. T. 277; 33 W. R. 160, C. A.

*Annotation:—Reid. Re Chiffertiel, Chiffertiel v. Watson* (1888), 58 L. T. 877.

**154. Order refusing issue of writ of sequestration—For breach of injunction by company.]—**Pltf. appealed from a refusal to issue a writ of sequestration against deft. co. for an alleged breach of an injunction to restrain the infringement of pltf.'s patent. On the appeal coming on for hearing it was proposed to read certain further affidavits which had been filed on behalf of applt. since the order was made in the ct. below. Deft. co. had been duly furnished with copies of such affidavits. Deft. co. objected to the reception of the fresh evidence, as leave had not been obtained for that purpose from the ct., & no special grounds had been shown under R. S. C., Ord. 58, r. 4, the order refusing the writ being, they contended, a final order as to the matter in dispute, & not an interlocutory order:—*Held*: the order appealed from was an interlocutory order within the rule referred to; & therefore applt. had a right to adduce fresh evidence.—*SPENCER v. ANCOATS VALE RUBBER CO., LTD.* (1888), 58 L. T. 363, C. A.

petition for the recusation of a comr. for the expropriation of land, is not a final judgment, & there is no appeal therefrom.—*EUHER v. EWING* (1899), 29 S. C. R. 446.—CAN.

**m. Judgment affirming referee's ruling on evidence.]—**Where a referee, on a reference under Vendor & Purchaser Act to settle the title under a written agreement for a lease, rules that evidence might be given to show what covenants the lease should contain, an appeal does not lie to the Supreme Ct. of Canada from a judgment affirming such ruling, it not being a final judgment.—*CANADIAN PACIFIC RY. CO. v. CITY OF TORONTO* (1900), 20 C. L. R. 269; 30 S. C. R. 337.—CAN.

**n. Judgment affirming dismissal of plea of prescription.]—**A judgment affirming dismissal of a plea of prescription when other pleas remain on the record is not a final judgment from which an appeal lies to the Supreme Ct. of Canada.—*GRIFFITH v. HARWOOD* (1900), 30 S. C. R. 315.—CAN.

**o. Order preventing vexatious actions.]—**The order absolute which may be granted by the High Ct. to protect justices of the peace & others from vexatious actions, is not final, but is appealable.—*R. v. MEEHAN* (1902), 22 C. L. T. 133; 3 O. L. R. 361; 1 O. W. R. 136, 248.—CAN.

**p. Refusal to pay money out of pocket.]—**(1906),

**q. Appeal from order for reference.]—**UNION BANK OF HALIFAX v. DICKIE (1908), 41 S. C. R. 13.—CAN.

**r. Judgment ordering valuation of improvements to property.]—**A judgment ordering a valuation of expenses

incurred & improvements made to a property, is not a final judgment, but is merely directory, & the Ct. of Appeal has no jurisdiction to interfere with it.—*LEROUX v. MCINTOSH* (1913), 11 L. N. S. 444.—CAN.

**t. Appeal from decision of judge—On preliminary objections.]—**The judgment of the Supreme Ct. of Alberta on appeal from the decision of a judge on preliminary objections is not a final judgment from which an appeal lies to the Supreme Ct. of Canada.—*Re EDMONTON PROVINCIAL ELECTION, CROSS v. CARSTAIRS* (1913), 24 W. L. R. 131; 4 W. W. R. 412; 11 D. L. R. 152; 47 S. C. R. 559.—CAN.

**u. Action for an accounting & redemption—Order refusing application for confirmation of clerk's report.]—**Refusal of accounting & redemption.—*BENEFIELD v. KNOX* (1914), 28 W. L. R. 161; 6 W. W. R. 737; 17 D. L. R. 398; 7 Alta. L. R. 346.—CAN.

**v. Order refusing to review costs.]—**An order by which a district judge refuses to review the question of costs as disposed of in a judgment given by him in an interlocutory order, & an appeal therefrom does not lie to the Ct. of Appeal, but to a judge of the Ct. of K. B.—*PETERS v. SANDERSON*, [1921] 2 W. W. R. 634; 14 Sask. L. R. 279.—CAN.

**w. Order dismissing application to add a defendant.]—**An order dismissing pltf.'s application to add as a deft. a person alleged to be jointly or alternatively liable to pltf. in respect of the matters in question, is in its nature interlocutory, & no appeal lies to the Appellate Div. from such an order in the District Ct.—*ROSEKE v. SENERIUS* (1922), 67 D. L. R. 722; [1922] 2

**SUB-SECT. 6.—FOR PURPOSE OF FURTHER PROCEEDINGS.**

**155. Sentence under Church Discipline Act, 1840 (c. 86)—Conditional order of suspension.]—**A suit having been brought against a clerk in the Ct. of Arches, under the above Act, a sentence of suspension for six months was pronounced against him on Mar. 9, 1878, but was made conditional on an affidavit being filed. Afterwards the affidavit was filed, & an unconditional sentence was pronounced on Mar. 23, & served on deft. A fresh suit was instituted in 1880 for fresh offences, & also for contumacious disobedience to the sentence of Mar. 23, 1878. These offences being proved, deft. was sentenced to be deprived of his benefice. A motion for a prohibition having been brought to restrain the Ct. of Arches from enforcing the sentence:—*Held*: the sentence of Mar. 9 was an interlocutory order which did not end the suit, & therefore the ct. was not *functus officio* when it pronounced the unconditional sentence of suspension.—*COMBE v. DE LA BERE* (1882), 22 Ch. D. 316; 47 L. T. 185; 31 W. R. 24; *on appeal*, 22 Ch. D. 336, C. A.

**156. Order for account—In action by mortgagees to enforce securities.]—***GWATKIN v. DOWLING*, [1887] W. N. 208.

**157. Order to refer.]—***NEALE v. GORDON LENNOX (LADY)*, No. 68, *ante*.

**158. —.]—**In an action an order was made at the trial referring partnership dealings & transactions to the official referee, who was to report to the ct., & the further consideration & costs were reserved. Defts. subsequently gave notice of intention to apply for further directions in the action, as to the security for costs from pltf.:—*Held*: the order at the trial referring the matter to the official referee was a final judgment, & what

W. W. R. 977.—CAN.

**d. Order dismissing motion for review of costs.]—**An order of a district judge dismissing a motion for a review of the taxation of costs of an interpleader judge as to the ownership of certain moneys is an interlocutory order, & an appeal therefrom does not lie to the Ct. of Appeal.—*BEAVER LUMBER CO., LTD. v. CAIN*, [1924] 4 D. L. R. 438; 3 W. W. R. 332.—CAN.

**e. Order rescinding order nisi—For sale of property.]—**An order rescinding an order nisi for the sale of property & giving pltf. leave to amend his statement of claim & ordering that a certain person be added as a deft. is an interlocutory order from which an appeal lies only to a judge of the K. B. in chambers.—*J. J. CROWE CO., LTD. v. SEBER & WOODS*, [1925] 1 D. L. R. 722; 1 W. W. R. 76.—CAN.

**f. Order of district court—Directing taking of account.]—**Where in an action in the district ct. for money received by deft. for the use of pltf., deft. counterclaims for an accounting & an order is made which merely directs the taking of accounts between the parties, such an order is an interlocutory order from which an appeal lies only to a judge of the K. B. in chambers.—*COUZENS v. MORRISON*, [1925] 1 D. L. R. 781; 1 W. W. R. 83.—CAN.

**PART II. SECT. 2, SUB-SECT. 6.**

**157 i. Order to refer.]—***MASON v. BABINGTON* (1866), 17 C. P. 149.—CAN.

**g. Judgment in interpleader.]—***FOX v. SYMINGTON* (1886), 13 A. R. 296.—CAN.

would take place in ct. afterwards would be further consideration, & the summons for directions came to an end with trial of the action; under R. S. C., Ord. 30, r. 5, security for costs could not be given on notice subsequently to trial, but in a proper case there was jurisdiction to deal, after judgment, with the question of security for costs before the official referee on summons under R. S. C., Ord. 65, r. 6.—*BROWN v. HAIG*, [1905] 2 Ch. 379; 74 L. J. Ch. 591; 93 L. T. 99; 54 W. R. 26; 49 Sol. Jo. 650.

**Application for extension of time—After action dismissed for want of prosecution.]—See Sub-sect. 7, post.**

#### SUB-SECT. 7.—ORDER DISMISSING ACTION.

**159. Jurisdiction of court to grant injunction to preserve property—Pending appeal.]—**Where a bill has been dismissed & the decree has been enrolled, the ct. has exhausted its jurisdiction in that suit, & will not grant an injunction to preserve the property which was in question in the cause pending an appeal to the House of Lords; & where pltf. is desirous of having the property thus temporarily protected, it is incumbent on him to see that the decree is framed so as to keep alive the jurisdiction pending the appeal.—*GALLOWAY v. LONDON CORPN.* (No. 2) (1865), 3 De G. J. & Sm. 59; 12 L. T. 623; 11 Jur. N. S. 537; 13 W. R. 933; 46 E. R. 560, L. J.J.

*Annotations:—*Reid. Polini v. Gray, Sturla v. Freccia (1879), 12 Ch. D. 438; Swanston v. Twickenham L. B. (1879), 11 Ch. D. 838.

**160. Action dismissed for want of prosecution—Jurisdiction to grant extension of time—For delivery of statement of claim.]—**An order was made under R. S. C., Ord. 29, r. 1, dismissing an action for want of prosecution unless a statement of claim should be delivered within a week. The week having expired & no statement of claim having been delivered:—*Held*: the action was at an end, & there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim.—*WHISTLER v. HANCOCK* (1878), 3 Q. B. D. 83; 47 L. J. Q. B. 152; 37 L. T. 639; 26 W. R. 211.

*Annotations:—*Distd. Welpy v. Buhl (1878), 38 L. T. 115; Burke v. Rooney (1879), 4 C. P. D. 226; Carter v. Stubbs (1880), 6 Q. B. D. 116. *Follid.* Script Phonography Co. v. Gregg (1890), 59 L. J. Ch. 406. *Distd.* Collinson v. Jeffery, [1896] 1 Ch. 644; *Re* Macintosh & Thomas, [1903] 2 Ch. 394. *Reid.* Keymer v. Reddy, [1912] 1 K. B. 215.

**161. S. P. WALLIS v. HEPBURN** (1878), 3 Q. B. D. 84, n.

*Annotations:—*Distd. Burke v. Rooney (1879), 4 C. P. D. 226; Carter v. Stubbs (1880), 6 Q. B. D. 116; *Re* Macintosh & Thomas, [1903] 2 Ch. 394.

**162. ———.]—**An order having been made on May 6, dismissing the action for want of prosecution if the statement of claim were not delivered within fourteen days, on May 19, pltf. took out a summons returnable the next day, the last of the fourteen days, for further time to deliver statement of claim. The summons was, on May 20, adjourned, by the consent of the parties in writing indorsed thereon, till May 21, & on May 21, a master made an order giving seven days

more for delivery of statement of claim:—*Held*: the master had no jurisdiction, the action being at an end on May 20.—*KING v. DAVENPORT* (1879), 4 Q. B. D. 402; 48 L. J. Q. B. 606; 27 W. R. 798.

*Annotations:—*Follid. Script Phonography Co. v. Gregg (1890), 59 L. J. Ch. 406. *Distd.* Collinson v. Jeffery, [1896] 1 Ch. 644; *Re* Macintosh & Thomas, [1903] 2 Ch. 394. *Reid.* Carter v. Stubbs (1880), 29 W. R. 132.

**163. ——— For taking particular step.]—**When an order has been made in chambers dismissing an action unless the next step is taken by pltf. within a specified time, & pltf. does not take that step within the specified time nor appeal against the order, the order takes effect, & the time for taking the step cannot subsequently be extended, the action having become dead, notwithstanding that the order has not been drawn up or served upon pltf. before it became operative.—*SCRIPT PHONOGRAPHY CO., LTD. v. GREGG* (1890), 59 L. J. Ch. 406.

*Annotation:—*Distd. Collinson v. Jeffery, [1896] 1 Ch. 644.

**164. ——— For appeal against order giving time.]—**By the combined operation of R. S. C., Ord. 54, r. 4, & Ord. 57, r. 6, the ct. or a judge has power to enlarge the time limited by an order of a master for doing an act, even after the expiration of the time so limited & the lapse of the four days' time for appealing where the justice of the case requires it. On Mar. 25 a master made an order dismissing an action for want of prosecution unless an affidavit in answer to interrogatories was filed on Mar. 31. The affidavit was not filed on that day; but, on the day following, a summons was taken out "for further time to answer the interrogatories":—*Held*: it was still competent to the ct. or a judge to enlarge the time for moving to set aside or vary the order of Mar. 26.—*BURKE v. ROONEY* (1879), 4 C. P. D. 286; 48 L. J. Q. B. 601; 43 J. P. 750; 27 W. R. 915.

*Follid.* Carter v. Stubbs (1880), 6 Q. B. D. 116; *Metcalfe v. British Tea Assn.* (1881), 46 L. T. 31. *Reid.* *Re* Macintosh, Dixon (1903), 88 L. T. 820; *R. v. Lewis*, [1906] 2 K. B. 307.

**165. ——— For appeal against original order.]—**A judge has jurisdiction under R. S. C., Ord. 57, r. 6, to enlarge the time for appealing against an order dismissing the action for want of prosecution, even after the order has taken effect & the action has therefore become dismissed; & he has also jurisdiction when he has so enlarged the time for appealing to vary or amend the order dismissing the action, & in the exercise of such jurisdiction his discretion is not limited by any fixed or arbitrary rules.—(*CARTER v. STUBBS* (1880), 6 Q. B. D. 116; 50 L. J. Q. B. 161; 43 L. T. 746; 29 W. R. 132, C. A.)

*Annotations:—*Reid. Gilder v. Morrison (1882), 30 W. R. 815; *Re* Manchester Economic Bldg. Soc. (1883), 24 Ch. D. 488; Bradshaw v. Warlow (1886), 32 Ch. D. 403.

**Time for appeal.]—See Sub-sect. 2, A. (i), ante.**  
**For length of notice of appeal.]—See No. 136, ante.**

#### SUB-SECT. 8.—ORDER REMITTING ACTION TO COUNTY COURT.

*See* COUNTY COURTS, Vol. XIII., pp. 486, 487.

#### PART II. SECT. 2, SUB-SECT. 7.

**165 i. Action dismissed for want of prosecution—Jurisdiction to grant extension of time—For appeal against original order.]—***SMITH v. HORTON* (1893), 26 N. S. R. (14 R. & G.) 41.—*CAN.*

**165 ii. ———.]—***CROWN CORUNDUM &*

*MICA CO. v. LOGAN* (1902), 1 O. W. R. 107, 174; 22 C. L. T. 159; 3 O. L. R. 334.—*CAN.*

**165 iii. ———.]—**An order dismissing an action for want of prosecution is a final order.—*GIBSON v. DRENNAN* (1905), 1 W. L. R. 577.—*CAN.*

**g. Action dismissed for non-com-**

*pliance with order of court.]—**PAULMON v. BEAMAN*, 22 C. L. T. 425.—*CAN.*

**h. Order dismissing motion for new trial.]—**An order dismissing a motion for a new trial is interlocutory.—*YOUNG v. HARPER* (1899), 8 N. Z. L. R. 179.—*N.Z.*

*Sect. 2.—Whether final or interlocutory: Sub-sects. 9 & 10. Sect. 3: Sub-sects. 1 & 2.]*

**SUB-SECT. 9.—UNDER BANKRUPTCY ACT, 1914.**

*See Bkpcy. Act, 1914 (c. 59), ss. 1 (1) (g), 125 (2); &, generally, BANKRUPTCY, Vol. IV., pp. 90 et seq.*

**Scottish decree registered in High Court.]—See BANKRUPTCY, Vol. IV., p. 89, No. 810.**

**SUB-SECT. 10.—DECISION OF SPECIAL CASE IN ARBITRATION PROCEEDINGS.**

*Distinguishing characteristics of interlocutory & final judgments & orders, see Sub-sect. 1, ante.*

*See ARBITRATION, Vol. II., p. 459, Nos. 1054 et seq.*

### SECT. 3.—DECLARATORY JUDGMENTS.

**SUB-SECT. 1.—BEFORE CHANCERY PROCEDURE AMENDMENT ACT, 1852.**

**166. Only as incidental to relief given.]—***Semble*: a ct. of equity will not make a declaration of right, except as incidental to relief given.—*ELLIOTSON v. KNOWLES* (1842), 11 L. J. Ch. 399; 6 Jur. 549.

**SUB-SECT. 2.—UNDER CHANCERY PROCEDURE AMENDMENT ACT, 1852, s. 50.**

**167. Consequential relief not asked for.]—***Semble*: the ct. has no authority, under above Act, to determine a mere question of law, that question not being necessary to be decided previously to the decision of the equitable question, but solely for the purpose of making a declaratory decree, not followed by any consequential relief.—*BIRKENHEAD DOCKS TRUSTEES v. LAIRD, ETC.* (1853), 4 De G. M. & G. 732; 23 L. J. Ch. 457; 18 Jur. 883; 2 W. R. 7; 43 E. R. 694, L. J.

*Annotations:—Mentd. London & Blackwall Ry. v. Limehouse District Board of Works* (1856), 3 K. & J. 123; *Fitzgerald v. Champneys* (1861), 2 John. & H. 31; *Furnell v. Wolverhampton New Waterworks Co.* (1861), 10 C. B. N. S. 576.

**168. —.]—**By a marriage settlement real estate was limited to such uses as the husband & wife should appoint, &, in default of appointment, to the use of the trustees during the life of the wife, on trust for her, for her separate use, with remainder to the husband in fee. The husband entered into a contract to sell the property, the purchaser having notice of the provisions of the settlement. The purchase-money was paid to the trustees of the settlement, & a draft conveyance was approved, in the form of an appointment by the husband & wife to the purchaser, but before the conveyance had been executed the husband suddenly died, having, by a will dated before the contract, devised all his real estate to trustees upon trust for his widow for life, & after her death to sell & divide the proceeds as therein directed. The widow, who was one of the exors., brought an action against the purchaser, the other exors., & the devisees in trust under the husband's will, asking the ct. to determine whether she could be compelled to concur in the conveyance to the purchaser, what was the effect of the contract for sale, what would be the devolution of the purchase-money if the contract should be completed, & whether, if the contract was completed by the trustees of the settlement alone, the purchaser would be entitled to compensation out

of the purchase-money in respect of pltf.'s life interest:—*Held*: the statement of claim was not open to demurrer by the purchaser on the ground that he was not interested in all the questions raised, or on the ground that only a declaratory decree was asked for.—*COX v. BARKER, BARKER v. COX* (1876), 3 Ch. D. 359; 35 L. T. 685; 2 Char. Pr. Cas. 265, O. A.

*Annotations:—Refd. Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536. *Mentd. Naylor v. Goodall* (1877), 47 L. J. Ch. 53.

**169. Consequential relief available.]—**A lease was granted by A. to two partners, the covenants being only joint at law. Bill filed by the representative of one of the lessees deceased, against the lessor, alleging that the lessor claimed to have a right, under the covenants, against pltf., if a breach should arise, & praying merely a declaration that deft. had no right. A demurrer to this bill was allowed, notwithstanding above sect.

The meaning of above sect. is only to remove the objection that a pltf., who might have consequential relief, prays merely a declaration of his right.

It did not mean to entitle a person to have a declaration as to a claim which may be made by another, under circumstances which may or may not happen.—*JACKSON v. TURNLEY* (1853), 1 Drew. 617; 1 Eq. Rep. 328; 22 L. J. Ch. 949; 21 L. T. O. S. 216; 17 Jur. 643; 1 W. R. 461; 61 E. R. 587.

*Annotations:—Folld. Rooke v. Kensington* (1856), 2 K. & J. 753. *Refd. Kathama Natchiar v. Dora Singa Tever* (1875), L. R. 2 Ind. App. 169; *Barracough v. Brown*, [1897] A. C. 615.

**170. —.]—**There is no jurisdiction in the Ct. of Ch. under which a pltf. may file a bill alleging that he has a good legal title to property of which he is in possession without any interruption of his enjoyment, but that deft. sets up an equitable claim which ought not to be binding on pltf., because he acquired his legal title without notice of it, &, praying no other relief, may obtain in such a suit a declaration that he had not notice of such equitable claim, & that it is not binding upon him.

Above sect. empowers the Ct. of Ch. "to make binding declarations of right without giving consequential relief" only in cases in which there is some equitable relief which might be granted if pltf. chose to ask for it.—*ROOKE v. KENSINGTON (LORD)* (1856), 2 K. & J. 753; 25 L. J. Ch. 795; 28 L. T. O. S. 62; 4 W. R. 829; 69 E. R. 986.

*Annotations:—Distd. Cox v. Barker, Barker v. Cox* (1876), 3 Ch. D. 359. *Consd. Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536. *Refd. Kathama Natchiar v. Dora Singa Tever* (1875), L. R. 2 Ind. App. 169; *Barracough v. Brown*, [1897] A. C. 615; *Dyson v. A.-G.*, [1911] 1 K. B. 410. *Mentd. Sells v. Sells* (1860), 29 L. J. Ch. 500; *Jenner v. Jenner* (1866), L. R. 1 Eq. 361; *Clark v. Girdwood* (1877), 7 Ch. D. 9; *Crompton v. Jarratt* (1885), 30 Ch. D. 298; *Danby v. Coutts* (1885), 29 Ch. D. 500; *Early v. Rathbone* (1888), 57 L. J. Ch. 652; *Williams v. Pickney* (1897), 67 L. J. Ch. 34.

**171. As to future rights.—Before happening of material event.]—***JACKSON v. TURNLEY*, No. 169, *ante*.

**172. —.]—**The ct. refused to make a declaratory decree on a special case, during the lifetime of the tenant for life, with regard to the interests of parties entitled in reversion.—*GARLICK v. LAWSON* (1853), 10 Hare, App. I. xiv.; 68 E. R. 110.

*Annotations:—Apprvd. Langdale v. Briggs* (1856), 8 De G. M. & G. 391. *Consd. Kathama Natchiar v. Dora Singa Tever* (1875), L. R. 2 Ind. App. 169; *Bright v. Tyndall* (1895), D. 189. *Refd. Fryse v. Fryse* (1872), L. R. 15 Eq. 86.

**173. —.]—**Case in which the ct. refused to make a declaration as to the interest of

parties who might be entitled in reversion.—**GREENWOOD v. SUTHERLAND** (1853), 10 Hare, App. I. xii.; 68 E. R. 1120.

**Annotations:—***Apprvd.* Langdale v. Briggs (1856), 8 De G. M. & G. 391. *Refd.* Pryse v. Pryse (1872), L. R. 15 Eq. 86; Kathama Natchiar v. Dora Singa Tever (1875), L. R. 2 Ind. App. 169; Bright v. Tyndall (1876), 4 Ch. D. 189.

**174.** ———.]—Where on the construction of a will the ct. held that certain persons were entitled for life, & at their deaths their respective then surviving children were entitled to their shares:—*Held:* it was a case wherein the ct. would, under above sect., declare the future rights.—**FLETCHER v. ROGERS** (1853), 10 Hare, App. I. xiii.; 20 L. T. O. S. 218; 1 W. R. 125; 68 E. R. 1120.

**175.** ———.]—The ct. will not make declarations of future rights in events which have not happened, & therefore, where a testator having by his will given copyholds & leaseholds to trustees upon trusts to correspond with the uses of the devised freeholds, & by a codicil limited the freeholds differently after the death of the first tenant for life, but was silent as to copyholds or leaseholds:—*Held:* during the continuance of the life estate the ct. would not determine how far the ulterior limitations of the copyholds & leaseholds were affected by the codicil.—**LANGDALE (LADY) v. BRIGGS** (1856), 8 De G. M. & G. 391; 26 L. J. Ch. 27; 28 L. T. O. S. 73; 2 Jur. N. S. 982; 4 W. R. 703; 44 E. R. 441, L. J.

**Annotations:—***Consd.* Juttendromohun Tagore v. Ganendromohun Tagore, Ganendromohun Tagore v. Juttendromohun Tagore (1872), L. R. Ind. App. Supp. 48; Kathama Natchiar v. Dora Singa Tever (1875), L. R. 2 Ind. App. 169. *Apld.* Hampton v. Holman (1877), 5 Ch. D. 183. *Consd.* Ram Lal Mookerjee v. Secretary of State for India (1881), L. R. 8 Ind. App. 46. *Refd.* Carroll v. Graham (1865), 11 Jur. N. S. 1012; Curtis v. Sheffield (1882), 30 W. L. 581; Re Dugdale, Dugdale v. Dugdale (1888), 38 Ch. D. 176. *Mentd.* Hopburn v. Skirving (1859), 32 L. T. O. S. 26; Taylor v. Sparrow (1863), 4 Giff. 703; Castle v. Fox (1871), L. R. 11 Eq. 542; Bothamley v. Sherson (1875), L. R. 20 Eq. 304; Re Bridger, Brompton Hospital v. Lewis (1893), 63 L. J. Ch. 186; Leslie v. Rothos, [1894] 2 Ch. 499; Re Hayes, Turbitt v. Hayes, [1900] 2 Ch. 332; Re Maddock, Llewellyn v. Washington, [1902] 2 Ch. 220; Mason v. Ogden (1902), 87 L. T. 622; Re Greenwood, Goodhart v. Woodhead, [1903] 1 Ch. 749; Re Horton, Lloyd v. Hatchett, [1920] 2 Ch. 1.

**176.** ———.]—A suit was instituted for a declaration of right as to the interests of tenants for life in the share of a deceased co-tenant for life. The decree made at the hearing after declaring the immediate rights of the tenants for life proceeded to declare that there were cross-remainders between them. The Lords Justices, although the usual time for re-hearing had elapsed, ordered a re-hearing of the case, at the instance of children of a tenant for life who had recently died, those children being prejudiced by the declaration as to cross-remainders, & the declaration being unnecessary for the determination of the question originally submitted to the ct.—**WALMSLEY v. FOXHALL** (1863), 1 De G. J. & Sm. 451; 2 New Rep. 252; 32 L. J. Ch. 672; 8 L. T. 559; 11 W. R. 792; 46 E. R. 179, L. J.

**Annotations:—***Distd.* Curtis v. Sheffield (1882), 21 Ch. D. 1. *Mentd.* Fussell v. Dowding (1884), 27 Ch. D. 237.

**177.** ———.]—Testator directed that on his daughter attaining twenty-one his trustees should pay the income of his freeholds & copyholds to her during her life; “& should she live to become marriageable, & die leaving a child or children behind her born in lawful wedlock,” then that his trustees should apply the income to the support & maintenance of “such child,” if only one, or, if more than one, equally among “such children during their lives, & in like manner to

their children & children's children, each family having the father or mother's share; or should his said daughter die previous to being married, or after marriage leaving no child or children behind her born in lawful wedlock, or, if leaving children as afore-described, upon them or their families becoming extinct,” then over.

Testator's daughter survived him & attained twenty-one, she being his sole heiress-at-law & a spinster.

The following questions then arose: First, whether the gift over after her life estate was not void for remoteness; secondly, if not, whether she was not entitled to an immediate estate tail in possession; & thirdly, whether, admitting that she took an estate for life, & that her children, if any, took life estates in remainder, she did not take an estate tail in remainder expectant on those life estates:—*Held:* the gift over after the daughter's life estate was not void for remoteness, she did not take an estate tail in possession, but the third question could not be decided at present, as it related to future rights.—**HAMPTON v. HOLMAN** (1877), 5 Ch. D. 183; 46 L. J. Ch. 248; 36 L. T. 287; 25 W. R. 459.

**Annotations:—***Mentd.* Re Harvey, Peek v. Savory (1888), 39 Ch. D. 289; Re Rising, Rising v. Rising, [1904] 1 Ch. 533; Re Mortimer, Gray v. Gray, [1905] 3 Ch. 502.

**178.** ———.]—**Happening of event uncertain.]**

—(1) Upon a special case to obtain a decision whether persons not *in esse* would be entitled, under certain circumstances which might never rise, to a share in property, the ct. declined to decide the question, being of opinion that it would be injurious to the parties to have that decision until the events should happen which would give rise to the question.

(2) Where the interests of the parties to a special case are not of such a nature as to give the ct. jurisdiction to decide the questions, the ct. will not feel itself bound to decide upon a fictitious interest created for the express purpose of obtaining a decision.—**BRIGHT v. TYNDALL** (1876), 4 Ch. D. 189; 25 W. R. 109.

**179.** ———.]—C., who carried on the business of a flax spinner at the S. mills in partnership with R., by a settlement made in contemplation of his marriage, after reciting that he was indebted to his intended wife in a sum of £20,000, covenanted to pay the sum of £20,000 to the trustees of the settlement, upon trust that as soon as he should become owner in fee simple of the S. mills estate, which he had agreed to purchase, they should advance the sum of £20,000 to him on the security of the same estate; & it was declared that the trustees should stand possessed of the sum of £20,000, & the securities for the same upon trust to pay the income to his intended wife for life for her separate use, & after her death to C. during his life or until he should become bkpt., with remainder in trust for the children of the marriage, & in default of children, for his wife absolutely. The recital that C. was indebted to his intended wife was entirely false, & C. was at the time of the marriage in insolvent circumstances; but the wife had no knowledge of the insolvency of her husband, & understood nothing about the recitals or the arrangement as to the £20,000, except that that sum was to be settled. C. subsequently purchased the S. mills estate, & mortgaged it to the trustees of the settlement for securing £20,000, but no money actually passed between the parties. C., & also his firm, afterwards became bkpt., & a bill was filed by the trustee in C.'s bkpcy. against C. & his wife, the trustees of the settlement, & the trustee in the bkpcy. of the firm, praying that the

**Sect. 3.—Declaratory judgments: Sub-sects. 2 &**

settlement & the mtge. might be set aside as fraudulent against the creditors; & that the rights of all parties might be declared:—**Held**: it would be premature to decide any question as to the future life interest of C. contingent on his wife's death in his lifetime.

The objection to the declaration is this, that it is a declaration as to future rights, future contingencies, & remote interests of the husband. The rule of the Ct. of Ch. was not to entertain a suit merely for that purpose. There are some instances, in which, as incidental to the relief given, it has become necessary to determine such rights, . . . but no suit is entertained simply for deciding future contingent rights (JESSEL, M.R.).—KEVAN v. CRAWFORD (1877), 6 Ch. D. 29; 46 L. J. Ch. 729; 37 L. T. 322; 26 W. R. 49, C. A.

**Annotations**:—**Mentd.** Mackintosh v. Pogose, [1895] 1 Ch. 505; *Re Itels, Ex p. Clough*, [1904] 2 K. B. 769.

**180. — Discretion of court in special circumstances.**—It is not the practice of the ct., & was not the practice of the Ct. of Ch., to decide as to future rights, but to wait until the event has happened, unless a present right depends upon the decisions, or there are some other special circumstances to satisfy the ct. that it is desirable at once to decide on the future rights. But where all the parties who in any event will be entitled to the property are of age & are ready to argue the case, the reason of the rule departs, & it becomes a bare technicality. The reason of the rule is this, that the ct. will not decide on future rights, because until the event happens it does not know who may be interested in arguing the question, & therefore may be shutting out parties who, when the event happens, may be entitled to succeed (JESSEL, M.R.).—CURTIS v. SHEFFIELD (1882), 21 Ch. D. 1; 51 L. J. Ch. 535; 46 L. T. 177; 30 W. R. 581, C. A.

**Annotations**:—**Apld.** *Re Staples, Owen v. Owen*, [1916] 1 Ch. 322. **Refd.** *Re Freme's Contract*, [1895] 2 Ch. 256. **Mentd.** *Pearoth v. Marriott* (1882), 22 Ch. D. 182; *— v. Dowding* (1884), 27 Ch. D. 237.

**181. How obtained—Whether made on petition.**—The ct. makes no declaration of right upon a petition, but prefaces the order with a statement of opinion.—SHARSHAW v. GIBBS (1854), as reported in 18 Jur. 330.

**182. — Whether on fictitious interest.**—BRIGHT v. TYNDALL, No. 178, *ante*.

**SUB-SECT. 3.—UNDER R. S. C., ORD. 25, R. 5.**

**A. In General.**

**183. Jurisdiction to make—Against Attorney-General—As representing Crown.**—BURGHES v. A.-G., No. 197, *post*.

**184. — — — — —**—(1) A declaratory judgment can, under above rule, be made against the A.-G., as deft. representing the Crown, & a pltf. is not bound in such a case to proceed by petition of right.

(2) I desire to guard myself against the supposition that I hold that a person who expects to be made deft., & who prefers to be pltf., can, as a matter of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The ct. may well say: "Wait until you are attacked & then raise your defence," & may dismiss the action with costs (COZENS-HARDY, M.R.).—DYSON v. A.-G., [1911] 1 K. B. 410; 80 L. J. K. B. 531; 103 L. T. 707; 27 T. L. R. 143; 55 Sol. Jo. 168,

C. A.; *subsequent proceedings*, [1912] 1 Ch. 158, C. A.

**Annotations**:—**As to** (1) **Fold.** *Dyson v. A.-G.*, [1912] 1 Ch. 158. **Consd.** *Electrical Development Co. of Ontario v. A.-G. for Ontario & Hydro-Electric Power Commission of Ontario*, [1919] A. C. 687; *Esquimalt & Nanaimo Ry. v. Wilson*, [1920] A. C. 358. **Expld.** *Bombay & Persia Steam Navigation Co. v. MacLay*, [1920] 3 K. B. 402. **Refd.** *Burghes v. A.-G.*, [1912] 1 Ch. 173; *Thornhill v. Weeks*, [1913] 1 Ch. 438; *Eastern Trust Co. v. McKenzie, Mann*, [1915] A. C. 750; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536; *Gresham Life Assce. Soc. v. A.-G.*, [1916] 1 Ch. 228; *China Mutual Steam Navigation Co. v. MacLay* (1917), 34 T. L. R. 81; *Hosier v. Derby*, [1918] 2 K. B. 671; *Markwald v. A.-G.*, [1920] 1 Ch. 348; *Smeeton v. A.-G.*, [1920] 1 Ch. 85. **As to** (2) **Consd.** *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536; *Re Clay, Clay v. Booth, Re Deed of Indemnity*, [1919] 1 Ch. 66. **Refd.** *Burghes v. A.-G.*, [1912] 1 Ch. 173; *In the Estate of Hall, Hall v. Knight & Baxter*, [1914] P. 1; *London Corp. v. Horner* (1914), 111 T. 512; *Hosier v. Derby*, [1918] 2 K. B. 671. **Generally**, **Mentd.** *West v. Gwynne* (1911), 104 L. T. 759; *Re Williams, Ex p. Official Receiver*, [1913] 2 K. B. 88.

**185. — — — — —**—On Aug. 9, 1910, pltf., who was the owner of land in Yorkshire, received a notice, dated Aug. 4, signed by the secretary to the Comrs. of Inland Revenue, requiring him to make returns of his property upon forms which accompanied the notice & deliver them "within thirty days from this date to the appointed officer H.B." The notice also pointed out that failure to make a return within the specified time would entail a penalty not exceeding £50. With the notice were sent six copies of Form 4, issued under Finance (1909-1910) Act, 1910 (c. 8), five of which related to premises belonging to pltf. & let to tenants, & one to property owned & occupied by him. The forms asked for "Particulars required by the Comrs. which must be furnished so far as it is in the power of the person making the return to give them. . . (i) If the person making the return is also the occupier state the annual value; that is the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair":—**Held**: the direction to make the return to H.B. instead of to the Comrs. did not invalidate the notice; requisition (i) was unauthorised & therefore, the whole of the Form 4 addressed to pltf. as owner & occupier was invalid; & inasmuch as the statutory period of thirty days provided by Finance (1909-1910) Act, 1910 (c. 8), s. 26 (2), as the period within which to make his return, had not been allowed to pltf., he was under no obligation to comply with the requisitions in any of the forms, & the ct. had jurisdiction to make a declaratory order against the A.-G. as representing the Crown.—DYSON v. A.-G., [1912] 1 Ch. 158; 81 L. J. K. B. 217; 105 L. T. 753; *sub nom.* DYSON v. A.-G., BURGHES v. A.-G., 28 T. L. R. 72, C. A.

**Annotations**:—**Consd.** *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536. **Expld.** *Bombay & Persia Steam Navigation Co. v. MacLay*, [1920] 3 K. B. 402. **Refd.** *Galloway v. Hallé Concerts Soc.*, [1915] 2 Ch. 233; *Gresham Life Assce. Soc. v. A.-G.*, [1916] 1 Ch. 228; *Hosier v. Derby*, [1918] 2 K. B. 671; *Smeeton v. A.-G.*, [1920] 1 Ch. 85; *Simmonds v. Newport Abercrom Black Vein Steam Coal Co.*, [1921] 1 K. B. 616. **Mentd.** *A.-G. v. Foran*, [1916] 2 A. C. 128; *Whitney v. I. R. Comrs.* (1925), 42 T. L. R. 58.

**186. — Against servant of Crown.**—HOSIER BROTHERS v. DERBY (EARL), No. 243, *post*.

**187. — In private capacity.**—By a direction under Reg. 39 BBB of the Defence of the Realm Regulations lawfully given by deft., who at all material times was His Majesty's Shipping Controller, a vessel belonging to pltf. was diverted from her voyage. The direction was subsequently cancelled, but pltf. lost the use of their vessel for some days & incurred certain expenses in consequence of the direction. Pltf. thereupon sued deft. claiming a declaration that they were entitled



to compensation for the loss & expenses so incurred by them, & that the amount of compensation should be referred for assessment to the Admiralty Transport Arbitration Board or to such other referee or tribunal as the ct. might direct. No statute or regulation imposed upon deft. any financial responsibility in the matter:—*Held*: plffs., by suing deft. in the only way open to them, namely, as an individual, could not obtain a declaration of their rights to compensation against the Treasury, & therefore the action must be dismissed as misconceived.—*BOMBAY & PERSIA STEAM NAVIGATION CO. v. MACLAY*, [1920] 3 K. B. 402; 90 L. J. K. B. 152; 124 L. T. 602; 15 Asp. M. L. C. 283.

*Annotations*:—*Expld.* Rowland v. Air Council (No. 2) (1923), 87 Sol. Jo. 385. *Refd.* Marshal Shipping Co. v. Board of Trade, [1923] 2 K. B. 343.

**188.** — *In absence of party to be bound.*—On a claim in an action, to which the co. was not a party, made by the principals against the sub-agent to recover commission received by him, it appeared that by the agreement between the co. & the sub-agent further sums by way of commission on the transaction would become payable in the future to the sub-agent by the co.:—*Held*: the ct. must decline to make any further declaration of right with regard to such sums than that the sub-agent would become indebted in respect of them to the principals when & as he should receive the same.

The [co.] is not a party to this action. If [defts.] require any declaration of right against that society, it would seem that such a right must be established in an action to which the [co.] is a party (*MATHEW, L.J.*).—*POWELL & THOMAS v. JONES (EVAN) & CO.*, [1905] 1 K. B. 11; 74 L. J. K. B. 115; 92 L. T. 430; 53 W. R. 277; 21 T. L. R. 55; 10 Com. Cas. 36, C. A.

*Annotation*:—*Mentd.* Bath v. Standard Land Co., [1911] 1 Ch. 618.

Joiuder of parties, generally, *see* PRACTICE.

**189.** — *As to past right—Invalidity of expired patent.*—An action claiming merely a declaration of invalidity of letters patent already expired, where no legal right of pltf. has been infringed, is not maintainable.—*NORTH EASTERN MARINE ENGINEERING CO. v. LEEDS FORGE CO.*, [1906] 2 Ch. 498; 75 L. J. Ch. 720; 95 L. T. 178; 22 T. L. R. 724; 50 Sol. Jo. 650, C. A.

*Annotation*:—*Refd.* Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536.

*See, generally*, PATENTS.

**190.** — *Extent.*—In 1917 pltf. was engaged as an uncertificated assistant teacher by the managers of a non-provided school under an agreement whereby she was to be paid a salary in accordance with the scale then in force in the district. In Dec. 1921, defts., who were the local education authority, directed the managers to give their teachers one calendar month's notice to terminate their agreements & to offer to reappoint them at reduced salaries. The managers refused to give the notices directed & thereupon defts. gave pltf. notice to terminate her agreement with the managers. In an action by pltf. for a declaration that the notice was invalid & inoperative:—*Held*: defts. having by their action made themselves parties to the contract between pltf. & the managers, pltf. had a right to come to the ct. for relief & was entitled to the declaration claimed.

In my opinion, under Ord. XXV., r. 5, the power of the ct. to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by

its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide (*LORD STERNDALÉ, M.R.*).—*HANSON v. RADCLIFFE URBAN DISTRICT COUNCIL*, [1922] 2 Ch. 490; 91 L. J. Ch. 829; 127 L. T. 509; 86 J. P. 144; 38 T. L. R. 667; 66 Sol. Jo. 556; 20 L. G. R. 541, C. A.

*Annotations*:—*Mentd.* Sadler v. Sheffield Corpn., Dyson v. Sheffield Corpn., [1924] 1 Ch. 483; *Short v. Poole Corpn.* (1925), 42 T. L. R. 107.

**191.** *Exercise of discretion.*—*AUSTEN v. COLLINS*, No. 209, *post*.

**192.** — *—*—*HANSON v. RADCLIFFE URBAN DISTRICT COUNCIL*, No. 190, *ante*.

**193.** — *Dependent on particular facts.*—The effect of above rule is to give the ct. power to make declarations regarding future rights, but whether the ct. will exercise the discretion depends on the circumstances of the particular case.—*Re BERENS, BERENS v. BERENS*, [1888] W. N. 95.

**194.** — *—*—*DYSON v. A.-G.*, No. 185, *ante*.

**195.** — *—*—The owners of certain land of about 186 acres in extent proposed to lay it out as building land, & to erect a large number of houses thereon. They had a plan prepared showing sewers of different dimensions from 9 inches to 18 inches in diameter, & claimed that as owners of the premises they were entitled to connect their sewers with the sewer of the G. District Council, which was only 12 inches in diameter. The G. District Council said that the construction of such a series of sewers was outside Public Health Act, 1875 (c. 55), s. 22, & that, if the owners insisted on arbitration the G. District Council would raise this objection at every stage. A writ was then issued asking for a declaration that plffs. were entitled to connect their proposed sewers with the sewer of defts., & for an injunction to restrain defts. from obstructing the connection. The case came on upon a notice for trial without witnesses, but without any consent, & by agreement it was treated as a motion for judgment. The claim to an injunction was not argued:—*Held*: although there is jurisdiction under above rule to make a declaratory order, the jurisdiction is one to be exercised with extreme caution; as no portion of the estate had been built on & no drains or sewers constructed, it was inexpedient to make a declaration that plffs. had a legal right to connect their sewers when made with that of defts.—*FABER v. GOSWORTH URBAN DISTRICT COUNCIL* (1903), 88 L. T. 549; 67 J. P. 197; 19 T. L. R. 435; 1 L. G. R. 579.

*Annotation*:—*Refd.* Russian Commercial & Industrial Bank v. British Bank for Foreign Trade, [1921] 2 A. C. 438.

**196.** — *Matter of convenience—Though declaration unnecessary.*—An action was brought by plffs. [a local authority] in the county ct. against deft. as the owner of certain premises, for (a) a declaration that they were entitled to a charge on the premises under Private Street Works Act, 1892 (c. 57), s. 13, for apportioned expenses incurred under Private Street Works Act, 1892 (c. 57), s. 6, in private street works; (b) an inquiry as to incumbrances, if any, on the premises; (c) an order for sale of the premises; (d) a receiver; (e) further or other relief. The county ct. judge dismissed the action with costs, on the ground that the proceedings were quite unnecessary since the passing of Private Street Works Act, 1892 (c. 57), s. 13:—*Held*: on appeal, the order asked for, though not necessary, was convenient, & plffs. were entitled to it.—*WEST HAM CORPN. v. SHARP*, [1907] 1 K. B. 445; 76 L. J. K. B. 307; 96 L. T. 230; 71 J. P. 100; 5 L. G. R. 694, D. C.



**Sect. 3.—Declaratory judgments: Sub-sect. 3, A., B.**

**197.** —[.]—The ct. has jurisdiction under above rule to make a binding declaration of right against the A.-G. as representing the Crown, but the jurisdiction is discretionary & ought to be exercised with great care & with due regard to all the circumstances of the case.—**BURGHES v. A.-G.**, [1911] 2 Ch. 139; 80 L. J. Ch. 506; 105 L. T. 193; 27 T. L. R. 433; 55 Sol. Jo. 520; *affd.*, [1912] 1 Ch. 173, C. A.

*Annotations*.—**Consd. Guaranty Trust Co. of New York v. Hannay**, [1915] 2 K. B. 536; **Smeeton v. A.-G.**, [1920] 1 Ch. 85. **Refd. Thornhill v. Weeks**, [1913] 1 Ch. 438; **Eastern Trust Co. v. McKenzie, Mann**, [1915] A. C. 750; **Gresham Life Assoc. Soc. v. A.-G.**, [1916] 1 Ch. 228; **Markwald v. A.-G.**, [1920] 1 Ch. 348; **R. v. Cheshire County Court Judge & United Soc. of Boller-makers, Ex p. Malone**, [1921] 2 K. B. 694. **Mentd. A.-G. v. Foran**, [1916] 2 A. C. 128.

**198.** — **Matter not of public interest.**—[Pltf. was served with a notice under Finance Act, 1915 (c. 89), Part III., requiring him to make a return for the purposes of excess profits duty in respect of his trade or business. As an advising engineer he was engaged in a profession dependent mainly upon his personal qualifications but, since July, 1915, in addition to his private practice, he had negotiated Government contracts on behalf of a co. making munitions of war & had advised the co. generally as an engineer. For this he received a fixed retaining fee per week & also a fixed payment for each shell & fuse of a certain description supplied by the co. Pltf. claimed to be within the exception (c) to sect. 39 of the Act, exempting him from excess profits duty, denied his liability to furnish a return or supply information to the comrs., & commenced this action for a declaratory judgment to that effect.

The ct. in the exercise of its discretion, & without expressing any opinion upon the question whether pltf. was carrying on a trade or business which was subject to Finance Act, 1915 (c. 89), Part III., refused to make any declaratory order, being of opinion (a) that the elements of invalidity & public interest present in *Dyson v. A.-G.*, No. 185, *ante*, & *Burghes v. A.-G.*, No. 197, *ante*, were absent from this case, in which the real question was whether pltf.'s business was within sect. 39 or not, & (b) that it was not desirable that cases of this character, in which the right of appeal prescribed by the Act was available to the pltf. if dissatisfied with his assessment, should be withdrawn from the ct. constituted for the purpose of dealing with Revenue cases.

The discretion [to grant declarations] ought to be exercised with great care. . . . This is not a case in which the decision would govern great numbers of persons (**PETERSON, J.**).—**SMEETON v. A.-G.**, [1920] 1 Ch. 85; 88 L. J. Ch. 535; 122 L. T. 23; 35 T. L. R. 706; 64 Sol. Jo. 20.

**199.** — **Causes in Commercial List.**—[An English bank obtained a loan from a Russian bank on the security of certain bonds. A question having arisen upon the construction of the contract whether the loan was repayable in roubles or in sterling, the borrowers commenced an action against the lenders in the K. B. Div., which was transferred to the Commercial Ct., claiming a declaration that they were entitled to the possession of the bonds upon payment of the amount of the loan in roubles, & an injunction restraining the lenders from parting with the bonds save by delivery of the same to the borrowers against such payment.—**Held**: the loan was repayable in roubles, & notwithstanding that the action, being an action for relief which was

incidental to a redemption action, was brought in the wrong ct., there was in the circumstances no ground for interfering with the discretion of the Ct. of Appeal in making the declaration or in allowing the amendment.

For many years it has been accepted practice in cases in the Commercial List to hear & determine claims for a declaration of rights, when a real & not a fictitious or academic question is involved & is in being between two parties, in order that they may know what business course to take without having to run the risk of acting & finding themselves liable in damages, when at last the matter is brought before the ct. (**LORD SUMNER**).—**RUSSIAN COMMERCIAL & INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LTD.**, [1921] 2 A. C. 438; 90 L. J. K. B. 1089; 126 L. T. 35; 37 T. L. R. 919; 65 Sol. Jo. 733, H. L.; *subsequent proceedings, sub nom. BRITISH BANK FOR FOREIGN TRADE, LTD. v. RUSSIAN COMMERCIAL & INDUSTRIAL BANK*, 38 T. L. R. 65.

*Annotations*.—**Refd. Prosperity v. Lloyds Bank** (1923), 39 T. L. R. 372. **Mentd. Re Chesterman's Trusts, Mott v. Browning**, [1923] 2 Ch. 466; **Anderson v. Equitable Life Assoc. Soc. of the United States** (1925), 42 T. L. R. 123.

**200.** — **No claim asserted against party seeking declaration.**—[**DYSON v. A.-G.**, No. 185, *ante*.

**201.** — [.]—Testator by his will appointed his wife & B. exors. & trustees thereof. The wife predeceased testator. B. was desirous of renouncing probate, but upon being pressed by the beneficiaries he consented to prove the will upon their executing a deed of indemnity. Proceedings were subsequently taken by two of the beneficiaries to administer the estate. In these proceedings two orders were made against B., & he was ordered to pay the costs. In the letter enclosing a cheque for the costs under the first order he stated that he reserved his rights under the deed of indemnity. The beneficiaries then presented a petition in the Palatine Ct. under R. S. C., Ord. LIVA, which is adopted & acted upon as a rule of the Palatine Ct., & Ord. XXIV., r. 5, of the Palatine Rules, which corresponds with R. S. C., Ord. XXV., r. 5, for the construction of the deed of indemnity & for a declaration that B. was not entitled to repayment of the costs ordered to be paid by him. The Vice-Chancellor held that he had jurisdiction under the orders to decide the question, & made the declaratory order asked. On appeal:—**Held**: as B. had never made a claim that he was entitled to recover or be repaid either of the two sets of costs, but had merely stated that he reserved his rights under the deed, whatever they might be, the Vice-Chancellor had no jurisdiction to make the declaratory order against him, & the order must therefore be discharged.—**Re CLAY, CLAY v. BOOTH, Re A DEED OF INDEMNITY**, [1919] 1 Ch. 66; 88 L. J. Ch. 40; 119 L. T. 754; 63 Sol. Jo. 23, C. A.

**202.** — **Mere academic question.**—[**Resps.**, who owned a motor lorry, took out a licence & paid a duty of £33 under par. 6 of the second Sched. to Finance Act, 1920 (c. 18). That Sched. as provided by sect. 13 (1) of the Act, prescribes the duties on mechanically propelled vehicles, par. 3 of the Sched. dealing with hackney carriages, & par. 6 dealing with "any vehicles other than those charged with duty under the foregoing provisions of this Sched."

**Resps.** used the lorry for passengers as well as for goods, & were summoned by applt. under Roads Act, 1920 (c. 72), s. 8 (3), for using it for a purpose other than that for which the licence had been taken out, it being alleged that they had

used it as a hackney carriage, for which a higher duty was chargeable. The justices dismissed the summons on the ground that the vehicle was not a hackney carriage within par. 3 of the Sched. On a case stated it was admitted for applt. that *R. v. Wood*, [1922] 1 K. B. 674, showed that resps. could not be convicted of an offence against Roads Act, 1920 (c. 72), s. 8 (3), as the licence had not, in the words of sect. 8 (3) "been taken out as for a vehicle to be used solely for a certain purpose." Both parties, however, desired the ct. to decide whether the vehicle in view of its user, was a hackney carriage within Roads Act, 1920 (c. 72):—*Held*: the ct. would not decide an academical question, as their decision would be merely *obiter*, since the appeal must, in any event, be dismissed.—*TINDALL v. WRIGHT* (1922), 127 L. T. 149; 86 J. P. 108; 38 T. L. R. 521; 66 Sol. Jo. 524; 27 Cox, C. C. 212, D. C.

#### B. As to Future Rights.

**203. General rule.]—***Re BERENS, BERENS v. BERENS*, No. 193, *ante*.

**204. —.]—**Above rule, while not countenancing applications for declarations "in the air," yet does seem to sanction the granting of a declaration as to the future in cases where it is definite & useful. But it is not the practice to grant it if it is embarrassing or useless for any good purpose, & I think that is the case here, especially as the extent of the obligation of the county council may vary very considerably at different dates & under different circumstances (*JELF, J.*).—*A.-G. v. SCOTT*, [1905] 2 K. B. 160; 74 L. J. K. B. 803; 93 L. T. 249; 68 J. P. 502; 20 T. L. R. 630; 48 Sol. Jo. 623; 2 L. G. R. 1113; *affd.*, [1905] 2 K. B. 170, C. A.

*Annotations*:—*Mentd.* *High Wycombe R. D. C. v. Palmer* (1905), 69 J. P. 167; *Chichester Corp. v. Foster*, [1906] 1 K. B. 167; *A.-G. v. Sharpness New Docks & Gloucester & Birmingham Navigation Co.*, [1914] 3 K. B. 1; *Worsborough U. D. C. v. Barnsley British Co-op. Soc.* (1914), 78 J. P. 425.

**205. Where all interested parties present—Application of former practice.]—**Notwithstanding above rule & Ord. 54A, the rule laid down in *Curtis v. Sheffield*, No. 180, *ante*, that it is the practice of the ct. not to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decision, or there are other special circumstances to satisfy the ct. that it is desirable at once to decide on the future rights, or all the parties who in any event will be entitled to the property are of age & are ready to argue the case, is generally applicable at the present time.

By a will freehold property was devised to M. for life " & after her death to her children & their issue, *per stirpes* & not *per capita*, in equal shares as tenants in common." There was a similar devise to T. for life, & after his death to his children & their issue. M. had five children, all of whom had obtained twenty-one. T. had two sons, both over twenty one, & the sons had between them three infant children. An originating summons by two of M.'s children & T.'s two sons against M., T., & the infant grandchildren, raising the questions whether under the devises in remainder the children of M. & T. respectively who were or might be entitled to share in the properties were entitled for estates in tail as tenants in common, & if not, what class or classes of persons would, on the death of M. & T. respectively, be entitled:—*Held*: the ct. ought not, in its discretion, to decide the question raised while the interests of the children & issue were still in remainder, but the summons must stand over, with liberty to amend, as it was

intimated that the children might desire an opportunity of executing disentailing assurances & applying to obtain payment of the proceeds of sale of part of the property which had been sold.—*Re STAPLES, OWEN v. OWEN*, [1916] 1 Ch. 322; 85 L. J. Ch. 495; 114 L. T. 682; 60 Sol. Jo. 321.

*Annotation*:—*Refd.* *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade*, [1921] 2 A. C. 438.

**206. As to liability under policy.]—**If a policy is liable to be completely avoided, as on the ground of fraud or misrepresentation, a Ct. of Equity has jurisdiction to direct its delivery up & cancellation, but it has no jurisdiction to direct the cancellation of a policy to any claim on which there is a good legal defence, or to declare that there is no liability upon it. If there is danger of the evidence for the defence being lost, the remedy is, not an action for cancellation, but an action to perpetuate testimony.—*BROOKING v. MAUDSLAY, SON & FIELD* (1888), 38 Ch. D. 636; 57 L. J. Ch. 1001; 58 L. T. 852; 36 W. R. 664; 4 T. L. R. 421; 6 Asp. M. L. C. 296.

*Annotations*:—*Refd.* *London Assoc. of Ship Owners & Brokers v. London & India Docks Joint Committee*, [1892] 3 Ch. 242; *The Manar*, [1903] P. 95; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536. *Mentd.* *West v. Sackville*, [1903] 2 Ch. 378.

**207. —.]—**P. insured his life with defts., & assigned the policy to pltf. After two premiums had been paid defts. refused to receive any further premium, & repudiated liability on the policy. Pltf. brought an action in the lifetime of P., claiming a declaration that the policy was valid, & an injunction to restrain defts. from repudiating it:—*Held*: on defts.' undertaking that if an action was hereafter brought on the policy they would not rely as a defence on the non-payment of premiums on the due-days, the action would be dismissed.

The ct. in many cases refuses to determine rights before the time has arrived at which the right is enforceable (*BUCKLEY, J.*).—*HONOUR v. EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES*, [1900] 1 Ch. 852; 69 L. J. Ch. 420; 82 L. T. 144; 48 W. R. 347; 44 Sol. Jo. 313.

**208. Rights of contribution—Though payment not made.]—**The ct. has power to make a declaration as to the title to recover sums payable by a taxpayer for excess profits from a manager of the taxpayer's business, although, in fact, the payment has not been actually made.—*THOMPSON BROTHERS & Co. v. AMIS*, [1917] 2 Ch. 211; 86 L. J. Ch. 647; 116 L. T. 719; 33 T. L. R. 323; 61 Sol. Jo. 491.

*Annotation*:—*Refd.* *Collette v. Lochlo, Pemberton* (1918) 63 Sol. Jo. 24.

#### C. Where No Consequential Relief Claimed or Claimable.

**209. Relief not claimed.]—**Under above rule the ct. has now jurisdiction to make a declaratory order, though no consequential relief is claimed, but such jurisdiction will be exercised with great caution.—*AUSTEN v. COLLINS* (1886), 54 L. T. 903.

*Annotations*:—*Refd.* *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade*, [1921] 2 A. C. 438. *Mentd.* *Re Croxon, Croxon v. Ferrers* (1904), 48 Sol. Jo. 191.

**210. —.]—**A dock co. having, under its special Act & Harbours, Docks & Piers Act, 1847 (c. 27), s. 83, power to make regulations & bye-laws, issued a compulsory code of regulations for shipowners using the docks; but these regulations were not confirmed as "bye-laws" in manner prescribed by Harbours, Docks & Piers Act, 1847 (c. 27), s. 85. Certain accommodation provided

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for by the regulations, such as the appropriation of particular berths at the option of any shipowner upon certain specified terms, were in excess of what was required by statute to be provided by the dock co., & certain rates & charges imposed by them were beyond the co.'s statutory powers. A firm of shipowners which, prior to the issue of the regulations, had been in the habit of using the docks & having particular berths appropriated for their ships, finding that the terms imposed by regulations for such accommodation caused them inconvenience & increased expense, brought an action, by themselves as individuals, against the dock co., for a declaration that the regulations were altogether invalid until confirmed as required by statute, & also an injunction by way of consequential relief; a trade protection assocn. of shipowners, of which the firm & other shipowners were members, but which owned no ships themselves, being made co-pltfs. At the hearing of the appeal, ptfs. abandoned their claim for the injunction, & a declaration was made, notwithstanding the abandonment of the claim for consequential relief, that the regulations, not having been confirmed as bye-laws, as required by statute were not binding on ptff. firm save so far as they agreed to be bound by the same; & that they were not entitled to have berths appropriated to their ships, or any other special accommodation or conveniences, except upon such terms as might be agreed on between them & the dock co.—**LONDON ASSOCN. OF SHIPOWNERS & BROKERS v. LONDON & INDIA DOCKS JOINT COMMITTEE**, [1892] 3 Ch. 242; 62 L. J. Ch. 294; 67 L. T. 238; 8 T. L. R. 717; 7 Asp. M. L. C. 195; 2 R. 23, C. A.

**Annotations:—***Consd.* Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536; *Re* Clay, Clay v. Booth, *Re* Deed of Indemnity, [1919] 1 Ch. 66. *Re*ld. Barracough v. Brown, [1897] A. C. 615.

**211. —.**—**ELSDON v. HAMPSTEAD CORPN.**, No. 253, *post*.

**212. —.**—The trustee of a debtor under a scheme of arrangement with his creditors brought an action against an unregistered money-lender, who, in the course of his business, had taken a mtge. from the debtor to secure a loan, for a declaration that the mtge. was illegal & void under Money-lenders Act, 1900 (c. 51), s. 2:—*Held*: the ct. had power to give a declaratory judgment, although no ancillary relief was claimed, & it ought not to impose upon ptff. equitable terms as to repayment of the actual money advanced as a condition of giving the declaratory judgment.—**CHAPMAN v. MICHAELSON**, [1909] 1 Ch. 238; 78 L. J. Ch. 272; 100 L. T. 109; 25 T. L. R. 101, C. A.

**Annotation:—***Re*ld. Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536.

**213. —.**—By a lease made in 1901 a house in Oxford Street was demised by defts. to the predecessors of ptff. for thirty-one years, less fifteen days, at a rent of £450 a year. The lease contained some onerous covenants, including a covenant by the lessees that they would not, without the licence in writing of the lessors, such licence not to be unreasonably or arbitrarily withheld, assign, transfer or underlet the demised premises. In 1905 ptff. purchased the residue of the term in the lease & desired to assign it to his wife. The lessors objected to an assignment to a married woman, & would only grant their licence to assign on condition that ptff. executed a covenant for himself, his exors. & administrators, at all times during the continuance of the lease of

1901 to pay the rent & perform all the covenants, agreements & provisions contained in the said lease, as if he had been a party thereto. Upon a summons in an action by the lessee against the lessors, the lessee claimed a declaration that he was entitled to assign the lease without the licence of the lessors, & free from conditions:—*Held*: the condition sought to be imposed by the lessors was altogether unreasonable, & the declaration asked would be made; but as no relief was sought against the lessors the declaratory order would be made without costs, according to the principle laid down by **SWINFEN EADY, J.**, in **Jenkins v. Price**, No. 218, *post*.—**EVANS v. LEVY**, [1910] 1 Ch. 452; 79 L. J. Ch. 383; 102 L. T. 128.

**Annotation:—***Re*ld. Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536.

**214. — Relief only enforceable in court of summary jurisdiction.**—A harbour board under the powers of a special Act reclaimed from the sea certain land below low-water mark for the purpose of making thereon a railway station. The reclamation was effected by building masonry walls round the land & filling up with chalk the area thus enclosed. By the terms of the special Act the harbour board was required to grant a lease of the reclaimed land to defts. Upon the outbreak of the war in 1914, & before any lease was granted to defts., the Govt. took possession of the reclaimed land. The Govt. were ready to make a payment in lieu of rates to the overseers of the poor of the adjoining parish, if certified that the land was part of that parish. In 1917 while the Govt. were still in possession of the land, the then overseers of the adjoining parish brought an action in the High Ct. against defts. claiming a declaration that the reclaimed land was part of that parish for all civil & parochial purposes within the meaning of Poor Law Amendment Act, 1868 (c. 122), s. 27:—*Held*: the High Ct. had jurisdiction to make the declaration, notwithstanding that its effect was to establish a liability which could be enforced only in a ct. of summary jurisdiction, & notwithstanding that defts. were not the occupiers of the land at the date of the writ.—**BARWICK v. SOUTH EASTERN & CHATHAM RY. COS.**, [1921] 1 K. B. 187; 90 L. J. K. B. 377; 124 L. T. 71; 85 J. P. 65; 37 T. L. R. 4; 18 L. G. R. 757, C. A.

**Annotations:—***Re*ld. **Simmonds v. Newport Abercarn Black Vein Steam Coal Co.**, [1921] 1 K. B. 616; *R. v. Poplar B. C.* (No. 1), [1922] 1 K. B. 72.

**215. Relief not claimable.**—**BAXTER v. LONDON COUNTY COUNCIL**, No. 221, *post*.

**216. —.**—Ptff. erected a fence round the piece of land. The local authority pulled down the fence & afterwards wrote a letter asserting their claim to the land. More than six months after this letter ptff. brought an action against them for a declaration that the land belonged to him & an injunction to restrain them from trespassing on it. By his statement of claim he alleged that defts. had pulled down his fence; that they claimed that the land formed part of the highway, & that this claim prevented him from selling the land:—*Held*: the assertion of defts.' claim to the land gave ptff. no cause of action, & therefore, he could not take advantage of the power given to the ct. by above rule, to make a merely declaratory judgment.

At one time I thought ptff. might be helped by Ord. XXV., r. 5, which enables the ct. to make a declaration without giving any specific relief; but on consideration I do not think that is so. I think that, in order to justify an action there must still, as before that rule, be some cause of action;

& all the rule means is, that if there is a cause of action *pltf.* may ask & the *ct.* may award, merely a declaration asserting his right without awarding other specific relief. But in order to justify an action there must be still, as before the rule, a cause of action (*WARRINGTON, J.*).—*OFFIN v. ROCHEFORD RURAL COUNCIL*. [1906] 1 Ch. 342; 75 L. J. Ch. 348; 94 L. T. 669; 70 J. P. 97; 54 W. R. 244; 50 Sol. Jo. 157; 4 L. G. R. 595.

*Annotations*.—*N.F. Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536. *Mentd.* *Chippendale v. Pontefract R. D. C.* (1907), 71 J. P. 231; *A.-G. & Croydon R. D. C. v. Moorsom-Roberts* (1908), 72 J. P. 123.

217. —.]—There would be a difficulty in making the declaration which *pltf.* asked for . . . because the declaration would not be ancillary to the putting in suit of any legal right (*COLLINS, M.R.*).—*WILLIAMS v. NORTH'S NAVIGATION COLLIERIES* (1889), [1904] 2 K. B. 44; 73 L. J. K. B. 575; 91 L. T. 3; 68 J. P. 371; 52 W. R. 564; 20 T. L. R. 448, C. A.; *on appeal*, [1906] A. C. 136, H. L.

*Annotations*.—*N.F. Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536. *Refd.* *North Eastern Marine Engineering Co. v. Leeds Forge Co.*, [1906] 1 Ch. 324. *Mentd.* *Parkin v. South Hetton Coal Co.* (1907), 98 L. T. 102; *Keates v. Lewis Merthyr Consolidated Collieries*, [1910] 2 K. B. 445.

218. —.]—The lessee of a hotel, who had covenanted not to assign without the lessor's consent unless "unreasonably withheld," asked permission to assign to a certain brewery. The lease had twelve years to run. The lessor, who entertained a strong opinion that a brewery tie would depreciate the value of the hotel, gave an unconditional consent to the assignment to a private person who would carry on the business as a free house, & added, "but if you desire to assign the tenancy to a brewery firm, then the rent must be increased by £25 *per annum* & the term extended from twelve to twenty-one years." His sole object in imposing these conditions was to recoup himself for the depreciation that would be caused by the tie:—*Held*: the demand of an increased rent as a condition for consenting to an assignment to a brewery was a demand of a "fine or sum of money in the nature of a fine," & being as such, directly contrary to the proviso precluding any such demand imported into the lease by Conveyancing & Law of Property Act, 1892 (c. 13), s. 3, was unreasonable. The consent had therefore been "unreasonably withheld," & the lessee was entitled to assign to the brewery without further consent. The lessee, having no cause of action against the lessor for unreasonably withholding his consent, was not entitled to the costs of an action to obtain the above declaratory judgment.

The lessee seeks a declaratory judgment, but she does not claim any other relief against the lessor. There is no covenant by him to give a consent; it is only this, that if he unreasonably withholds his consent then she is entitled to assign. An unreasonable refusal releases the restriction against assigning, but it gives her no cause of action against the lessor. Therefore, although she is entitled to a declaration, *prima facie* she would not be entitled to recover the costs of the action (*SWINFEN EADY, J.*).—*JENKINS v. PRICE*, [1907] 2 Ch. 229; 76 L. J. Ch. 507; 23 T. L. R. 608; *reversd.* on other grounds, [1908] 1 Ch. 10, C. A.

*Annotations*.—*Apld.* *Evans v. Levy*, [1910] 1 Ch. 452. *Refd.* *Burghes v. A.-G.*, [1911] 2 Ch. 139; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

219. —.]—The *ct.* has power [under above rule] to make a declaration at the instance of a *pltf.* though he has no cause of action against *def.*; & the rule so construed is merely an extension of the

practice & procedure of the *ct.* & is not *ultra vires*.—*GUARANTY TRUST CO. OF NEW YORK v. HANNAY & Co.*, [1915] 2 K. B. 536; 84 L. J. K. B. 1465; 113 L. T. 98; 21 Com. Cas. 67, C. A.

*Annotations*.—*Apld.* *British Assocn. of Glass Bottle Manufacturers v. Forster* (1917), 86 L. J. Ch. 489. *Conad. Re Clay, Clay v. Booth, Re Deed of Indemnity*, [1919] 1 Ch. 66; *Simmonds v. Newport Abercrom Black Vein Steam Coal Co.*, [1921] 1 K. B. 616. *Apld.* *Barwick v. S. E. & C.*, [1921] 1 K. B. 187. *Fold.* *Hanson v. Radcliffe* (1922) 2 Ch. 490. *Refd.* *Re Staples, Owen v. Owen*, [1916] 1 Ch. 322; *Rio Tinto Co. v. Ertel Bleber, Same v. Vereimigte Konigs & Laurahutte Act., Same v. Dynamit Act.* (1917), 116 L. T. 810; *Thompson v. Amls*, [1917] 2 Ch. 211; *Bombay & Persia Steam Navigation Co. v. MacLay*, [1920] 3 K. B. 402; *Markwald v. A.-G.*, [1920] 1 Ch. 348; *R. v. Cheshire County Court Judge & United Soc. of Boilermakers, Ex p. Malone*, [1921] 2 K. B. 694; *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade*, [1921] 2 A. C. 438; *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

220. Relief claimed.—Claim for damages for conspiracy—No damages awarded by jury.—*Declaration made without damages.*—*Pltfs.* were eight members of a trade union called the National Union of Railwaymen. One was the president of the union, another was the general secretary, three were assistant secretaries, & three were members of the executive committee. The general secretary & the assistant secretaries received salaries from the union, & the other four received no salary, but were paid a fixed sum per day for expenses when engaged on the work of the union. *Defts.* were six members of a trade union called the Associated Society of Locomotive Engineers & Firemen. In June, 1915, at a meeting at which representatives of the railway companies & *pltf.* & *defts.* as representatives of their respective unions were present, a request was made for a war bonus of 5s. a week to railwaymen, but this request was not granted. At a meeting in Oct. 1915, a war bonus of 5s. a week was granted to the men. In Oct. 1915, *defts.* made speeches at meetings of railwaymen in various places reflecting on the conduct of *pltf.* at the meeting in June, & stating that but for their conduct at that meeting the men would have got the bonus then. *Pltfs.* brought an action in respect of those statements. The statement of claim alleged that *defts.* conspired together to injure *pltf.* by publishing defamatory matter, & that in pursuance thereof they spoke & published of *pltf.* & each of them in respect of their offices as officials of the union certain defamatory statements, & they claimed damages against *defts.* No special damage was alleged or proved. The jury found that four of *defts.* had conspired to slander *pltf.*; that all *defts.* slandered *pltf.*; & they assessed the damages for the separate slanders published by each of *defts.*, but did not assess any damages on the conspiracy claim. Judgment was entered for *pltf.* for the respective amounts awarded to them by the jury, & for a declaration that the four *defts.* had conspired to injure *pltf.* by publishing oral defamatory statements of them:—*Held*: as damage was the gist of the cause of action for conspiracy, the declaration was wrongly made.

I may be convenient to have a claim for a declaration as to the rights of the parties in respect of contracts extending over a long space of time, & not to wait until there is a breach to have the rights determined. But I have never heard of a declaration that a *def.* is doing wrong, unless perhaps it is followed by a statement that damage has accrued or is likely to accrue, & that *def.* threatens to continue his wrongful act against *pltf.* (*PICKFORD, L.J.*).

Speaking as a judge of the Ch. Div., a Div. which may claim as the descendant of the old Ct. of Ch. to have an inherited instinct with regard to



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declaratory decrees, I wish to say that, in my opinion, the granting of relief by way of declaration in the present case involved a misconception of the circumstances in which declaratory decrees have ever been, or are in the present day, made (NEVILLE, J.).—**THOMAS v. MOORE**, [1918] 1 K. B. 555; 87 L. J. K. B. 577; 118 L. T. 298, C. A.

**Annotations:—***Consd.* **Simmonds v. Newport Abercorn Black Vein Steam Coal Co.**, [1921] 1 K. B. 616. *Mentd.* **Pratt v. British Medical Assocn.**, [1919] 1 K. B. 244. **Myroft v. Sleight** (1921), 90 L. J. K. B. 883; **Payne v. British Time Recorder Co.**, [1921] 2 K. B. 1.

**D. Where Other Mode of Proceeding Prescribed.**

**221. By writ of mandamus.]—**The quinquennial period of five years, for which a county coroner's salary is fixed under County Coroners Act, 1860 (c. 116), s. 4, ends with the coroner's death, & his successor on his election is entitled to have a new settlement or fixing of his salary, & such salary so fixed continues for a period of five years from the time it is so fixed without reference to the time when it was last fixed for his predecessor, & the coroner is entitled to the salary so fixed for the whole of the term of five years, even although in the meantime the district, to which the coroner was assigned has been, by Order of the Privy Council, subdivided, & a new coroner appointed & assigned to a part of that district. The coroner however, cannot bring an action against the justices of the county, *quod* justices, or any number of them acting for the whole, claiming a declaration of rights that he is entitled to the full salary fixed, or a *mandamus* to enforce those rights; the action is not such an action wherein, under the Jud. Act or otherwise, a declaration of rights may be made, or a *mandamus* granted, as a declaration of rights is only made, or a *mandamus* granted, where the action is such that relief can be given, & the rights claimed, enforced in that action, whereas in a case like the present, the only appropriate remedy is the prerogative writ of *mandamus* to the justices.—**BAXTER v. LONDON COUNTY COUNCIL** (1890), 63 L. T. 767; 55 J. P. 391; 7 T. L. R. 142.

**Annotations:—***Mentd.* **Smith v. Chorley District Council**, [1897] 1 Q. B. 532; **Davies v. Gas Light & Coke Co.**, [1909] 1 Ch. 248; **Everett v. Griffiths**, [1924] 1 K. B. 941.

**222. Summary proceedings—Prescribed by statute.]—**Where a statute gives a right to recover expenses in a ct. of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Ct. for a declaration that appct. has a right to recover the expenses in a ct. of summary jurisdiction; he can only take proceedings in the latter ct.—**BARRACLOUGH v. BROWN**, [1897] A. C. 615; 66 L. J. Q. B. 672; 78 L. T. 797; 62 J. P. 275; 13 T. L. R. 527; 8 Asp. M. L. C. 290; 2 Com. Cas. 249, H. L.; *affg.* (1896), 65 L. J. Q. B. 333, C. A.

**Annotations:—***Consd.* **Guaranty Trust Co. of New York v. Hannay**, [1915] 2 K. B. 536; **Barwick v. S. E. & C. Ry.**, [1921] 1 K. B. 157. *Refd.* **A.-G. v. Merthyr Tydfil Union**, [1900] 1 Ch. 516; **Devonport Corp. v. Tozer**, [1902] 2 Ch. 182; **R. v. Philbrick** (County Court Judge), *Ex p.* Edwards (1905), 53 W. R. 527; **De Gasquet James v. Mecklenburg Scherwin**, [1914] P. 53; **Simmonds v. Newport Abercorn Black Vein Steam Coal Co.**, [1921] 1 K. B. 616; **Everett v. Griffiths**, [1924] 1 K. B. 941. *Mentd.* **Smith v. Wilson**, [1896] A. C. 579; **The Veritas**, [1901] P. 304; **The Wallend**, [1907] P. 302; **Boston Corp. v. Fenwick** (1923), 129 L. T. 766; **Whitney v. I. R. Comrs.** (1925), 42 T. L. R. 58.

**223. ——— Discretion of court in special circumstances.]—**The ct. will not interfere by way of injunction or declaration of right where the Legislature has pointed out a mode of procedure before a magistrate; unless, it seems, in very special circumstances.—**GRAND JUNCTION WATER-**

**WORKS Co. v. HAMPTON URBAN COUNCIL**, [1898] 2 Ch. 331; 67 L. J. Ch. 603; 78 L. T. 673; 62 J. P. 566; 46 W. R. 644; 14 T. L. R. 467; 42 Sol. Jo. 571.

**Annotations:—***Apld.* **St. James's Hall v. L. C. C.** (1900), 63 L. T. 98. *Consd.* **Devonport Corp. v. Tozer**, [1902] 2 Ch. 182; **Russell v. Midhurst R. D. C.** (1908), 98 L. T. 530. *Foll.* **Williams v. Weston-super-Mare U. D. C.** (1909), 74 J. F. 52 (See 74 J. P. 370). *Consd.* **Merrick v. Field**, *Dunbar v. ...*

**Annotations:—***Consd.* **Merthyr Tydfil Union**, [1900] 1 Ch. 516; **Elsdon v. Hampstead Corp.**, [1905] 2 Ch. 633; **R. v. Philbrick** (County Court Judge), *Ex p.* Edwards (1905), 53 W. R. 527; **Simmonds v. Newport Abercorn Black Vein Steam Coal Co.**, [1920] 3 K. B. 131; **Russian Commercial & Industrial Bank v. British Bank for Foreign Trade**, [1921] 2 A. C. 438; **Everett v. Griffiths**, [1924] 1 K. B. 941.

**224. ———]**—Defts. were the owners of a triangular piece of land within plffs.' borough. Two sides of the triangle abutted upon public highways within the borough. Defts., in pursuance of a building scheme, erected houses on their land fronting the highways. Plffs. alleged that defts. were laying out the highways as new streets which did not comply with the requirements of the borough bye-laws as to width, & they claimed, first, an injunction, & secondly, a declaration that plffs. were entitled to remove or pull down any work begun or done by defts. in contravention of the bye-law. The bye-laws, which were framed under Public Health Act, 1875 (c. 55), prescribed a penalty for infringement, to be recovered by summary proceedings, & provided that plffs. might, subject to any statutory provision in that behalf, remove, alter, or pull down any work begun or done in contravention of the bye-laws:—*Held*: the bye-laws could not be enforced by action for an injunction, but only by the special remedies thereby provided, or by way of information by the A.-G.; & no such declaration as asked for ought to be made.—**DEVONPORT CORPN. v. TOZER**, [1903] 1 Ch. 759; 72 L. J. Ch. 411; 88 L. T. 113; 67 J. P. 269; 52 W. R. 6; 19 T. L. R. 257; 47 Sol. Jo. 318; 1 L. G. R. 421, 1 A.

**Annotations:—***Refd.* **A.-G. v. Wimbledon House Estate Co.**, [1904] 2 Ch. 34; **Watson v. Hythe B. C.** (1906), 4 L. G. R. 340; **A.-G. v. Pontypridd Waterworks Co.**, [1908] 1 Ch. 388; **Russell v. Midhurst R. D. C.** (1908), 98 L. T. 530. *Mentd.* **Fellowes v. Sedgley U. D. C.** (1906), 70 J. P. 412; **A. G. v. Gibb**, [1909] 2 Ch. 265; **A.-G. v. Dorin**, [1912] 1 Ch. 369.

**225. ——— Highways Act, 1835 (c. 50), s. 55.]—**The right to get materials from waste lands for the repair of the highways under sect. 51 of above Act carries with it a power to stack such materials on the waste lands for a reasonable time, such a power being reasonably necessary to enable the statutory rights to be carried out. The amount of materials so got under sect. 51 of above Act is limited to such as in the discretion of the surveyor is necessary for repairs in immediate contemplation, though the express limitation in the sect. 51 only extended to the carrying away more than the authority was entitled to. There is no reason for the ct. to grant an injunction or declaration in respect of acts done contrary to sect. 55 of above Act, since that sect. itself provides remedies which are sufficient.—**RUSSELL EARL v. MIDHURST RURAL DISTRICT COUNCIL** (1908), 98 L. T. 530; 72 J. P. 180; 24 T. L. R. 368; 6 L. G. R. 462.

**226. ———]**—A local authority, under the power of a special Act, made a bye-law in 1889, forbidding the erection of any booth, stall or other erection on the foreshore, provided that the prohibition should not apply in any case where they granted permission for the erection; & in 1890

they made an additional bye-law under the Act providing that no person should, on any part of the foreshore, sell or offer for sale any commodity, except on such part of the foreshore as they should by notice appoint for the purpose.

Pltf. brought a coffee van on the foreshore without the permission of the local authority, & on their prosecution was convicted & fined by the justices for a breach of the bye-law of 1889, on the ground that his coffee van was an "erection" within the meaning of that bye-law, & on a case stated by the justices their decision was affirmed by a Div. Ct. of the K. B. Div., who also held that the bye-law was valid.

Pltf. then brought an action against the local authority in the Ch. Div., alleging a customary right exercised for sixty years to sell from a stall or otherwise on the foreshore, & claimed (a) a declaration that the said bye-laws were *ultra vires* & void; (b) a declaration that his coffee van was not an "erection" within the meaning of the bye-law of 1889; & (c) an injunction to restrain the local council from interfering with his selling from his coffee van on the foreshore.

The ct. followed the decision of the Div. Ct. on the two points decided by them & also declined to make a declaratory order under R. S. C., Ord. 25, r. 5, with regard to the bye-law of 1900.—*WILLIAMS v. WESTON-SUPER-MARE URBAN DISTRICT COUNCIL* (1909), 74 J. P. 52; *affd.* (1910), 103 L. T. 9; 74 J. P. 370; 26 T. L. R. 506; 8 L. G. R. 843, C. A.

*Annotation*:—*Mentd.* *Cassell v. Jones* (1913), 11 L. G. R. 488.

227. —.]—*BARWICK v. SOUTH EASTERN & CHATHAM RY. COS.*, No. 214, *ante*.

228. — *Alternative procedure—Right to statement of wages under Coal Mines Act, 1911 (c. 50).*]

—Sub-sect. 2 of above Act imposes upon the mineowners a duty to deliver a statement with the detailed particulars therein prescribed to a boy employed in the mine who works under, & whose wages are handed to him by, a collier known as a butty who has received the amount from the mineowners. This duty can be enforced not only by proceedings before justices under sub-sect. 3 of above Act, but by an action for a declaration at the instance of a boy so employed to whom such a statement as aforesaid has been refused by the mineowners.—*SIMMONDS v. NEWPORT ABERCARN BLACK VEIN STEAM COAL CO.*, [1921] 1 K. B. 616; 90 L. J. K. B. 609; 124 L. T. 557; 85 J. P. 109; 37 T. L. R. 165; 65 Sol. Jo. 114, C. A.

*Annotation*:—*Reid.* *R. v. Poplar B. C.* (No. 1), [1922] 1 K. B. 72.

229. *Appeal—Against tax assessment.*]—*SMETON v. A.-G.*, No. 198, *ante*.

230. *Quo warranto—Qualification of chairman of guardians.*]—An action was brought by an inhabitant of a parish, who was not a ratepayer, against the chairman of a board of guardians claiming a declaration that he was disqualified under Local Government Act, 1894 (c. 73), s. 46 (1) (e), because being a servant of a co. which had a contract to supply the guardians with milk he was concerned in or participated in the profit of the contract. It was also alleged that deft. was disqualified under Local Government Act, 1894 (c. 73), s. 46 (2) (c), because he had voted on the question of the giving of the contract to the co. in which he was an employee, & pltf. further claimed to recover penalties:—*Held*: the action was not maintainable, as the proper procedure was by an information in the nature of a *quo warranto*. The penalties could not be recovered by action, as the statute provided that the penalties should

be recovered in a ct. of summary jurisdiction, & that remedy alone could be followed.—*EVERETT v. GRIFFITHS*, [1924] 1 K. B. 941; 93 L. J. K. B. 583; 131 L. T. 405; 88 J. P. 93; 40 T. L. R. 477; 68 Sol. Jo. 562; 22 L. G. R. 330.

*Annotation*:—*Mentd.* *Lapish v. Braithwaite*, [1925] 1 K. B. 474.

231. *Special jurisdiction of public officer.*]—By art. 249 (b) of the Treaty of Peace with Austria the Allied & Associated Powers reserved the right to retain & liquidate all property, rights & interests which belonged at the date of the coming into force of the Treaty to nationals of the former Austrian Empire, but it was provided that "Persons who within six months of the coming into force of the present Treaty show that they have acquired *ipso facto* in accordance with its provisions the nationality of an Allied or Associated Power . . . will not be considered as nationals of the former Austrian Empire within the meaning of this paragraph." The annex to arts. 249 & 250 sanctioned the imposition of a charge on such property, rights or interests. Arts. 218 to 262 with their annexes were scheduled to the Treaty of Peace (Austria) Order, 1920, & by art. 1 (i), of the Order given full effect as law. By art. 1 (ix), the charge was imposed on all property, rights & interests within His Majesty's Dominions belonging to nationals of the former Austrian Empire at the date when the Treaty came into force. Art. 2 provided that: "For the purposes of the foregoing provisions of this Order but not including the Sched. therein referred to . . . the expression, 'nationals of the former Austrian Empire,' does not include persons who within six months of the coming into force of the Treaty show to the satisfaction of the Administrator that they have acquired *ipso facto* in accordance with its provisions nationality of an Allied or Associated Power":—*Held*: where the Administrator had decided that he was not satisfied that pltf., who was originally a national of the former Austrian Empire, had acquired *ipso facto* the nationality of an Allied or Associated Power, the ct. would not, in an action by him for a declaration that he has "shown that he has acquired *ipso facto* in accordance with the provisions of the said Treaty the nationality of the Republic of Poland & that he is not a national of the former Austrian Empire within the meaning of the said Treaty & the said Treaty of Peace Order & that his property, rights & interests in His Majesty's Dominions are not subject to be charged under the said Treaty & the said Treaty of Peace Order," go behind the decision of the Administrator & investigate independently the question of nationality.—*REITZES DE MARIENWERT v. ADMINISTRATOR OF AUSTRIAN PROPERTY* [1924] 2 Ch. 282; 93 L. J. Ch. 587; 132 L. T. 42; 40 T. L. R. 698; 68 Sol. Jo. 614, C. A.

### E. Particular Instances.

#### (a) Existence or Non-Existence of Incorporeal Rights.

232. *Non-existence of right—User of highway—User amounting to trespass.*]—Deft. was the owner of a grouse moor crossed by a highway, the soil of which was vested in him. On the occasion of a grouse drive upon this moor, pltf. went upon the highway, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with deft.'s enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the shooters. Deft.'s keepers having forcibly prevented pltf. from such interference, he brought an action for assault



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against deft., in which deft. justified on the ground that pltf. was a trespasser upon his land on the occasion in question, & by way of counterclaim asked for a declaration to that effect:—**Held:** inasmuch as pltf. was upon the highway for purposes other than its use as a highway, he was a trespasser, the ct. ought to make a declaration to that effect.—**HARRISON v. RUTLAND (DUKE)**, [1893] 1 Q. B. 142; 62 L. J. Q. B. 117; 68 L. T. 35; 57 J. P. 278; 41 W. R. 322; 9 T. L. R. 115; 4 R. 155.

**Annotations:—****Refd.** Hickman v. Maisey, [1900] 1 Q. B. 752. **Mentd.** Allen v. Flood, [1898] A. C. 1; Luscombe v. G. W. Ry., [1899] 2 Q. B. 313; Fitzhardinge v. Purcell, [1908] 2 Ch. 139; London City Land Tax Comr. v. C. L. Ry., [1913] A. C. 364.

**233. — User of seashore—For religious services.**—Defts. were the local authority of L. & the seashore at L. between high & low water mark was vested in them under a lease from the Crown. W., a clergyman of the Church of England, held services & delivered addresses on the seashore without the consent of pltf.s., & asserted that the seashore was a highway & that he had a right to do so. Pltf.s. brought an action against W. claiming a declaration that he was not entitled to hold services, etc., on the seashore without their consent, & an injunction to restrain him from so doing. There was no evidence that the acts of W. caused an obstruction or led to a breach of the peace; nor did W. adduce any evidence of a prescriptive right or custom in support of his contention:—**Held:** pltf.s. were entitled to the declaration for which they asked; but the matter was too trivial for an injunction, which must be refused.—**LLANDUDNO URBAN COUNCIL v. WOODS**, [1899] 2 Ch. 705; 68 L. J. Ch. 623; 81 L. T. 170; 63 J. P. 775; 48 W. R. 43; 43 Sol. Jo. 689.

**Annotations:—****Refd.** Brinckman v. Matley, [1904] 2 Ch. 313; Ichrens v. Richards, [1905] 2 Ch. 614; A.-G. v. Sewell (1918), 88 L. J. K. B. 425. **Mentd.** Yeatman v. Homberger (1912), 107 L. T. 742.

**234. — Use of sewer.**—Where pltf.s., the vestry of a parish within the metropolitan area, made an arrangement with certain landowners of a district without the metropolitan area, now represented by defts., the urban district council, whereby the discharge of some sewage from defts.' district into a sewer belonging to pltf.s. had been permitted for many years, & this additional sewage had increased so as periodically to choke up pltf.s.' sewer:—**Held:** having regard to the conduct of pltf.s. & to the difficulty in which an injunction would place defts. by compelling them to close their sewers, the ct. ought only to make a declaration that defts. were not entitled to send sewage from their district into pltf.s.' sewer without the consent of pltf.s.—**ST. MARY, ISLINGTON, VESTRY v. HORNSEY URBAN COUNCIL**, [1900] 1 Ch. 695; 69 L. J. Ch. 324; 82 L. T. 580; 48 W. R. 401; 15 T. L. R. 286; 44 Sol. Jo. 327, C. A.

**Annotations:—****Refd.** L. C. C. v. Acton U. D. C. (1900), 17 T. L. R. 157; East Barnet Valley U. C. v. Stallard (1909), 79 L. J. Ch. 103; Liverpool Corp'n. v. Coghill, [1918] 1 Ch. 307.

**235. — Easement of light.**—Pltf.s. were the owners of a piece of land adjoining deft.'s premises. The latter consisted of a house with a backyard open to the sky. In the house there were on the ground floor two ancient lights looking into the yard. At the other end of the yard was a shed which derived light from the yard, to which one of its sides was open, & from an ancient light looking on to pltf.s.' land. Deft. pulled down his

house & rebuilt it, preserving the ancient lights. He raised the wall between his yard & pltf.s.' land, & left in it the window to the shed & two apertures to give light to the yard. He covered in the yard so as entirely to shut out all light except that which came through the apertures. He pulled down hoardings which pltf.s. had erected to close the apertures & the shed window, & they brought this action against him for a declaration that he was not entitled to any easement over their land for light & air:—**Held:** deft. had increased the burden on pltf.s.' land; it was impossible to sever the burden & say that he was still entitled to impose on pltf.s.' land the burden which had previously existed; he could no longer maintain an action against pltf.s. for interference with his ancient lights; he had no right which could be enforced; & therefore pltf.s. were entitled to the declaration they claimed.—**ANKERSON v. CONNELLY**, [1906] 2 Ch. 544; 75 L. J. Ch. 804; 95 L. T. 716; 22 T. L. R. 743; *affd.*, [1907] 1 Ch. 678; 76 L. J. Ch. 402; 96 L. T. 681; 23 T. L. R. 486, C. A.

**Annotations:—****Refd.** Bailey v. Holborn & Finsbury, [1914] 1 Ch. 598.

**236. — Right of highway.**—If a district council, acting under Local Government Act, 1894 (c. 73), s. 26, assert that there is a public right of way over pltf.s.' close & threaten & intend to exercise it by their servants or agents, an action for a declaration & injunction will lie against them.—**THORNHILL v. WEEKS**, [1913] 1 Ch. 438; 82 L. J. Ch. 299; 108 L. T. 892; 77 J. P. 231; 57 Sol. Jo. 477; 11 L. G. R. 362.

**Annotations:—****Refd.** Thornhill v. Weeks (No. 3), [1915] 1 Ch. 106.

**237. — —.**—An action was brought by certain landowners against private individuals for removing obstructions to an alleged public right of way. The district council having passed & acted on a resolution to defend the action under Local Government Act, 1894 (c. 73), s. 26, were themselves made defts., & a declaration that there was no public right of way was asked against them. On an application by the district council to be struck out as defts., pltf.s. were allowed to amend by alleging that the district council threatened & intended to use the alleged public right of way by their servants or agents. The district council then put in a defence stating that they neither claimed nor denied that the public right of way claimed by their defts. in fact existed, & they denied any threat or intention to use it by their servants or agents, but, though innocent of any such threat or intention, they in fact conducted the whole on the main issue, namely, the existence of the public right of way, up to the trial, & failed to establish it:—**Held:** pltf.s. were entitled to a declaration with costs against all defts., including the district council.—**THORNHILL v. WEEKS (No. 3)**, [1915] 1 Ch. 106; 84 L. J. Ch. 282; 111 L. T. 1067; 78 J. P. 154; 12 L. G. R. 597.

**238. Existence of right—User of stands in market.**—Pltf.s., six in number, sued on behalf of themselves & other the growers of fruit, flowers, vegetables, roots & herbs, within the meaning of a local Act to enforce certain preferential rights to stands in the market, which they alleged to have been given to the class of growers by the Act. The sole deft. was the lord of the market:—**Held:** there being a *bond fide* question as to the construction of the Act, pltf.s. as representing the class of growers, who had an interest in common, could maintain the action, but the A.-G. must be added as a deft. to represent the rest of the public who were interested in disputing the alleged preference.

Under the Jud. Act, actions can be brought merely to declare rights . . . I am referring to Ord. XXV., r. 5. . . Having regard to that rule, it appears to me impossible now to say that one grower could not maintain such an action as this, on behalf of himself & all other the growers of fruit & vegetables, to assert the preferential rights to which, he says, the whole class of growers are entitled (LINDLEY, M.R.).—*ELLIS v. BEDFORD (DUKE)*, [1899] 1 Ch. 494; 68 L. J. Ch. 289; 80 L. T. 332; 47 W. R. 385; 15 T. L. R. 202; 43 Sol. Jo. 258, C. A.; *on appeal, sub nom. BEDFORD (DUKE) v. ELLIS*, [1901] A. C. 1, H. L.

*Annotations*:—*Consd. West v. Sackville*, [1903] 2 Ch. 378; *Chapman v. Michaelson*, [1909] 1 Ch. 238. *Reid. Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536; *Equimault & Nanaimo Ry. v. Wilson*, [1920] A. C. 358. *Mentd. Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426; *Crosfield v. Manchester Ship Canal Co.* (1904), 90 L. T. 557; *Markt v. Knight S.S. Co., Sale & Frazer v. Knight S.S. Co.*, [1910] 2 K. B. 1021; *Janson v. Property Insee*, (1913), 30 T. L. R. 49; *Vacher v. London Soc. of Compositors*, [1913] A. C. 107; *Mercantile Marine Service Assocn. v. Toms*, [1916] 2 K. B. 243; *Churchill v. Whetnall, Aberconway v. Whetnall* (1918), 119 L. T. 34.

**239. — Right of ferry.**—In an action for a declaration that pltf. is entitled to an ancient ferry & an injunction restraining deft. from disturbing pltf. in the enjoyment thereof, where disturbance is not proved, the ct. ought not to make a declaration of pltf.'s title.—*HAMMERTON v. DYSART (EARL)*, [1916] 1 A. C. 57; 85 L. J. Ch. 33; 113 L. T. 1032; 80 J. P. 97; 31 T. L. R. 592; 59 Sol. Jo. 665; 13 L. G. R. 1255, H. L.; *reversg. S. C. sub nom. DYSART (EARL) v. HAMMERTON & Co.*, [1914] 1 Ch. 822, C. A.

*Annotations*:—*Reid. General Estates Co. v. Beaver*, [1914] 3 K. B. 918; *Windsford Entertainments v. Winsford U. D. C.* (1924), 23 L. G. R. 254; *Yorkshire East Riding County Council v. Selby Bridge Co.*, [1925] 1 Ch. 841.

**240. — Easement of light.**—The ct. has discretion to make an order declaratory of the pltf.'s rights [easement of light] with liberty to apply for an injunction if it should become necessary.—*LITCHFIELD-SPEER v. QUEEN ANNE'S GATE SYNDICATE (No. 2), LTD.*, [1919] 1 Ch. 407; 88 L. J. Ch. 137; 120 L. T. 565; 35 T. L. R. 253; 63 Sol. Jo. 300.

*Annotation*:—*Mentd. Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431.

#### (b) Construction.

**241. Mercantile contract—Whether binding.**—Where sufficient reason is shown, parties to a mercantile contract are entitled to ask the ct. for a declaration whether they are bound by the contract or not. Therefore where a contract, if it had been binding, would have continued in force for a year & a half & the breach of it would have involved pltf. in heavy damages, the ct. in an action brought by them claiming a declaration that they were not bound to perform the contract granted the declaration as prayed.—*SOCIÉTÉ MARITIME ET COMMERCIALE v. VENUS STEAM SHIPPING CO., LTD.* (1904), 9 Com. Cas. 289.

*Annotations*:—*Apld. Chapman v. Michaelson*, [1908] 2 Ch. 612. *Consd. Guaranty Trust of New York v. Hannay*, [1915] 2 K. B. 536; *Consorzio Veneziano di Armamento e Navigazione v. Northumberland Shipbuilding Co.* (1919), 88 L. J. K. B. 1194. *Distd. Re Clay, Clay v. Booth, Re A Deed of Indemnity*, [1919] 1 Ch. 66. *Reid. Hulton v. Hulton*, [1916] 2 K. B. 642.

**242. Contract—Necessary parties.**—An action by one party to a contract for a declaration as to its construction will not lie in the absence of the other party, where there is no third party, whose interests make it necessary to determine its construction.—*ZINC CORPN., LTD. & ROMAINE v. SKIPWITH* (1914), 31 T. L. R. 107, C. A.

**243. — Action against servant of Crown.**—

By a contract made between pltf. & the Secretary of State for War, the Secretary of State hired from pltf. a steam engine & hay press upon the terms that the engine should be used only for the purpose of working the press. Pltf. brought an action against deft. who was Secretary of State for War at the date of the writ, but at the date of the contract did not nor did he now hold that office, alleging tdat deft. had improperly used the engine for other than the specified purposes, & claiming a declaration that pltf. were entitled to compensation for the improper use of the engine, & certain other declarations as to the construction & meaning of the contract:—*Held*: the action was not maintainable. It could no more be brought against a servant of the Crown for a declaration as to what the contract meant than for substantive relief upon the contract itself.—*HOSIER BROTHERS v. DERBY (EARL)*, [1918] 2 K. B. 671; 87 L. J. K. B. 1009; 119 L. T. 351; 34 T. L. R. 477, C. A.

**244. — Currency in which loan repayable.**—*RUSSIAN COMMERCIAL & INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LTD.*, No. 109, *ante*.

**245. Award—Under Coal Mines (Minimum Wage) Act, 1912 (c. 2).**—Where a joint district board under sect. 2 of above Act makes an award settling the minimum rates of wages in their district, & the award is expressed in ambiguous terms, although there is no right of appeal from the award, the High Ct. has jurisdiction under above rule to determine what it means, & declare the rights of the parties under it accordingly.—*LOFTHOUSE COLLIERY, LTD. v. OGDEN*, [1913] 3 K. B. 120; 82 L. J. K. B. 910; 107 L. T. 827; 29 T. L. R. 179; 57 Sol. Jo. 186.

*Annotation*:—*Consd. Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

**246. Statute.**—*TINDALL v. WRIGHT*, No. 202, *ante*.

#### (c) Declarations as to Title.

**247. Of mortgagees in possession.**—Pltf., mtgees. of a British ship, on default in payment of the mortgage money, took possession of the vessel & chartered her for a voyage to a French port. On arrival there the vessel & her freight were arrested by defts., British subjects, claiming as creditors of mtgors. for necessities supplied to the ship, & in respect of which they had rendered "executory" in France a judgment obtained by default in England. The mtgees. intervened in the proceedings in France, & for the purpose of assisting them in those proceedings, they commenced separate actions against defts., the necessities men, & defts., the mtgors., asking under above rule, for declaratory judgments that they as mtgees. in possession were entitled to the ship & her freight in priority to the necessities men & to the mtgors. Both defts. moved to stay the actions as vexatious:—*Held*: the action against defts., the necessities men, would be allowed to proceed, for the opinions of foreign experts were conflicting as to the force to be attributed to an English judgment in a French ct., & no other sufficient evidence had been given to show that, in the proceedings in France, the declaratory judgment asked for would not be of use to pltf. to protect their interests as mtgees. of the vessel & owners of the freight; but that the action against the other defts., the mtgors., would, on the authority of *Brooking v. Maudslay, Son & Field*, No. 206, *ante*, be stayed, as the mtgors., not having taken any active step to dispute the validity of the mtge., could not be forced to try

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that issue in the present proceedings.—**THE MANAR**, [1903] P. 95; 72 L. J. P. 41; 89 L. T. 26; 51 W. R. 687; 9 Asp. M. L. C. 420.

**Annotation**.—**Reid**, Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536.

**248.** —.]—Mtgcs. of a ship, having taken possession under their mtge., chartered the vessel for a voyage to a French port. On her arrival at her destination the ship was arrested & the freight attached in the hands of the consignees of the cargo, in proceedings instituted in the French Cts., against the mtgcs., a limited co., which had gone into liquidation, by certain creditors of such co., who alleged that the ship & freight were the property of the mtgcs.

In an action brought by the mtgcs. against plffs. in the French proceedings claiming under Ord. 14, r. 5, a judgment declaratory of the validity of the mtge. & the rights of the mtgee. in possession to the ship & to freight earned by her, with the object of using such judgment in the French proceedings, the learned judge, with certain amendments, gave the judgment asked for.—**THE MANAR** (1903), 72 L. J. P. 64; 89 L. T. 218; 19 T. L. R. 617; 9 Asp. M. L. C. 482.

**249. Of tenant in tail in remainder—As alternative to action to perpetuate testimony.**—An action was brought to perpetuate testimony concerning the validity of the marriage of pltf.'s mother with a view to establish his claim to succeed, on the death of his father, to a peerage & to the family estates, to which pltf. claimed to be entitled as next tenant in tail male in remainder expectant on the death of his father:—**Held**: inasmuch as the sole question really in dispute was the validity of the marriage of pltf.'s mother, & he could, by proceeding under Legitimacy Declaration Act, 1858 (c. 93), obtain an immediate judicial determination of that question, an order for the examination of witnesses abroad, for the purpose of perpetuating their testimony, ought not to be made.

**Semble**: pltf. could at once, by above rule, bring an action for a declaration of his title to the estate as tenant in tail in remainder expectant on the death of his father.—**WEST v. SACKVILLE (LORD)**, [1903] 2 Ch. 378; 72 L. J. Ch. 649; 88 L. T. 814; 51 W. R. 625; 19 T. L. R. 541; 47 Sol. Jo. 581, C. A.

**250. Of local authority—To charge under Private Street Works Act, 1892 (c. 57), s. 13.**—**WEST HAM CORPN. v. SHARP**, No. 196, ante.

**(d) Declarations as to Legality.**

**251. Of application of rates.**—The High Ct. has jurisdiction to restrain guardians from applying the poor rates improperly. But this jurisdiction does not interfere with the power of the Local Government Board under s. 4 of the Poor Law Audit Act, 1848 (c. 91), to remit improper payments by guardians which have been disallowed by the auditor. Pltfs. claimed an injunction to restrain defts. from applying the rates in the relief of able-bodied men who could have obtained work, but who refused to accept it, & also a declaration of the illegality of such an

application of the rates. At the trial of the action plffs. did not ask for an injunction:—**Held**: the ct. had jurisdiction, & ought to make a declaration that any payment out of the rates for setting to work or for the relief of able-bodied men who could at the time obtain & perform work at wages sufficient to support themselves & their wives & families, if any, was unlawful & ought to be disallowed by the auditor of the guardians' accounts. But the declaration was not to include relief given to or for the wives & children of such men, & was in no way to affect the power of the Local Government Board to remit such disallowed payments, although unlawfully made, under any statute enabling them to do so.—**A.-G. v. MERTHYR TYDFIL UNION**, [1900] 1 Ch. 516; 69 L. J. Ch. 299; 82 L. T. 662; 64 J. P. 276; 48 W. R. 403; 16 T. L. R. 251; 44 Sol. Jo. 294, C. A.

**Annotations**.—**Folld**, A.-G. v. Bedwellty Union Grdns. (1900), 44 Sol. Jo. 328. **Apld**, A.-G. v. Tottenham U. D. C. (1909), 8 L. G. R. 95; A.-G. v. Poplar Grdns. (1924), 40 T. L. R. 752. **Reid**, A.-G. v. East Barnet Valley U. D. C. (1911), 75 J. P. 484. **Mentd**, Poplar Union v. Martin (1904), 91 L. T. 550; R. v. L. G. Board, *Ex p. Arldge*, [1914] 1 K. B. 160; Lewisham Union Grdns. v. Nice, [1924] 1 K. B. 618.

**252.** —.]—**A.-G. v. BEDWELLY UNION GUARDIANS** (1900), 44 Sol. Jo. 328.

**253. Of apportionment of expenses—Metropolis Management Act, 1855 (c. 120), s. 105—Metropolis Management Amendment Act, 1862 (c. 102), s. 77.**—The cases which decide that in the absence of *mala fides* the ct. will not question the principle upon which the expenses of paving a new street have been apportioned amongst the adjoining owners of a vestry or district board under Metropolis Management Acts, 1855 (c. 120), & 1862 (c. 102), apply only to an apportionment made upon the persons properly chargeable; & if any owners are omitted by the authority under a mistaken view of the facts, it is competent for the ct. in a proper case to entertain in an action by an aggrieved owner for a declaration that the apportionment is invalid whether any consequential relief can be claimed or not.

**Semble**: an apportionment ought to refer to the owners by name, or at least ought to specify the properties to be charged in such a way as to preclude the possibility of mistake.—**ELSDON v. HAMPSTEAD CORPN.**, [1905] 2 Ch. 633; 75 L. J. Ch. 27; 93 L. T. 335; 54 W. R. 43; 21 T. L. R. 772; 3 L. G. R. 1199; *sub nom.* **ELSTON v. HAMPSTEAD CORPN.**, 69 J. P. 434.

**254. Security void under Money-lenders Act, 1900 (c. 51).**—**CHAPMAN v. MICHAELSON**, No. 212, ante.

**(e) Other Cases.**

**255. Declaration of legitimacy—Whether granted in probate action.**—In an action for probate the ct. refused to allow pltf. to include in the writ of summons a prayer for a declaration of legitimacy.—**WARTER v. WARTER** (1890), 15 P. D. 35; 59 L. J. P. 45; 62 L. T. 328; *subsequent proceedings*, 15 P. D. 152.

**See, generally**, **BASTARDY**, Vol. III., pp. 369 et seq.

**256. Power to assign leaseholds—Where unreasonable condition imposed.**—Where a lease contains a covenant by the lessee not to assign

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**k. As substitute for action to perpetuate testimony.**—The granting of an order perpetuating testimony is in

the discretion of the ct., & such an order will not be made in a case in which, in the opinion of the ct., it is not necessary.—**KELLY v. KELLY**, [1917] 1 I. R. 51.—**IR.**  
1. —.]—The ct. has under its

general jurisdiction power to make a declaratory order, in a proper case, that a copy of a lost deed is a true copy.—**SHANAHAN v. SHANAHAN**, [1917] 1 I. R. 57.—**IR.**

without the licence in writing of the lessor, "such licence not to be unreasonably withheld," although the lessor, in refusing a licence to assign, is not bound to give any reason for his refusal, yet if, in granting a licence he attaches to it a condition which, in the opinion of the ct., is unreasonable, the ct. will, in an action brought by the lessee for the purpose, make a declaratory order under above rule, declaring that the lessor is not entitled to impose the unreasonable condition, & that the lessee is entitled to assign without any further consent of the lessor.—*YOUNG v. ASHLEY GARDENS PROPERTIES, LTD.*, [1903] 2 Ch. 112; 72 L. J. Ch. 520; 88 L. T. 541, C. A.

*Annotations*:—*Fold. Evans v. Levy* (1910), 79 L. J. Ch. 383. *Reid. West v. Gwynne* (1911), 104 L. T. 759. *Mentd. Re Gibbs & Houlder's Lease, Houlder v. Gibbs*, [1925] 1 Ch. 575.

**257.** ———.]—*Conveyancing & Law of Property Act*, 1892 (c. 13), s. 3, applies to all leases whether executed before or after the commencement of the Act, & in the absence of express provision to the contrary, engrafts upon every covenant in any such lease against assignment or underletting without consent a proviso that no money shall be payable in respect of such consent. If a lessor refuses to give a consent except upon payment, the lessee is relieved from obtaining his consent & can make a valid assignment or underlease without it; but he is also entitled to bring an action for a declaration to that effect, in which costs will be given him though no relief is asked for beyond the declaration.—*WEST v. GWYNNE*, [1911] 2 Ch. 1; 80 L. J. Ch. 578; 104 L. T. 759; 27 T. L. R. 444; 55 Sol. Jo. 519, C. A.

*Annotations*:—*Mentd. Henshall v. Porter*, [1923] 2 K. B. 193; *Re Clemmons Aluminium* (1924), 94 L. J. K. B. 487; *Re Snowdown Colliery Co., South Eastern Coalfield Extension Co. v. Snowdown Colliery Co.* (1925), 94 L. J. Ch. 305.

*See, generally, LANDLORD & TENANT.*

**258. Of invalidity of expired patent.**—*NORTH EASTERN MARINE ENGINEERING CO. v. LEEDS FORGE CO.*, No. 189, ante.

*See, generally, PATENTS.*

**259. As to validity of marriage.**—There is no authority, either in the Ecclesiastical Cts. before 1857, or in this ct. since the Matrimonial Causes Act, 1857 (c. 85), was passed, for pronouncing a mere declaratory judgment, in a case which does not come within the scope of the Legitimacy Declaration Act, 1858 (c. 94).

The mere fact that the marriage was celebrated in England, & that the petitioner purported to be residing here at the date of the institution of proceedings, cannot give the ct. power to give a declaratory judgment as to the validity of the marriage. Above rule does not apply to such a case, & it can confer no jurisdiction on the Divorce Div. to make a declaration as to the validity of such a marriage.—*DE GASQUET JAMES (COUNTESS) v. MECKLENBURG-SCHWERIN (DUKE)*, [1914] P. 53; 83 L. J. P. 40; 110 L. T. 121; 30 T. L. R. 329; 58 Sol. Jo. 341.

*Mentd. Perrin v. Perrin, Powell v. Powell*, 135.

*See, generally, HUSBAND & WIFE*, Vol. XXVII., pp. 73, 74.

**260. As to validity of deed of separation.**—A married woman brought against her husband an action for damages for deceit, alleging that by his false & fraudulent representations & concealment as to his means he had induced her to enter into a deed of separation & in accordance with its terms, to live separate upon an inadequate allowance & to abstain from claiming a judicial separation or restitution of conjugal rights

& a proper allowance by way of alimony. She also claimed to have the deed rescinded & declared void:—*Held*: such claims were maintainable both before & since the Married Women's Property Acts, & in claiming such relief she was not suing her husband for a tort within Married Women's Property Act, 1882 (c. 75), s. 12.

In the circumstances of the case the ct. ordered the deed to be rescinded, & made a declaration that pltf. was not bound by it, although since action brought the marriage had been dissolved, & except as to acts done under it, the deed had ceased to be operative.—*HULTON v. HULTON*, [1917] 1 K. B. 813; 86 L. J. K. B. 633; 116 L. T. 551; 33 T. L. R. 197; 61 Sol. Jo. 268, C. A.

*See, generally, HUSBAND & WIFE*, Vol. XXVII., pp. 219 *et seq.*

**261. As to nationality.**—It is an abuse of the process of the ct. for a foreigner residing in this country, who has not received from the authorities any notice differentiating him as respects military service from any other foreigner temporarily commorant here, to claim a declaration as to his nationality in an action against the A.-G.—*ROESIN v. A.-G.* (1918), 34 T. L. R. 417, C. A.

**262.** ———.]—*REITZES DE MARIENWERT v. ADMINISTRATOR OF AUSTRIAN PROPERTY*, No. 231, ante.

*See, generally, ALIENS*, Vol. II., pp. 119 *et seq.*

#### SUB-SECT. 4.—UNDER R. S. C., ORD. 54A.

**263. Where questions of fact & construction involved.**—By a deed of 1897 an exor. handed over securities to a legatee upon terms which included a guarantee by the exor. that until Dec. 31, 1903, the securities should be of a certain value. The legatee mortgaged his interest in the estate by a deed which did not mention the guarantee. The mtgees., by a deed which recited, (*inter alia*), the guarantee, sold the mortgaged property to L. He brought an action in the K. B. Div. against the exor. claiming the alleged difference between the guaranteed value of the securities & the amount realised. This action was by agreement dropped & another action brought in the Ch. Div. The mtgees. then executed a deed conveying by way of confirmation to L. all the premises comprised in the mtge. L. discontinued his action, & took out an originating summons asking for a declaration that according to the true construction of the deeds the benefit of the guarantee had been assigned to & vested in him, & for an account:—*Held*: inasmuch as questions both of fact & of construction were involved, & a decision of the questions of construction would not, in whichever way they were decided, necessarily put an end to the litigation, an originating summons under above Ord. was not the proper mode of procedure.—*LEWIS v. GREEN*, [1905] 2 Ch. 340; 74 L. J. Ch. 682; 93 L. T. 303; 54 W. R. 93.

*Annotations*:—*Distd. Harrowby v. Leicester Corpn.* (1915), 85 L. J. Ch. 150. *Reid. Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 369.

**264. What court will consider.**—Where under R. S. C., Ord. 54A, the ct. is asked to construe any written instrument it is intended that the answer of the ct. should settle the litigation between the parties. Nevertheless the Ord. should be given a liberal construction, & when it appears to the ct. that its answer will satisfy the proceedings then at issue, it will not refuse a decision on the

*Sect. 3.—Declaratory judgments: Sub-sects. 4 & 5.* 85 L. J. Ch. 150; 114 L. T. 129; 80 J. P. 92; 14  
*Part III. Sects. 1, 2, 3, 4, 5 & 6. Parts IV.,* L. G. R. 42.  
*V., VI., VII. & VIII.]*

possibility of further litigation arising in connection with matters not directly before it.—  
 HARROWBY (EARL) v. LEICESTER CORPN. (1915),

SUB-SECT. 5.—UNDER COLONIAL STATUTES AND ORDERS.

*See Cases infra.*

## Part III.—Modes of Obtaining Judgment.

### SECT. 1.—BY DEFAULT.

*See PRACTICE.*

### SECT. 2.—BY CONSENT.

*See PRACTICE.*

### SECT. 3.—BY WARRANT OF ATTORNEY OR JUDGE'S ORDER.

*See PRACTICE.*

### SECT. 4.—SUMMARY JUDGMENT AFTER APPEARANCE—R. S. C., ORD. 14.

*See PRACTICE.*

### SECT. 5.—MOTION FOR JUDGMENT BEFORE TRIAL.

*See PRACTICE.*

### SECT. 6.—AT TRIAL.

*See PRACTICE.*

## Part IV.—Drawing up Judgments and Orders.

*See PRACTICE.*

## Part V.—Entry of Judgments and Orders.

*See PRACTICE.*

## Part VI.—Date of Judgments and Orders.

*See PRACTICE.*

## Part VII.—Service of Judgments and Orders.

*See PRACTICE.*

### PART II. SECT. 3, SUB-SECT. 5.

*m. Where no consequential relief claimed or claimable.]—COOSWELL v. SUGDEN (1877), 24 Gr. 474.—CAN.*

*n. —.]—A declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same et., or, under special circumstances as to jurisdiction, in some other et.—KATHAMA NATCHIAR v. DORASINGA TEVER (1875), 2 L. R. Ind. App. 169.—IND.*

*o. Declaration as to present rights.]—PECK v. SUN LIFE ASSURANCE CO. OF CANADA (1905), 11 B. C. R. 215; 1 W. L. R. 302.—CAN.*

*p. —.]—WALLACE v. SMART (1912),*

*19 W. L. R. 787; 1 D. L. R. 70; 22 Man. L. R. 68.—CAN.*

*q. —.]—LETHBRIDGE v. CANADIAN WESTERN NATURAL GAS, LIGHT, HEAT & POWER CO., LTD., [1923] 4 D. L. R. 1055; [1923] S. C. R. 652; 3 W. W. R. 976; *affo.*, [1923] 2 D. L. R. 1; 19 Alta. L. R. 143.—CAN.*

*r. Declaration as to future rights.]—Where an action for recovery of money is premature & all interested parties are of age & represented, the ct. has power to make a declaratory judgment as to pltf.'s rights, but should not as a rule do so.—SECURITY TRUST CO. v. WISHART (1920), 1 W. W. R. 476; 51 D. L. R. 814.—CAN.*

*t. —.]—Where all existing parties interested under a will are in ct., a declaration as to future rights after the determination of the life interest may be made.—JUTTENDROMOHUN TAGORE v. GANENDROMOHUN TAGORE (1872), L. R. Ind. App. Supp. Vol. 48.—IND.*

*u. —.]—RAM LAL MOOKERJEE v. SECRETARY OF STATE FOR INDIA (1881), L. R. 8 Ind. App. 47.—IND.*

*b. Discretionary power.]—TORONTO RY. CO. v. CITY OF TORONTO (1906), 8 O. W. R. 78, 431; 13 O. L. R. 532.—CAN.*



## Part VIII.—Priority of Judgments and Orders.

See, now, Law of Property Act, 1925 (c. 20), s. 195 (3); Land Charges Act, 1925 (c. 22), ss. 6, 7. Admiralty action in county court—Transferred to High Court.]—See ADMIRALTY, Vol. I., p. 177, Nos. 884, 885.

**265. Assignee of judgment—After decree.]**—The assignment obtained by him [a puisne incumbrancer] after the decree made, he shall not profit by it, or change the order of payment; but must come in according to the time of his own incumbrance, without regard to the old judgment & mtgee., which he got in after the decree & report (*per* CUR.).—BRISTOL (EARL) v. HUNGERFORD (1705), 2 Vern. 524; 1 Eq. Cas. Abr. 142; 23 E. R. 938.

*Annotations:—*Reid. Wortley v. Birkhead (1754), 2 Ves. Sen. 571. *Mentd.* Farrington v. Knightly (1721), 1 P. Wms. 544; Soley v. Wood (1804), 10 Ves. 71.

**266. — Taking transfer of first mortgage.]**—A father & son entered into an arrangement by which the father contracted to sell to his son three different estates, all of which were subject to mtges., one of these mtges. being for £880, which was also secured by a judgment confessed by both father & son. Upon the sale of the estate all the mtges. were paid off, & the son mortgaged the purchased property to three other persons for the purpose of raising the purchase-money. There was a further mtge. by the father of other property not included in the sale to C., out of which the £880 was paid off, & the judgment was assigned to C. by the mtgee. Some time after the purchase the third mtgee. & the son gave six months' notice to the first mtgee. to pay off the mtge. Before the expiration of the notice the first mtgee. was assigned to C. who then claimed priority in respect of his judgment, & refused to be paid off unless the £880 were also discharged; & he advertised the property for sale. The same solrs. were employed in negotiating the whole transaction, & it was the understanding of all parties that the purchaser's three mtges. were to take the property unaffected by any prior incumbrance. Upon a bill filed by the third mtgee. & the son to restrain the sale by C. & for redemption of the first mtge.:—*Held*: C. was not justified in claiming priority for his judgment over the three mtges. & he must pay pltf.'s costs.—CANNOCK v. JAUNCEY (1857), 27 L. J. Ch. 57; 29 L. T. O. S. 381; 5 W. R. 764.

**267. As against mortgagee—Mortgage prior to judgment—Mortgage defective.]**—Mtgor. compelled, under the covenant for further assurance, to supply a defect in a mtge., against judgment creditors.—BURGH v. FRANCIS (1673), Cas. temp. Finch, 28; 1 Eq. Cas. Abr. 320; Nels. 183; 1 P. Wms. 279; Wight. 126; 3 Swan. 536, n.; 23 E. R. 16.

*Annotations:—*Consd. Whitworth v. Gaugain (1846), 1 Ph. 728. *Reid.* Ross v. Army & Navy Hotel Co. (1886), 34 Ch. D. 43. *Mentd.* Pigott v. Nower (1677), 3 Swan. 534, n.; Ray v. Sherwood & Ray (1836), 1 Curt. 173; Bugden v. Bignold (1843), 2 Y. & C. Ch. Cas. 377.

**268. — — —.]**—Rector, entitled to an annual stipend in lieu of tithes, assigns it by way of mtge. Afterwards a creditor of the rector obtains judgment, & in the regular course, seques-

tration of the stipend:—*Held*: the mtgee. should be preferred.—ERRINGTON v. HOWARD (1757), Amb. 485; 27 E. R. 317.

**269. — — — Judgment pending foreclosure proceedings.]**—WINCHESTER (BP.) v. BEAVOR (1797), 3 Ves. 314; 30 E. R. 1029.

*Annotations:—*Consd. Metcalfe v. Pulvertoft (1813), 2 Ves. & B. 200. *Reid.* Winchester (BP.) v. Paine (1805), 11 Ves. 194. *Mentd.* Palk v. Clinton (1805), 12 Ves. 48; Kelsall v. Kelsall (1834), 2 My. & K. 409.

**270. — — —.]**—Judgment confessed after a bill of foreclosure ineffectual against pltf.—METCALFE v. PULVERTOFT (1813), 2 Ves. & B. 200; 35 E. R. 295.

*Annotations:—*Reid. Bellamy v. Sablue (1857), 1 De G. & J. 566; Wigram v. Buckley, [1894] 3 Ch. 483.

**271. — Mortgage unregistered.]**—A judgment is not such a charge upon land, except it be within Judgments Act, 1838 (c. 110), as to give it precedence over an unregistered mtge.—CATHROW v. EADE (1853), 1 Sm. & G. 423; 21 L. T. O. S. 179; 65 E. R. 186.

**272. — Assignee of judgment acquiring first mortgage.]**—CANNOCK v. JAUNCEY, No. 266, *ante*.

**273. — Judgment assigned to mortgagor.]**—

(1) In 1805 C. N. agreed to sell a piece of land to W. in fee simple, for a sum of £380. On investigating the title it was found that C. N. was only tenant for life, with remainder to his second son in tail. It was agreed, however, that the purchase money should be paid to C. N., & W. took a bond from C. N., dated Jan. 1, 1806, whereby he was bound to W., in the penalty of £760, conditioned to be void if C. N. and his second son would, within three calendar months after the latter came of age, execute a proper conveyance to W. in fee. W. died in 1819, having by will devised all his residuary real & personal estate to deft., then a single woman. In 1820 deft. married C. B., & in the year 1836 C. B. acting, as the deft. alleged, without her knowledge, & under a misapprehension of his rights as her husband, obtained from C. N., & his second son G. N., who had then attained twenty-one, a conveyance to himself of the land in fee simple. On Oct. 18, 1858, C. B. deposited the title deeds of the estate with pltf. by way of equitable mortgage. C. B. died in Dec. 1858. Upon bill by pltf. for foreclosure, deft. claimed to be entitled by title paramount to pltf. under the bond & the will, & that her husband was a trustee for her:—*Held*: the title of deft. was not paramount to that of pltf.

(2) C. B. devised all his real & personal estate to deft. After his death she purchased a judgment which had been entered up & registered before Oct. 18, 1858:—*Held*: deft. was not entitled to any priority in respect of the judgment over pltf.'s security.

As regards the judgment, assuming that the assignment was *bond fide*, it is clear from the authorities that where a mtgor. takes an assignment of a prior incumbrance, he cannot set it up against his own mtgee. (STUART, V.-C.).—CHES-SHIRE v. BISS (1860), 2 Giff. 287; 2 L. T. 404; 6 Jur. N. S. 599; 66 E. R. 120.

**274. — Judgment registered before mortgage.]**—An old judgment of 1826 was on May 3,

## PART VIII.

**2681. As against mortgagee—Mortgage prior to judgment.]**—A judgment creditor purchasing an equity of redemption at

sheriff's sale, cannot set up his registered judgment against a mtge. made before the delivery of the writ to the sheriff.—PEGGE v. METCALFE (1856), 5 Gr.

628.—CAN.

**2741. — Judgment registered before mortgage.]**—A purchaser of real estate gave his creditor a mtge. thereon for a



1854, duly registered under Judgments Act, 1838 (c. 110). On June 6, 1854, the legal personal representatives of the party entitled to the debt in respect of which the judgment had been entered up revived the judgment. The judgment debtor having come into possession of considerable real estate, mortgaged it on Oct. 1, 1853, for an advance of £5,000, & on June 6, 1854, charged all the property by three memoranda of that date with certain sums in favour of three relatives. On June 10, 1858, a suit was commenced by the parties entitled to the debt to redeem & foreclose, & for a sale:—*Held*: the judgment creditor, on bill filed by him against the first mtgee., & the puisne incumbrancers, was entitled to be paid the full amount of his judgment debt in priority to the three incumbrancers.—*DOSWELL v. REECE* (1865), 13 L. T. 156; 11 Jur. N. S. 704.

See, generally, EXECUTION, Vol. XXI., pp. 562, 563, Nos. 1389–1393; MORTGAGE.

**275. — Delay in re-registration.]**—Under Judgments Act, 1839 (c. 11), if A. has a judgment registered under Judgments Act, 1838 (c. 110), such registration will protect him against all who become mtgees. or purchasers during the currency of the five years, & such protection will continue as to them under a re-registration, even though he should have omitted to re-register within five years, but as to persons becoming mtgees. or purchasers between the period when his first registration ceased, & when his re-registration began he will not be protected, but they will have priority over him.—*SHAW v. NEALE* (1858), 6 H. L. Cas. 581; 27 L. J. Ch. 444; 31 L. T. O. S. 190; 4 Jur. N. S. 695; 6 W. R. 635; 10 E. R. 1422, H. L.; *reusg.* (1855), 20 Beav. 157.

*Annotations*:—*Consd.* *Boyan v. Oxford* (1855), 4 De G. M. & G. 492. *Reid.* *Hopkinson v. Robt* (1861), 9 H. L. Cas. 514. *Mentd.* *Turner v. Letts* (1855), 20 Beav. 185; *Menzies v. Lightfoot* (1871), L. R. 11 Eq. 459. *North v. Stewart* (1890), 15 App. Cas. 452; *Briscoe v. Briscoe*, [1892] 3 Ch. 543; *Re Knight, Knight v. Gardner*, [1892] 2 Ch. 368; *Meguerditchian v. Lightbound*, [1917] 2 K. B. 298.

**Judgment registered after mortgage.]**—See, generally, MORTGAGE.

**276. As against purchaser—Sale under power reserved to debtor—Uses to bar dower.]**—Where an estate is settled to the usual uses to bar dower, & then a judgment is entered up against the owner of the estate, & before execution is taken out the owner of the estate appoints it to a purchaser, the judgment creditor's lien is defeated.—*TUNSTALL v. TRAPPES, TUNSTALL v. TASBURGH, RAWSON v. TASBURGH* (1830), 3 Sim. 286; 57 E. R. 1005.

*Annotations*:—*Consd.* *Benham v. Keane* (1861), 3 De G. F. & J. 318. *Reid.* *Aoraman v. Corbett* (1861), 30 L. J. Ch. 642. *Mentd.* *Hart v. Cradock* (1837), 1 Jur. 735; *Neato v. Marlborough* (1838), 3 My. & Cr. 407; *Barnes v. Rastor* (1842), 1 Y. & C. Ch. Cas. 491; *Allin v. Crawshaw* (1851), 9 Hare, 382; *Doswell v. Reece* (1865), 13 L. T. 156; *Mara v. Browne*, [1895] 2 Ch. 69; *Re Thursty's Settltmt.*, *Grant v. Littledale*, [1910] 2 Ch. 181; *Re Stanley's Settltmt.*, *Maddocks v. Andrews*, [1916] 2 Ch. 50.

balance of purchase-money, which was not registered until after a judgment against the purchaser had been registered:—*Held*: the judgment had priority over the mtgo.—*BURGESS v. HOWELL* (1860), 8 Gr. 37.—*CAN.*

**274 II. —**—A judgment registered after the date of a mtgo., but before its registration, takes priority over the mtgo.—*BANK OF HAMILTON v. HARTERY*, [1919] 1 W. W. R. 868.—*CAN.*

**c. —**—The mtgee. of land who registers his mtgo. with notice of a judgment against the mtgor., afterwards registered, does not obtain priority over the judgment creditor.—

**277. — Purchase with notice.]**—Notice to a purchaser of judgments against the vendor whose estate is limited to uses to bar dower does not prevent the purchaser from taking the estate free from the judgments, under an exercise of the power reserved to the vendor.—*EATON v. SANXTER* (1834), 6 Sim. 517; 3 L. J. Ch. 197; 58 E. R. 688.

*Annotation*:—*Folld.* *Skeeles v. Sherley* (1836), Donnelly, 127.

**278. —**—When an estate is limited to such uses as a purchaser shall appoint, & subject thereto, to the usual uses to bar dower, an appointment made under the power will in equity as well as at law, overreach any judgments which may, in the mean time, have been entered up against the purchaser; & the circumstance that the appointee takes with notice of the judgments, will make no difference in this respect.—*SKEELES v. SHEARLY* (1837), 3 My. & Cr. 112; 7 L. J. Ch. 3; 1 Jur. 888; 40 E. R. 867, L. C. *Annotation*:—*Reid.* *Langton v. Horton* (1842), 1 Hare, 549.

**279. — Delay in re-registration.]**—*SHAW v. NEALE*, No. 275, *ante*.

**280. As against assignee in bankruptcy—Land sold—Priority as regards proceeds of sale.]**—A debtor having real estate, gave a judgment & warrant of attorney under Judgments Act, 1838 (c. 110). Afterwards he became insolvent; the estate was sold:—*Held*: the judgment creditor had an equitable interest in the money in priority over the assignees.—*ROBINSON v. HEDGE* (1850), 17 Sim. 183; 19 L. J. Ch. 463; 15 L. T. O. S. 323; 14 Jur. 784; 60 E. R. 1099.

**281. As against assignee for creditors.]**—In May, 1835, a lease, to commence in Dec. 1833, & to continue for twenty-one years & thirty-three days, of certain lead mines in Yorkshire was granted by the Crown to four lessees, of whom F. was one. In June, 1888, F. conveyed & assigned to J. (*inter alia*) the property of which he was possessed for any term of years, etc., upon the trusts mentioned; & in July, 1848, F. granted & assigned to J. all his personal estate, & the surplus, if any, which might arise on the sale of his freehold & leasehold estates, upon trusts, after paying costs, etc., for the benefit of creditors, as therein mentioned. Pltfs., who were creditors of F., executed the deed in 1849, but no other creditor executed the deed until 1855. J. did not dispose of F.'s share in the mines. In May, 1854, the Crown granted a lease of the said lead mines to seven lessees, two of whom were F. & J., for a term of twenty-one years, to commence on Jan. 5, 1855. F. died intestate in Aug. 1854. B., in Aug. 1848, recovered a judgment on two bonds against F., which was duly entered up; & in July, 1848, C. & others also recovered judgment against F., which was duly entered up in Aug. following. Subsequently these judgments were assigned to S., & were duly registered in the

*MORSE v. KIZER* (1919), 59 S. C. R. 1; 46 D. L. R. 607.—*CAN.*

**280 I. As against assignee in bankruptcy—Land sold—Priority as regards proceeds of sale.]**—*KAULBACK v. TAYLOR* (1880), R. E. D. 400.—*CAN.*

**d. As against creditor—Unregistered prior charge.]**—*CASE v. BARTLETT* (1898), 12 Man. L. R. 280.—*CAN.*

**e. Judgment reinitiated in specified time.]**—A failure to reinitiate an existing judgment does not give priority to a subsequent judgment which has been reinitiated previous to the date for reinitiating the first judgment, although it would give priority to a judgment

recovered & reinitiated subsequent to that date.—*RATTENBURY v. CONNOLLY* (1881), 2 P. E. I. 439.—*CAN.*

**f. Registered memorial of judgment.]**—A registered memorial of a judgment has a priority, as a charge on the land of the debtor, over a subsequent judgment & execution; & a sale by the sheriff under such execution is subject to the charge of the prior registered judgment.—*MILLS v. MILLS* (1858), 9 N. B. R. (4 All) 45.—*CAN.*

**g. Registration of judgment—Priority from time of registration—Though not executed.]**—*MEYERS v. MEYERS* (1874), 21 Gr. 214.—*CAN.*

**h. Conflicting defective judgments—**

county of York, & in the Common Pleas, which was afterwards renewed:—*Held*: (1) *plffs.* had, by virtue of the assignment of June, 1848, & of the declaration of trust of July, 1848, they having executed the latter deed in 1849, acquired a beneficial interest in the renewed lease; (2) the judgments registered before *plffs.* executed the latter deed were entitled to be considered as equitable charges upon the old lease & upon the new lease, in priority to the claims of the creditors, who did not become *cestuis que trust* until after the regis-

tration of the judgments.—*LANGHORNE v. HARLAND* (1856), 28 L. T. O. S. 227; 2 Jur. N. S. 872; 4 W. R. 696.

**Position of execution creditor generally.**—*See*, generally, EXECUTION, Vol. XXI., p. 442.

— **On insolvency of debtor.**—*See* BANKRUPTCY, Vol. V., pp. 808 *et seq.*

**Priority in administration suit.**—*See* EXECUTORS, Vol. XXIII., pp. 351 *et seq.*

**Registration of judgments.**—*See* Part XIV., *post*.

## Part IX.—Effect of Judgments and Orders.

### SECT. 1.—IN GENERAL.

#### 282. Whether character of debt changed.]—

A debt became due to *bkpt.* in the course of his business, & on Jan. 15, 1924, he assigned the debt to W., in consideration of money advanced to him by W., having on Dec. 18, 1923, obtained a judgment in respect of the larger part of the debt owing. The assignment contained a covenant by *bkpt.* that in the event of W. refraining from giving notice to S., whose debt was assigned, *bkpt.* would, when S. paid, at once pay W. No notice was given to S. of the assignment until after the date of the receiving order, Sept. 18, 1924. On Feb. 27, 1924, *bkpt.* committed an act of *bkpcy.* In Mar. 1924, it was arranged that S. should give promissory notes for the remainder of the debt not covered by the judgment payable over a period, & drawn in favour of *bkpt.* or order, & at that time neither S. nor W. were aware of the act of *bkpcy.*, & the promissory notes were deposited with W. The trustee in *bkpcy.* claimed that the debts comprised in the assignment of Jan. 15, 1924, were at the commencement of the *bkpcy.* in the possession, order, or disposition of *bkpt.* in his business by the consent of the true owner under such circumstances that *bkpt.* was the reputed owner thereof within *Bkpcy. Act*, 1914 (c. 59), s. 38 (c), & formed part of the property divisible amongst his creditors. *Resp.*, the exor. of W., alleged that so much of the debt as became merged in the judgment was taken out of the order & disposition clause, & that the deposit of the promissory notes by *bkpt.* with W. was a transaction for valuable consideration within *Bkpcy. Act*, 1914 (c. 59), s. 45 (d):—*Held*: the judgment debt did not change its nature on judgment being obtained, but remained a debt due to *bkpt.* in the course of his business.—*Re WETHERED. Ex p. SALAMAN*, [1926] 1 Ch. 167; 70 Sol. Jo. 324; *sub nom. Re WETHERED, Ex p. SALAMAN'S TRUSTEE*,

*TRUSTEE v. BANCE*, 95 L. J. Ch. 127; 134 L. T. 264.

**From what date effective.**—*See* PRACTICE.

**283. Whether lien obtained by creditor.**—It is not correct to say that, according to the usual acceptance of the term, a creditor obtains a lien by virtue of his judgment (*LORD COTTENHAM, C.*).—*NEATE v. MARLBOROUGH (DUKE)* (1838), 3 My. & Cr. 407; 2 Jur. 76; 40 E. R. 983, L. C.

*Annotations*:—*Consd. Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275. *Reid. Gordon v. Horstall* (1817), 5 Moo. P. C. C. 393; *Smith v. Hurst* (1852), 10 Hare, 30; *Bond v. Bell* (1857), 4 Drew. 157; *Benham v. Keane* (1861), 3 De G. F. & J. 318; *Godfrey v. Tucker* (1863), 33 Beav. 280; *Doswell v. Reece* (1865), 13 L. T. 156; *Re Watkins, Ex p. Evans* (1879), 13 Ch. D. 252; *Flegg v. Prentiss*, [1892] 2 Ch. 429; *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338; *Marshall v. South Staffordshire Tram. Co.*, [1895] 2 Ch. 36. *Mentd. Martineau v. Cox* (1837), 2 Y. & C. Ex. 638; *Tyrell v. Painton*, [1895] 1 Q. B. 202.

*See, generally, LIEN.*

**284. Decree by consent—Binding on purchasers.**—Decree by consent, for a lease, or other personal estate, shall bind purchasers.—*WINDHAM v. WINDHAM* (1667), *Freem. Ch.* 127; 22 E. R. 1103.

**Judgment conclusive until set aside.**—*See* ESTOPPEL, Vol. XXI., pp. 140, 141, Nos. 42 *et seq.*

**Judgment against local authority—Whether a "charge" within Public Health Acts—For which rate can be levied.**—*See* LOCAL GOVERNMENT.

**Order of court for sale of land.**—*See* SALE OF LAND.

**What orders & decrees operate as judgments.**—*See* Part XIII., Sect. 2, sub-sect. 1, *post*.

### SECT. 2.—ON LAND.

*See, now, Law of Property Act, 1925 (c. 20), s. 195; Land Charges Act, 1925 (c. 22), ss. 6, 7.*

**285. Apart from statute.**—*CATHROW v. EADE*, No. 271, *ante*.

**Priority of claimant in possession.**—*DAVIS v. LEVEY* (1861), 11 C. P. 292.—*CAN.*

**k Judgment in foreclosure action—Judgment previously obtained against defendant.**—*Priority of foreclosure judgment.*—*MCDERMOTT v. BIELSCHOWSKY* (1912), 21 W. L. R. 77; 2 W. W. R. 182; 22 Man. L. R. 319.—*CAN.*

**l Judgment against executor—Before administration decree.**—*WILSON v. MARVIN* (1894), 3 B. C. R. 327.—*CAN.*

### PART IX. SECT. 1.

**282 l. Whether character of debt changed.**—A judgment neither creates, adds to nor detracts from a debt on which it is based; its only office is to declare the existence of the debt, fix the amount & secure to the creditor the means of enforcing its payment.—*INTERNATIONAL HARVESTER Co. v.*

*HOGAN*, [1917] 1 W. W. R. 857; 10 Alta. L. R. 400.—*CAN.*

**m. From what date effective.**—As a general rule, an order operates from the time it is pronounced, & not from the time it is drawn up.—*BUCHANAN v. PETERS* (1871), N. B. Dig. 648.—*CAN.*

**n. —.**—*KELLY v. WADE* (No. 2), (1890), 14 P. R. 66.—*CAN.*

**o. —.**—*DAVIDSON v. TAYLOR, ELLICK TOWNSHIP, GARNISHES* (1890), 14 P. R. 78.—*CAN.*

**p. —.**—*INTERNATIONAL HARVESTER Co. v. MCCURRACH*, [1920] 1 W. W. R. 158; 51 D. L. R. 139.—*CAN.*

**q. Decree by consent—Binding on parties.**—If a co. enters into a transaction which is *ultra vires* & litigation ensues, in the course of which a judgment is entered by consent, such judgment is as binding upon the parties

as one obtained after a contest, & will not be set aside because the transaction was beyond the power of the co.—*CHARLEBOIS v. DELAP* (1895), 28 S. C. R. 221.—*CAN.*

**r. Judgment of Supreme Court—Becomes judgment of inferior court.**—A judgment of the Supreme Ct. certified to the proper officer of the ct. of original jurisdiction becomes the judgment of the inferior ct. for all intents & purposes, & it is not necessary to make special application for leave to issue execution in order to obtain the costs of *appt.* in the Supreme Ct. allowed him on taxation in that ct.—*Ex p. JONES* (1900), 35 N. B. R. 108.—*CAN.*

### PART IX. SECT. 2.

**t Under 49 Vict. c. 35.]—No statute prior to 49 Vict. c. 35, made any**

Sect. 2.—On land.]

**286.** —.—.]—(1) Under Judgments Act, 1838 (c. 110), a judgment is a security upon land, as if debtor had by writing agreed to charge his lands, independent of the intention of the parties.

(2) *Semble*: before Judgments Act, 1838, a judgment creditor by *elegit* could get possession of lands & debtor could not withdraw them, but a judgment was not properly a security upon land.—*BOND v. BELL* (1857), 4 Drew. 157; 27 L. J. Ch. 233; 30 L. T. O. S. 346; 3 Jur. N. S. 1290; 6 W. R. 163; 62 E. R. 61.

**287.** —.—.]—Whether charge extends to proceeds of sale.]—A father conveyed real estates to trustees, upon trust to sell, & repurchase annuities granted by his son, & pay the son's debts at their discretion, & subject thereto, upon trust for the father for life, with remainder to his son in fee. An annuitant mentioned in a schedule to the deed, & stated to have entered up & docketed a judgment upon a warrant of attorney which accompanied his security, has no lien, by virtue of his judgment, upon the produce of the trust estates, when sold.—*FOSTER v. BLACKSTONE* (1833), 1 My. & K. 297; 2 L. J. Ch. 84; 39 E. R. 691; *affd.* without affecting this point, *sub nom.* *FOSTER v. COCKERELL* (1835), 9 Bli. N. S. 332, H. L.

*Annotations*:—*Mentd.* *Pearcock v. Burt* (1834), 4 L. J. Ch. 33; *Thomson v. Ramsbottom* (1837), 2 Keen. 35; *Jones v. Jones* (1838), 8 Sim. 633; *Meux v. Bell* (1841), 1 Hare. 73; *Mecke v. Kettlewell* (1842), 11 L. J. Ch. 293; *Bugden v. Bignold* (1843), 2 Y. & C. Ch. Cas. 377; *Etty v. Bridges* (1843), 2 Y. & C. Ch. Cas. 486; *Wiltshire v. Rabbitts* (1844), 14 Sim. 76; *Wilnot v. Pike* (1845), 5 Hare. 14; *Rice v. Rice* (1854), 2 Drew. 73; *Warburton v. Hill, Stent v. Wickens* (1854), Kay. 470; *Rooper v. Harrison* (1856), 2 K. & J. 86; *Lee v. Howlett* (1856), 2 K. & J. 531; ('Consolidated Investment & Insee. v. Riley' (1859), 1 Giff. 371; *Re Hughes' Trusts* (1864), 2 Hon. & M. 89; *Macleod v. Buchanan* (1864), 4 De G. J. & Sm. 265; *Ford v. Tynte* (1865), 34 L. J. Ch. 452; *Arden v. Arden* (1885), 29 Ch. D. 702; *Re Richards, Humber v. Richards* (1890), 45 Ch. D. 589; *English & Scottish Mercantile Investment Trust v. Brunton*, [1892] 2 Q. B. 1; *Re Wyatt, White v. Ellis*, [1892] 1 Ch. 188; *Ward v. Duncombe*, [1893] A. C. 369; *Re Wasdale, Brittin v. Partridge*, [1899] 1 Ch. 163; *Re Lake, Ex p. Cavendish*, [1903] 1 K. B. 151; *Montefiore v. Guodalla*, [1903] 2 Ch. 26; *Re Dallas*, [1904] 2 Ch. 385.

**288.** Under Judgments Act, 1838 (c. 110), s. 13 —Whether charge created.]—A judgment is made a charge on lands by above Act, but to obtain the benefit of it, there must be an order for payment within a given time; & if not, then a sale; a foreclosure is not the course.—*CARLON v. FARLAR* (1845), 8 Beav. 525; 5 L. T. O. S. 142; 50 E. R. 206.

**289.** —.—.]—A judgment from the time of registry, under above Act becomes a charge bearing interest upon the real estate of debtor, & at the expiration of one year from the date of such registry, has the force of a mtge. in equity, & may be executed by suit for foreclosure against the lands of debtor in the same manner as a mtge. The Ct. of Ch. will enlarge the time for payment of the debt notwithstanding the decree for foreclosure has become absolute, & been enrolled, on a proper case being shown; but the application must be made to the Lord Chancellor.—*FORD v. WASTELL* (1847), 6 Ilare. 229; 16 L. J. Ch. 372; 9 L. T. O. S. 372; 11 Jur. 537; 67 E. R. 1151; *on appeal*, 2 Ph. 501, L. C.

*Annotations*:—*Expld.* *Thorhill v. Manning* (1851), 1 Sim. N. S. 451. *Refd.* *Pres v. Coke* (1871), 6 Ch. App. 645.

lands exempt from a judgment registered under County Cts. Act. A judgment registered before the 49 Viet. may be enforced after its passage.—*HOPKINS v. BECKEL* (1887), 4 Man. L. R. 408.—*CAN.*

a. Under Judgments Act, 1908 (c.

26).]—Sect. 3 of above Act gives the judgment creditor only a right to register his judgment against the interest in lands beneficially owned by the judgment debtor.—*ENTWISTLE v. LENZ & LEISER* (1908), 14 E. C. R. 51.—*CAN.*

**290.** —.—.]—Effect of subsequent insolvency of debtor.]—A creditor entered up judgment on a warrant of attorney more than a year before the bkpcy. of his debtor, & registered the judgment before the bkpcy., but did not issue execution:—*Held*: a lien was thereby created, under above sect. upon the real estate of debtor, who had become bkpt., within the exception in 12 & 13 Vict. c. 106, s. 184, & the creditor having such lien was entitled to the usual equitable mtgee.'s order.—*Re BOYLE, Ex p. BOYLE* (1853), 3 De G. M. & G. 515; 22 L. J. Bcy. 78; 22 L. T. O. S. 110; 17 Jur. 979; 43 E. R. 202, L. JJ.

*Annotation*:—*Refd.* *Re Owen*, [1894] 3 Ch. 220.

**291.** —.—.]—In a mtge. suit by a judgment creditor of a tenant in tail in possession, the latter was ordered to execute a disentailing deed, in order to give full effect to pltf.'s charge [under above sect.].—*LEWIS v. DUNCOMBE* (1855), 20 Beav. 398; 52 E. R. 656.

*Annotations*:—*Consd.* *Bankes v. Small* (1887), 38 Ch. D. 716. *Distd.* *Re Anthony, Anthony v. Anthony*, [1893] 3 Ch. 498.

**292.** —.—.]—*BOND v. BELL*, No. 286, *ante*.

**293.** —.—.]—Under Judgments Act, 1838 (c. 110), s. 13, a judgment creditor was, prior to the passing of Judgments Act, 1864 (c. 112), entitled to foreclosure, on the ground that the former statute places the judgment creditor in the same position as regards remedies in equity as if the judgment debtor had by writing under his hand agreed to charge the hereditaments against which the judgments is sought to be enforced (*STIRLING, J.*).—*Re OWEN*, [1894] 3 Ch. 220; 63 L. J. Ch. 749; 71 L. T. 181; 43 W. R. 55; 38 Sol. Jo. 617; 8 R. 566.

*Annotations*:—*Refd.* *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Mentd.* *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413.

**294.** —.—.]—Judgment against corporation.]

—Judgment upon a bond given by a municipal corpn. before the passing of 5 & 6 Will. 4, c. 76:—*Held*: under above sect., to operate as a charge upon all lands & hereditaments of the corpn., whether acquired before or after the passing of 5 & 6 Will. 4, c. 76, the ct. being of opinion, that, even if the latter statute, standing alone, would have prevented the judgment creditor from charging after-acquired lands, which, *semble*, it would not, that objection was removed by 6 & 7 Will. 4, c. 104, s. 1; & the power by that sect. given to municipal corpn. of charging their lands & hereditaments for securing repayment & satisfaction of any debt contracted by them before the passing of 5 & 6 Will. 4, c. 76, is a power which they might exercise "for their own benefit," within Judgments Act, 1838 (c. 110), s. 13, the words "for his own benefit" meaning no more than "for his own use," "not as a trustee."—*ARNOLD v. GRAVESEND CORPN.* (1856), 2 K. & J. 574; 25 L. J. Ch. 530; 27 L. T. O. S. 97; 20 J. P. 358; 2 Jur. N. S. 703; 4 W. R. 478; 69 E. R. 911.

*Annotations*:—*Mentd.* *A.-G. v. Newcastle-upon-Tyne Corpn.* & *N. E. Ry.* (1889), 23 Q. B. D. 492; *Re Thompson, Bedford v. Teal* (1890), 45 Ch. D. 161.

**295.** —.—.]—*Qu.*: whether a judgment is a lien on the property of a municipal corpn.—*BRECON CORPN. v. SEYMOUR* (1859), 26 Beav. 548; 28 L. J. Ch. 606; 5 Jur. N. S. 1069; 7 W. R. 380; 53 E. R. 1010.

b. Judgment against homesteader.—*Land assigned to patent-holder.—Land continues liable.*]—After the registration of a judgment against a homesteader who had obtained his recommendation, he assigned the land to a third party to whom the patent issued:—*Held*:

**296. — Right to enforce charge.—When it accrues.]**—Pltf. was the mtgee. of premises, the equity of redemption in which belonged to J., against whom in May, 1857, an adjudication in bkpcy. was made, & assignees of the estate & effects duly appointed. B. in Dec. 1856, & D. in Feb. 1857, entered up judgments duly recovered against J. On a bill filed by pltf. for foreclosure, B., by answer, disclaimed all right & interest in the mortgaged premises. D. by answer, after stating that his judgment remained unsatisfied, stated that he did not claim to be entitled to any charge on the mortgaged premises, being advised that under above Act, such judgment was unavailable by reason of the bkpcy of J., & that he was an unnecessary party to the suit. He did not, however, disclaim all right & interest in the premises:—*Held*: (1) though by above sect. a judgment creditor is not entitled to proceed in equity to obtain the benefit of his charge until after the expiration of one year from the time of entering up his judgment, yet it seemed that there is nothing to prevent him from taking proceedings to make his charge available at the end of one year; (2) where a judgment was not entered up one year before the bkpcy. of the person against whom judgment was entered up, it would not operate to give the judgment creditor any preference; & therefore, although D. was deprived of his right to a preference, he was not deprived of his right to a charge, of which he would at the end of one year be entitled to claim the benefit, & consequently he was properly made a party to the suit.—*HARRISON v. PENNELL* (1858), 32 L. T. O. S. 15; 4 Jur. N. S. 682; 6 W. R. 712.

*See, generally, Part XIII., post.*

**297. — What lands affected.—Not lands no longer in possession of debtor.]**—*SIMMONS v. PETTIT*, No. 313, *post*.

**298. — Judgment debtor a mortgagee.—Equitable mortgage.]**—A., by articles of agreement, covenanted to pay B. £5,000 & it was thereby agreed & declared, that the £5,000 & interest should be & was thereby charged on land:—*Held*: by virtue of above sect., a judgment creditor of B. had a charge upon such land, & was a proper party to a suit for foreclosure.—*RUSSELL v. M'CULLOCH* (1855), 1 K. & J. 313; 24 L. T. O. S. 308; 1 Jur. N. S. 157; 3 W. R. 280; 69 E. R. 477.

**299. — Mortgage paid off on sale of land.]**—Judgments Act, 1854 (c. 15), s. 4, gives a good title to a *bond fide* purchaser as against registered judgment creditors of a mtgee., where the mtgee. is paid off, whether the mtgee. be prior to or subsequent to the passing of the Act.—*GREAVES v. WILSON* (No. 2) (1858), 25 Beav. 434; 28 L. J. Ch. 103; 4 Jur. N. S. 802; 53 E. R. 702.

*See, now, Law of Property Act, 1925 (c. 20), s. 195 (3) (iv).*

**300. — Lands of which debtor beneficial owner.]**—(1) The rights of simple contract creditors of an ancestor as against the descended estates are not defeated by judgments entered up against the heir, for his personal debts, before suit. 3 & 4 Will. 4, c. 104, makes real estate "assets to be administered in cts. of equity" for payment of simple contract debts of deceased, & Judgments Act, 1838 (c. 110), s. 13, makes a judgment a

charge on any lands of which the judgment creditor is seised, etc., or over which he shall have any disposing power, for his own benefit, & it makes such judgment an equitable mtge. thereon:—*Held*: judgments, entered up against the heir for his own debt, before any action or suit by the simple contract creditors of the ancestor have no priority over the simple contract creditors of the intestate, in respect of the descended estate.

(2) By Judgments Act, 1838 (c. 110), s. 13, the Legislature meant that a judgment was to operate on all lands & interest in lands over which debtor might have a disposing power, for his own benefit, without committing a breach of duty, that is, over which he had a right, at law or in equity, to consider himself the beneficial owner. The introduction of such words as "honestly" or "without committing a breach of duty" appears to be superfluous, for they are necessarily to be understood as forming a part of the clause.—*KINDERLEY v. JERVIS* (1856), 22 Beav. 1; 25 L. J. Ch. 538; 27 L. T. O. S. 245; 2 Jur. N. S. 602; 4 W. R. 579; 52 E. R. 1007.

*Annotations:—As to (1) Held. Price v. Price* (1887), 35 Ch. D. 297. *As to (2) Held. Nicholls v. Rosewarne* (1859), 6 C. B. N. S. 480; *Baker v. Tynite* (1860), 6 Jur. N. S. 1192; *Eyre v. McDowell* (1861), 9 H. L. Cas. 619; *Pickering v. Ilfracombe Ry.* (1868), L. R. 3, C. P. 235; *Gill v. Continental Gas Union Co.* (1872), 41 L. J. Ex. 176; *Re Leavesley*, [1891] 2 Ch. 1. *Generally, Mend. Robinson v. Nesbitt* (1868), L. R. 3, C. P. 264.

**301. — Lands held under agreement for purchase.]**—A. agreed to sell land to B., who accepted the title, paid part of his purchase-money, & was let into possession, but took no conveyance. A. subsequently obtained a decree against B. for sale of the property, & payment of the balance of purchase-money out of the proceeds:—*Held*: a purchaser under the decree could not be compelled to complete without the concurrence of the registered judgment creditors of B., whose judgments were prior to the decree, & who were not parties to the suit.—*GREY-COAT HOSPITAL (GOVERNORS) v. WESTMINSTER IMPROVEMENT COMRS.* (1857), 1 De G. & J. 531; 5 W. R. 855; 44 E. R. 829; *sub nom. GRAY-COAT HOSPITAL (GOVERNORS) v. WESTMINSTER IMPROVEMENT COMRS.*, 26 L. J. Ch. 843; 29 L. T. O. S. 330; 3 Jur. N. S. 1188, L. JJ.

**302. — Whether charge extends to proceeds of sale.]**—After verdict, & before judgment had been entered up, debt. sold his leaseholds by auction:—*Held*: under above Act, pltf. could not levy execution on the purchase-money.—*BROWN v. PENROTT* (1841), 4 Beav. 585; 49 E. R. 460.

**303. — Whether annuity out of real estate included.]**—Judgment debt, payable at a future day, & subject to be defeated in the event of the previous death of debtor, held to be a charge, under above sect., upon an annuity, bequeathed to debtor, & payable out of real estate, but not so as to affect growing payments accruing due before the judgment debt became payable.—*YOUNG-HUSBAND v. GISBORNE* (1847), 1 De G. & Sm. 209; 10 Jur. 834; 63 E. R. 1036.

*Annotation:—Folld. Bagnall v. Carlton* (1877), 6 Ch. D. 130.

**304. — Whether share of profits included.]**—Where, under a power to invest on real or govt. securities, a trust fund is invested on mtges., a judgment creditor of one of the *cestuis que trust* is entitled to a charge on his interest, to the extent

the land was liable, notwithstanding the patent, to answer the judgment.—*HARRIS v. RANKIN* (1887), 4 Man. L. R. 115.—*CAN.*

a. Judgment registered to bind lands

—*Lands already conveyed to stranger*  
—*Conveyance not registered.*—Defts recovered judgments against B. & registered them so as to bind his lands. At that time 2,000 acres of land belonging to pitfs. & conveyed to

pitfs. by B. stood in the name of B. owing to the conveyance not being registered:—*Held*: as the lands were not the lands of the judgment debtor, & there was no laches on the part of pitfs., there should be a declaration

**Sect. 2.—On land. Sects. 3, 4 & 5.]**

of all moneys which may be payable to him out of the rents & profits of the mortgaged property or otherwise, by virtue of such mtg. But the share of the judgment debtor in the interest paid to the trustees by the mtgor. & not taken out of rents & profits, is not subject to a charge under Judgments Act, 1838 (c. 110), s. 13, the covenant to pay being a security which falls under sect. 12. —*AVISON v. HOLMES, PENNY v. AVISON* (1861), 1 John. & H. 530; 30 L. J. Ch. 564; 4 L. T. 617; 7 Jur. N. S. 722; 9 W. R. 550; 70 E. R. 855.

**305. Under Judgments Amendment Act, 1864 (c. 112)—Whether charge created—Execution & return by sheriff necessary.]**—By above Act a judgment creditor has no lien upon the land of his debtor until he has got a return from the sheriff, though he may, after putting the writ in the hands of the sheriff & before the return, have a right to file a bill to remove a legal impediment; & priorities of judgment creditors against lands are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff.

A judgment creditor subsequent in point of date was the first to place his writ in the hands of the sheriff, & get the lands of debtor extended under such writ:—*Held*: he was entitled in priority to a prior judgment creditor whose writ was subsequently placed in the sheriff's hands before the lands were extended.—*GUEST v. COWBRIDGE RY. CO.* (1868), L. R. 6 Eq. 619; 37 L. J. Ch. 909; 18 L. T. 871; 17 W. R. 7.

*Annotations*:—*Reid, Re Newcastle* (1869), L. R. 8 Eq. 700; *Hutton v. Haywood* (1874), 43 L. J. Ch. 372; *Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275.

**306.** ————.]—The mere registration of a judgment upon which no writ of execution has issued, constitutes no lien upon debtor's land. Above Act has in effect repealed Judgments Act, 1838 (c. 110), s. 13.—*Re BAILEY'S TRUSTS* (1869), 38 L. J. Ch. 237; 20 L. T. 168; 17 W. R. 393.

*Annotations*:—*Exptd. Cork v. Russell* (1871), L. R. 13 Eq. 210. *Fold, Hutton v. Haywood* (1873), 22 W. R. 53. *Reid, Mildred v. Austin* (1869), L. R. 8 Eq. 220.

**307.** ————.]—Judgment creditors of a mtgor., whose judgments do not affect the mortgaged land at the date of the decree in a foreclosure suit, are entitled to redeem, if they acquire a charge on the land by issuing writs of *elegit*, & obtaining a return from the sheriff, within six months from the date of the decree.—*MILDRED v. AUSTIN* (1869), L. R. 8 Eq. 220; 20 L. T. 939; 17 W. R. 638.

*Annotation*:—*N.F. [Cork v. Russell* (1871), L. R. 13 Eq. 210.

**308.** ————.]—The preamble of Judgments Act, 1864 (c. 112), expressly states that it is desirable to assimilate the law affecting freehold, copyhold, & leasehold estates to that affecting purely personal estates, in respect to future judgments, statutes, & recognisances." That shows the object of the statute, which was based upon a large public policy, & that object would fail if the statute failed to assimilate real estates to mere personal estates with respect to the law of judgments; the law being that mere personal estates are not bound by a judgment unless there has been an actual delivery of them in execution (*LORD SELBORNE, C.*)—*HATTON v.*

*HAYWOOD* (1874), 9 Ch. App. 229; 43 L. J. Ch. 372; 30 L. T. 279; 22 W. R. 356, L. C. & L. JJ.

*Annotations*:—*Apld. Re South* (1874), 9 Ch. App. 369. *Comd. Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275; *Backhouse v. Siddle* (1878), 38 L. T. 487; *Re Watkins, Ex p. Evans* (1879), 13 Ch. D. 252; *Re Hastings, Ex p. Brown* (1892), 61 L. J. Q. B. 654. *Reid, Beckett v. Buckley* (1874), L. R. 17 Eq. 435; *Smith v. Cowell* (1889), 50 L. J. Q. B. 38; *Re Pope* (1886), 17 Q. B. D. 743; *Re Anthony, Anthony v. Anthony*, [1892] 1 Ch. 450; *Blackman v. Fysh*, [1892] 3 Ch. 209; *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338; *Re Jones & Judgments Act*, 1864 (1895), 39 Sol. Jo. 671; *Thompson v. Gill*, [1903] 1 K. B. 760; *R. v. Selfe* (1908), 77 L. J. K. B. 697; *Ashburton v. Nocton*, [1915] 1 Ch. 274.

**309. Under Land Charges Act, 1900 (c. 26), s. 2.—Registration of writ of *elegit*.]**—Where land is subject to a mtg. & incapable of being delivered in execution under a writ of *elegit* the registration by a judgment creditor of a writ of *elegit* is a registration of "a writ or order for the purpose of enforcing" the judgment within Land Charges Act, 1900 (c. 26), s. 2, & operates to create a charge on the land under Judgments Act, 1838 (c. 110), s. 13.—*ASHBURTON (LORD) v. NOCTON*, [1915] 1 Ch. 274; 84 L. J. Ch. 193; 111 L. T. 895; 31 T. L. R. 122; 59 Sol. Jo. 145, C. A.

*See, generally, EXECUTION, Vol. XXI., pp. 556 et seq.*

**SECT. 3.—ON GOODS AND CHATTELS.**

**310. General rule.]—HATTON v. HAYWOOD, No. 308, ante**

**Judgment in trover or detinue.]—See EXECUTION, Vol. XXI., p. 584, Nos. 1613–1618; & generally, TROVER.**

**Enforcement by writ of fieri facias.]—See, generally, EXECUTION, Vol. XXI., pp. 470 et seq.**

**SECT. 4.—ON MONEY AND SECURITIES.**

**Apart from statute—Whether proceeds of sale of land included.]—See Nos. 287, 302, ante.**

**311. Under Judgments Act, 1838 (c. 110), s. 13.—Whether proceeds of sale of remainder included.]—A remainderman who failed in a suit instituted by him against the tenant for life in respect of alleged waste, & who was ordered to pay the costs of the suit, sold his remainder & executed a conveyance of it to the purchaser before the costs could be taxed, & he paid his solr.'s bill out of the proceeds of the sale without leaving sufficient to pay deft.'s costs of the suit, & without having any means of paying them:—*Held*: deft. was not entitled to have the conveyance set aside or declared fraudulent, or to recover from the remainderman's solr. the portion which the solr. had received of the proceeds of the sale in payment of his costs, & the fact of the purchaser having or not having notice of the circumstances attending the sale, or of the purpose of it, was immaterial.—*NORTLIFFE v. WARBURTON* (1862), 4 De G. F. & J. 449; 31 L. J. Ch. 777; 6 L. T. 768; 8 Jur. N. S. 854; 10 W. R. 635; 45 E. R. 1258, L. C.**

**312. Under Judgments Act, 1838 (c. 110), s. 14 —Right to charging order.]—Upon judgment in an action declaring that deft. is liable to pay to plff. a certain sum, & decreeing payment to be made**

that these judgments did not bind the lands.—*SISSIBOO PULP CO. v. CARRIER LANE CO.* (1905), 40 N. S. R. 546.—*CAN.*

**d. Registration of judgment—"Lands acquired before or after."]**—*LOUIEBURG*

*LAND CO. v. TUTTY* (1883), 4 R. & G. 401.—*CAN.*

**e. Where no personal estate.]—**Under Jud. Act, Ord. 55, r. 3, a judgment creditor has the right, when there is no personal estate, to apply

by way of originating summons to have lands, bound by memorial of judgment, sold, without an administration of the estate.—*MASSEY-HARRIS CO. v. WHITEHEAD*, [1923] 4 D. L. R. 408; 51 N. B. R. 282.—*CAN.*



on or before that day three months, *pltf.* is at once entitled, under the above sect., to obtain a charging order upon stock & shares standing in the name of *deft.*—*BAGNALL v. CARLTON* (1877), 6 Ch. D. 130; 47 L. J. Ch. 51; 36 L. T. 730; 26 W. R. 71.

See, generally, EXECUTION, Vol. XXI., pp. 647 *et seq.*

#### SECT. 5.—POSITION OF JUDGMENT CREDITOR.

**313. Rights as regards third parties.—Whether limited to rights of judgment debtor.**—*See*  *judgments Acts, 1838–1840*, only give effect to the judgment where debtor is the owner of the land, & not where, prior to the judgment, the land had passed from the hands of debtor.—*SIMMONS v. PETTIT* (1844), 2 L. T. O. S. 438; 8 Jur. 209.

**314. ———.**—*A.*, an attorney, employed by *B.* to invest money, lent it to *C.* on an agreement, by which *C.*, as a security, charged his interest in £5,000 consols, standing in the names of trustees in trust for *C.* *A.* neglected to give notice to the trustees. A judgment creditor of *C.*, subsequently to this loan, obtained a charging order under Judgments Act, 1838 (c. 110), s. 11, notice of which was given to the trustees. *C.* obtained the benefit of the Insolvent Act. *B.* brought an action against *A.* for negligence; on the trial, the judge directed the jury, in estimating the damages, to consider that, as no notice had been given to *C.*'s trustees of the charge in favour of *B.*, the subsequent charge created by the judge's order had priority over it:—*Held*: (LORD CAMPBELL, C.J., WIGHTMAN, J., & CROMPTON, J.) the direction was correct, & the judgment creditor had the same rights as a subsequent incumbrancer without notice, & was, therefore, to be preferred in equity to *A.*; (ERLE, J., *diss.*) the judgment creditor had only those remedies which affected what, at the time of the charging order, remained the property of the judgment debtor.—*WATTS v. PORTER* (1854), 3 E. & B. 743; 2 C. L. R. 1553; 23 L. J. Q. B. 345; 23 L. T. O. S. 228; 1 Jur. N. S. 133; 118 E. R. 1319.

*Annotations*:—*Dbtd.* *Beavan v. Oxford* (1856), 6 De G. M. & G. 507. It seems to me open to argument whether the view of the case taken by ERLE, J., who differed from the rest of the ct., was not the right one (LORD CRANWORTH, C.). I prefer the opinion of ERLE, J., to that of the other three judges (TURNER, L.J.). *N.F.* *Kinderley v. Jervis* (1856), 22 Beav. 1; *Scott v. Hastings* (1858), 4 K. & J. 633. My judgment coincides with that of ERLE, J. (SIR W. PAGE WOOD, V.-C.). *Consd.* *Nicholls v. Rosewarne* (1859), 6 C. B. N. S. 480. *N.F.* *Benham v. Keane* (1861), 1 John. & H. 685. *Dbtd.* *Pickering v. Ilfracombe Ry.* (1868) L. R. 3 C. P. 235. If it were necessary to decide between this conflict of authority, I should have no hesitation in agreeing with the opinion of ERLE, C.J. (BOVILL, C.J.). *N.F.* *Robinson v. Nesbitt* (1868), L. R. 3 C. P. 264. The opinion of the majority of the ct. in that case is no longer law (BOVILL, C.J.); *Gill v. Continental Gas Co.* (1872),

L. R. 7 Exch. 332; *Punchard v. Tomkins* (1882), 31 W. R. 286. The case of *Watts v. Porter* is itself unsound law, but ERLE, C.J.'s construction of Judgments Act, 1838 (c. 110), is now held to be the law (CHITTY, J.); *Re General Horticultural Co., Ex p. Whitehouse* (1886), 32 Ch. D. 512; *Re Leavelley*, [1891] 2 Ch. 1. The judgment of ERLE, J., in *Watts v. Porter* is now accepted as an accurate explanation of the meaning of these clauses.

*Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 693.  
*V. Coates* (1856), 18 C. B. 757; *Croft v. Lumley* (1858), 6 H. L. Cas. 672; *Baker v. Tynte* (1860), 2 E. & E. 897. *Mentd.* *Whistler v. Forster* (1863), 14 C. B. N. S. 248.

**315. ———.**—No order can be made conferring upon the judgment creditor a right which the judgment debtor had already divested himself of (WILLES, J.).—*HIRSCH v. COATES* (1856), 18 C. B. 757; 25 L. J. C. P. 315; 27 L. T. O. S. 202; 4 W. R. 656; 139 E. R. 1568.

*Annotations*:—*Apld.* *Re General Horticultural Co., Ex p. Whitehouse* (1886), 32 Ch. D. 512; *Davis v. Freethy* (1890), 24 Q. B. D. 519. *Reid.* *Newman v. Rook* (1858), 4 C. B. N. S. 434; *Cole v. Eley* (1894), 70 L. T. 892.

**316. ———.**—A judgment creditor will be postponed to a subsequent mtgee. of an equitable interest in stock, notwithstanding such creditor has, since the mtge., but before notice thereof to the trustee of the fund, obtained, under Judgments Act, 1838 (c. 110), s. 14, an order charging the fund.

In such a case, the rule in *Dearle v. Hall* (1828), 3 Russ. 1, does not apply in favour of the judgment creditor.

The stock was disposed of before the order *nisi* was made; & even if, by the order *nisi*, an inchoate right had been obtained, it would have been a sufficient cause to show against making the order absolute, that, before the order *nisi*, the debtor had assigned his interest in the stock (PAGE WOOD, V.-C.).—*SCOTT v. HASTINGS* (LORD), *BEAVAN v. MACQUEEN, HASTINGS* (LORD) *v. BEAVAN* (1858), 4 K. & J. 633; 5 Jur. N. S. 240; 6 W. R. 862; 70 E. R. 263.

*Annotations*:—*Consd.* *Punchard v. Tomkins* (1882), 31 W. R. 286. *Apld.* *Re Bell, Carter v. Stadden* (1886), 54 L. T. 370. *Reid.* *Haly v. Barry* (1868), 3 Ch. App. 452; *Gill v. Continental Gas Union* (1872), 41 L. J. Ex. 176; *Arden v. Arden* (1885), 29 Ch. D. 702; *Re Leavelley*, [1891] 2 Ch. 1; *Gray v. Stone & Funnell* (1893), 69 L. T. 282; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727.

**317. ———.**—The case of *Watts v. Porter* [No. 314, *ante*] is itself unsound law, but the opinion which was expressed by ERLE, C.J., in that case has been adopted in several subsequent decisions.

By Judgments Act, 1838 (c. 110), a judgment is to operate as a charge on land, under sect. 13, as if the judgment debtor had agreed to charge the amount of such judgment debt & interest—that is to say, to create a general charge; & the question coming before the ct., the result of the decision now is, that that means only what he can honestly charge. That is to say, you must look at the state of his title at the time, & you must not make

#### PART IX. SECT. 5.

**1. Rights as regards third parties.—Purchaser of land attached.**—Where a party purchases land upon which a judgment has attached, he holds the land subject to right of sale under a *fi. fa.* by the judgment creditor.—*DODD v. McPHERSON v. HUNTER* (1848), 4 U. C. R. 449.—CAN.

**5. ———. Interpleader action.—Proof of judgment.**—The form of an interpleader issue to try title of claimants of goods as against the execution creditor assumes the right of the execution creditor to seize the goods of the execution debtor by virtue of a judgment recovered against him, & consequently the execution creditor is not bound to prove the judgment.—*HOLDEN & ADAMSON v. LANGLEY*,

*PATTERSON v. LANGLEY* (1862), 11 C. P. 407.—CAN.

**h. Rights of subsequent creditor.—Prior judgment irregular.**—A subsequent judgment creditor of *deft.* has no right to complain of an irregularity in *pltf.*'s judgment, as that it was signed too soon. It is only in case of fraud that a subsequent creditor can apply to set aside judgment.—*ROBINSON v. NEW BRUNSWICK & CANADA RY. & LAND CO.* (1863), 10 N. B. R. (5 All.) 630.—CAN.

**k. ———. Prior judgment not bona fide.**—When it is not clearly shown that a person in whose favour a judgment was confessed is a bona fide creditor for a certain sum, the judgment will not be sustained against a subsequent creditor.—*SHERATON v. SHERATON*

(1886), 25 N. B. R. 534.—CAN.

**l. ———.**—*CARACADEN v. ZIMMERMAN* (1893), 9 Man. L. R. 178.—CAN.

**m. Validity of judgment granted.—Right to attack.**—*POWERMAN v. PHILLIPS* (1888), 15 A. R. 679.—CAN.

**n. Trust deed for benefit of creditors.—Rights of judgment creditors named in deed.—As against unnamed creditors.**—*HANNEY v. SHERATON* (1886), 25 N. B. R. 521.—CAN.

**o. Judgment against partners.—Payment of whole debt by one.—Substitution for judgment creditor.—Rights against remaining partner.**—*Pltf. & defts.* were partners, & judgment was recovered against them by a bank upon certain promissory notes, of which they were respectively maker



**Sect. 5.—Position of judgment creditor. Sect. 6.]**

him or make the Act of Parliament commit a fraud by overriding the prior incumbrances upon the same interest. The language of *EBLE, C.J.*, is, to my mind, quite satisfactory on the point (*CHITTY, J.*).—*PUNCHARD v. TOMKINS* (1882), 31 W. R. 286.

**318. ———.]**—A garnishee order under R. S. C., Ord. 45, binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order was obtained & served; consequently it is postponed to a prior equitable assignment of the debt, even in the absence of notice.—*Re GENERAL HORTICULTURAL CO., Ex p. WHITEHOUSE* (1886), 32 Ch. D. 512; 55 L. J. Ch. 608; 54 L. T. 898; 34 W. R. 681.

*Annotations:—***Expld.** *Davis v. Freethy* (1890), 24 Q. B. D. 619. **Consd.** *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727. **Refd.** *Badeley v. Consolidated Bank* (1886), 34 Ch. D. 536; *Robson v. Smith*, [1895] 2 Ch. 118; *Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 693.

**319. ———.]**—The judgment creditor stands exactly in the shoes of the judgment debtor, & if the judgment debtor cannot impugn the deed as between herself as assignor & her husband as assignee, neither can the judgment creditor impugn it (*VAUGHAN WILLIAMS, L.J.*).—*GLEGG v. BROMLEY*, [1912] 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 825, C. A.

*Annotations:—***Consd.** *Re Lloyd's Furniture Palace, Evans v. Lloyd's Furniture Palace*, [1925] 1 Ch. 853. **Mentd.** *Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478; *Wells v. Wells* (1914), 30 T. L. R. 437; *German v. Yates* (1915), 32 T. L. R. 52; *Hambleton v. Brown*, [1917] 2 K. B. 93; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Hosack v. Robins* (1918), 62 Sol. Jo. 520; *Denny's Trustee v. Denny & Warr*, [1919] 1 K. B. 583; *Ellis v. Torrington*, [1920] 1 K. B. 399.

**320. ———.]**—A judgment creditor who has obtained a garnishee order takes no more than the rights of debtor (*COLLINS, J.*).—*COLE v. ELEY*, [1894] 2 Q. B. 180; 70 L. T. 802; 42 W. R. 505; 10 T. L. R. 461; 38 Sol. Jo. 460; 9 R. 552, D. C.; *affd.*, [1894] 2 Q. B. 350, C. A.

*Annotations:—***Expld.** *Edmunds v. Edmunds*, [1904] P. 362. **Refd.** *Glegg v. Bromley* (1911), 81 L. J. K. B. 334. **Mentd.** *The Paris*, [1896] P. 77; *Watts v. Hetley* (1899), 44 Sol. Jo. 134; *Ridd v. Thorne*, [1902] 2 Ch. 344; *Levene v. Maton* (1907), 51 Sol. Jo. 532; *Knight v. Knight*, [1925] 1 Ch. 835.

**321. ——— To impeach voluntary assignment.]**—A judgment creditor is not a purchaser within Stat. 27 Eliz. c. 4, & has therefore no title on that ground to set aside a prior voluntary settlement.

Judgments Act, 1838 (c. 110), s. 13, does not confer on the judgment creditor any right against a person claiming under a voluntary settlement previously made by the judgment debtor.

Now what did the Legislature mean to do by that enactment? In the first place they meant to make the judgment directly operate as a charge; but a charge on what? I apprehend that there was no principle inducing them to mean, & that the words do not represent them as having meant, to give the judgment creditor any right except against his debtor, that is, the judgment was to

have the effect of a charge on property of the debtor (*LORD BEAVAN v. OXFORD (FAEL)* (1856), 6 De G. M. & G. 507; 25 L. J. Ch. 299; 26 L. T. O. S. 277; 2 Jur. N. S. 121; 4 W. R. 275; 43 E. R. 1831, L. C.).

*Annotations:—***Consd.** *Kinderley v. Jervis* (1856), 22 Bear. 1; *Scott v. Hastings* (1858), 4 K. & J. 633; *Baker v. Tynte* (1860), 2 E. & E. 897. **Expld.** *Benham v. Keane* (1861), 1 John. & H. 685. **Refd.** *Hirsch v. Coates* (1856), 18 C. B. 757; *Croft v. Lumley* (1858), 6 H. L. Cas. 672; *Nicholls v. Rosewarne* (1859), 6 C. B. N. S. 480; *Eyre v. M'Dowell* (1861), 9 H. L. Cas. 619; *Pickering v. Ilfrcombe Ry.* (1868), L. R. 3 C. P. 235; *Robinson v. Nesbitt* (1868), L. R. 3 C. P. 264; *Gill v. Continental Gas Union Co.* (1872), 41 L. J. Ex. 176; *Punchard v. Tomkins* (1882), 31 W. R. 286; *Dallow v. Garrold, Ex p. Adams* (1884), 14 Q. B. D. 543; *Re Bell, Carter v. Stadden* (1886), 54 L. T. 370; *Re Leavesley*, [1891] 2 Ch. 1; *Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 693.

**322. ———.]**—An assignment of choses in action, since these became subject to attachment by C. L. P. Act, 1854 (c. 125), ss. 60 *et seq.*, may be void under 13 Eliz. c. 5, as tending to defeat, hinder or delay creditors.

It was urged that the judgment creditor could take no more rights under the deed than the judgment debtor had; in my opinion this is not in point where the rights of third parties are affected at the time of the assignment, & in my judgment the deed can be challenged by the judgment creditor in these proceedings (*GORELL BARNES, J.*).—*EDMUNDS v. EDMUNDS*, [1904] P. 362; 73 L. J. P. 97; 91 L. T. 568.

*Annotations:—***Appld.** *Glegg v. Bromley* (1911), 81 L. J. K. B. 334. **Refd.** *Wells v. Wells* (1914), 30 T. L. R. 437.

*See, also, EXECUTION, Vol. XXI., pp. 645, 656, 657, Nos. 2240, 2348–2356.*

**After execution levied.]**—*See, generally, EXECUTION, Vol. XXI., p. 442.*

**Where debtor insolvent.]**—*See BANKRUPTCY, Vol. V., pp. 809 et seq.*

**Execution as protected transaction.]**—*See BANKRUPTCY, Vol. V., pp. 826, 827.*

**Effect of notice of assignment of chose in action.]**—*See CHOSSES IN ACTION, Vol. VIII., pp. 477, 478.*

**As creditor in administration suit.]**—*See EXECUTORS, Vol. XXIII., pp. 351 et seq.*

**Enforcement of rights.]**—*See, generally, Part XIII., Sect. 1, post.*

**Under orders & decrees in equity.]**—*See Part XIII., Sect. 2, post.*

**SECT. 6.—MERGER.**

**323. General rule.]**—A promissory note for £100, on the face of it payable on demand, was given to the trustee of a building society, to secure certain instalments, fines, & interest. The payee having sued upon the note, took a *cognovit* for the instalments then due, & costs, which were afterwards paid; & he gave a receipt as for debt & costs in the action:—*Held*: he could not maintain another action on the note for instalments which subsequently became due.

& indorser. Pltff. paid the judgment immediately after its recovery, took an assignment of it, & proceeded to enforce it against deft. The partnership accounts were taken by a referee, whose finding, approved by the ct., was that deft. should have paid one-half of the judgment:—*Held*: pltff. was entitled to that extent to stand in the place of the original judgment creditor, & enforce the judgment against the deft.—*HONINGER v. LOVE* (1888), 16 O. R. 170.—*CAN.*

**p. Debtor's charge over third person's lands.—Right of judgment creditor**

**to sell.]**—An execution creditor cannot, under a *fi. fa.* lands, sell the charge which the judgment debtor may have upon the lands of a third party by virtue of a registered judgment.—*ABELL v. ALLAN* (1887), 5 Man. L. R. 25.—*CAN.*

**q. Delay in enforcement by first judgment creditor.—Right of subsequent judgment creditor.]**—*SMITH v. SMITH* (1866), 2 Old. 303.—*CAN.*

**r. Irregularity in obtaining judgment.—Postponement of execution.—Subject to rights of other judgment creditors.]**

—*MCGERE v. BAIRD & CUNNINGHAM* (1860), 3 P. R. 9.—*CAN.*

**t. Release by one joint creditor.—Not binding on other.]**—A release of a judgment, executed by one co-creditor in collusion with the judgment debtor, is not binding on the other co-creditor.

—*GREAT REPUBLIC GOLD MINING CO. v. HUSSEY & MCNEIGHT* (1886), 5 N. Z. L. R. 126 (S. C.).—*N.Z.*

**PART IX. SECT. 6.**

**a. Judgment on promissory note.]**—Judgment was recovered by pltffs.,

The party gives a *cognovit*, by which you have got the benefit of a judgment. A judgment would have merged the original demand, & as it would have passed in *rem judicatam*, you could no longer have sued upon the security (BAYLEY, B.).—SIDDALL v. RAWCLIFFE (1833), 1 Cr. & M. 487; 3 Tyr. 441; 2 L. J. Ex. 237; 149 E. R. 491; *previous proceedings*, 1 Mood. & R. 263, N. P.

*Annotation*.—Mentl. Orridge v. Sherborne (1843), 12 L. J. Ex. 313.

**324. Interlocutory judgment.]**—In an action upon a promissory note interlocutory judgment does not merge the note.—A.-G. v. ELWELL (1725), Bunb. 199; 145 E. R. 646.

**Merger of negotiable instrument in judgment.]**—See, generally, *BILLS OF EXCHANGE*, Vol. VI., pp. 387 *et seq.*

**325. Judgment on bond—Liability on bond joint & several—Judgment entered against debtors jointly.]**—B. & C. being indebted to A. give a joint & several bond. A. takes as part of the same security a joint warrant of attorney & enters up a joint judgment. B. & C. become bkpts. :—*Held*: bond is merged in the judgment & A. can only prove against the joint estate of B. & C.—*Re BARROW & GEDDES*, *Ex p. CHRISTY* (1832), 2 Deac. & Ch. 155; Mont. & B. 352; 1 L. J. Bcy. 103, Ct. of R.

*Annotations*.—*Apld.* *Re Foxwell*, *Ex p. Pearce* (1832), 1 L. J. Bcy. 109. *Reid.* *Re Kearsley*, *Ex p. Pennell* (1841), 2 Mont. D. & De G. 273; *Re Agnew* (1856), 27 L. T. O. S. 27. *Mentl.* *Re Davison*, *Ex p. Chandler* (1884), 13 Q. B. D. 50.

—*See, generally*, *BONDS*, Vol. VII., pp. 254, 255, Nos. 963–965.

**326. Judgment on simple contract debt.]**—If one who is indebted in a simple contract debt give a bond to his creditor, or have judgment entered up against him upon it, the simple contract debt is merged in the higher security; but merger can only be by a higher contract between the same parties. If, indeed, there be a collateral security taken between other parties for this same previous debt, & that security be pursued to satisfaction, it would then operate as a bar to the former debt, & so far as a merger of it, but not otherwise.—*BELL v. BANKS* (1841), 3 Man. & G. 258; 3 Scott, N. R. 497; Drinkwater, 236; 5 Jur. 486; 133 E. R. 1140; *sub nom.* *BELL v. SHUTTLEWORTH*, 10 L. J. C. P. 239.

*Annotations*.—*Reid.* King v. Hoare (1844), 13 M. & W. 494; Chetwynd v. Allen, [1899] 1 Ch. 353; Isaacs v. Salbstein, [1916] 2 K. B. 139.

**327. —**—In an action on a bill of exchange by indorsee against drawer, deft. pleaded that before the indorsement to plffs., judgment had been recovered against deft. by a prior indorser :—*Held*: a good plea, especially as it appeared that one of plffs. was one of those by whom that judgment had been recovered.

The general rule is, that the indorsee of an overdue bill takes it subject to all the equities to which the party from whom he receives it was subject. The indorser of an overdue bill, who has recovered judgment upon it, can confer no title by indorsing it to parties who then, for the first time, claim any interest in it (PATTESON, J.).

After judgment has been recovered, the simple contract debt is merged in the judgment debt (ERLE, J.).—WARD v. LIDDAMAN (1847), 10 L. T. O. S. 225.

**328. — Due by firm—Judgment entered against firm.]**—Where a firm is adjudicated bkpt.

on a judgment debt recovered against the firm jointly, if the partners are also severally liable in respect of the same matter by reason, for instance, of its arising out of breach of trust, the several liability of the partners is not, solely by reason of the creditor having sued for & obtained a joint judgment, merged in such judgment, so as to preclude a proof by the judgment creditor against their respective separate estates.—*Re DAVISON*, *Ex p. CHANDLER* (1884), 13 Q. B. D. 50; *sub nom.* *Re DAVISON*, *Ex p. BLENKIRON'S EXECUTORS*, 50 L. T. 635.

*Annotation*.—*Reid.* *Re King & Boesley*, *Ex p. Horner* (1894), 64 L. J. Q. B. 126.

**329. — Consent judgment—Not filed under Debtors Act, 1869 (c. 62), s. 27.]**—Where an order is made by consent for judgment against a defendant in respect of a simple contract debt, such debt is not merged in the judgment, the judgment itself being void, because the consent order has not been filed as provided by Debtors Act, 1869 (c. 62), s. 27.—*VIBART v. COLES* (1890), 24 Q. B. D. 364; 59 L. J. Q. B. 152; 62 L. T. 551; 38 W. R. 350, C. A.

**330. Judgment on collateral security.]**—A. & B., for a valuable consideration paid to them, join with C., as their surety, in granting an annuity to D.; & the three jointly, & any two of them separately, covenant that the three, or some or one of them, shall well & truly pay the annuity. A warrant of attorney, of even date with the indenture, was also given by the three as a collateral security; & it was thereby declared that the judgment to be entered up on the warrant of attorney should be considered as a further security to D. A. & B. afterwards became bkpts. :—*Held*: (1) D. might prove against the estate of A. & B. for the value of the annuity; (2) the covenant to pay the annuity was not merged in the judgment.—*Re KEASLEY*, *Ex p. PENNELL* (1841), 2 Mont. D. & De G. 273; 5 Jur. 899; *sub nom.* *Re KEASLEY*, *Ex p. PENNELL*, 10 L. J. Bcy. 77, Ct. of R.

**331. Effect of satisfaction of original debt.]**—Judgment was recovered in 1912 against a railway co. for arrears of interest on some of its debenture stock, but the judgment was not satisfied. The said debenture stock, with all arrears of interest thereon, was purchased by plff., who also took an assignment of the judgment. The railway in question was by virtue of Railways Act, 1921 (c. 55), of an absorption scheme made thereunder absorbed in, & its liabilities were transferred to, the Southern Railway. By that scheme it was provided that the registered holders of stock of the absorbed co. should become holders of stock of the Southern Railway in certain proportions in lieu of the stock of the absorbed co. held by them, & that the holders should be deemed to have accepted the stock allocated to them under the scheme "in substitution for the stock of the (absorbed) co., held by them & in satisfaction of all claims thereunder including any arrears of interest." In accordance with the scheme stock of the Southern Railway was allocated to plff. in substitution for the debenture stock held by him in the absorbed co. Plff. brought this action against the Southern Railway upon the judgment to recover (a) the amount of the judgment debt of which he was assignee, & (b) the statutory interest which had accrued due upon that judgment.

debt, upon a promissory note  
a part of the purchase-money  
by plffs. to deft. :—*Held*:

so long as the judgment stood, no  
action could be brought upon the  
original cause of action, which had

become merged.—TORONTO DENTAL  
MATERIALS CO. v. MCLAREN  
(1890), 14 P. R. 89.—CAN.

*Sect. 6.—Merger. Sects. 7, 8, 9, 10, 11, 12, 13 & 14.]*

The judge gave judgment for debts. upon the claim under head (a) & for pltf. upon that under head (b). On appeal:—*Held*: the claim under the judgment for the arrears of interest due on the debenture stock was not the less a "claim thereunder" within the meaning of the absorption scheme because the debt had become merged in the judgment. The judgment was a security for the payment of that debt, & upon the extinguishment of the debt by reason of the absorption scheme the judgment was extinguished also; & the same consequence attached to the claim for the statutory interest upon that judgment. Pltf.'s claim therefore failed under both heads.—*AMAN v. SOUTHERN RY. CO.*, [1926] 1 K. B. 59; 95 L. J. K. B. 58; 134 L. T. 9; 42 T. L. R. 31; 70 Sol. Jo. 42, C. A.

**332. Effect of covenant to pay interest.**—In consideration of pltf.'s discounting a bill, deft., jointly & severally with D., undertook if the same was not paid at maturity to pay, as interest thereon, £20 for each month afterwards. The bill was not paid at maturity, & pltf. issued a writ against deft., & by the indorsement thereon claimed the amount of the bill & interest at £20 per month as per agreement; but the declaration in the action was on the bill only, & contained no count upon the agreement or for interest, & pltf. recovered judgment by default for the amount of the bill only. Pltf. having brought a second action against deft. upon the agreement for interest:—*Held*: the action was maintainable for interest due before the judgment was recovered, but not for interest due subsequently to it.—*FLORENCE v. JENINGS* (1857), 2 C. B. N. S. 454; 26 L. J. C. P. 274; 30 L. T. O. S. 53; 3 Jur. N. S. 772; 140 E. R. 494.

*Annotations*:—*Consd. Re Sneyd, Ex p. Fewings* (1883), 25 Ch. D. 338. *Reid. Re King & Beesley, Ex p. King & Beesley*, [1895] 1 Q. B. 189; *Faber v. Latham* (1897), 77 L. T. 168.

**333.** —[—]—A memorandum indorsed on a warrant of attorney stated that the warrant had been given to secure the payment on June 2, 1864, of a sum of money, with interest thereon at the rate of £5 per cent. per month; that judgment was forthwith to be entered up, & that if the debt & interest were not paid on the day aforesaid, execution was to issue. The debt was not paid at the time named, & judgment was not entered up:—*Held*: after the day named for payment the debt carried interest at £4 per cent. *per annum* only.—*ROBINSON v. WOOD* (1869), 18 W. R. 32.

**334.** —[—]—A. executed an instrument acknowledging the receipt from B. of an advance of 9,000 rupees, bearing interest at 18 per cent. *per annum*, which amount he promised to repay by monthly instalments until the whole amount, with interest, should be finally liquidated, the monthly interest to be deducted from the instalment, & the balance to be applied towards the liquidation of the principal, & he assigned to B. as a security a policy of assurance on his life. He subsequently executed a similar instrument on the occasion of a further advance by B., the interest being at the same rate, but in that case the monthly instalments were not to commence until after the final liquidation of the former debt, & in the meantime he promised to pay the monthly interest at the aforesaid percentage, & the policy was again charged. B. had recovered judgment for the amounts due on these securities, with interest at 18 per cent. to the date of the judgment.

The total amount due under the judgment, with interest at 4 per cent. from the date of it, & the taxed costs, had been paid to B., but he claimed interest at 18 per cent. until payment:—*Held*: the covenants for the payments of interest were merely subsidiary to the covenants for the payment of the principal sums, & were merged in the judgment for the principal sums, & B. was only entitled to interest at 4 per cent. from the date of the judgment.—*ARBUTHNOT v. BUNSILALL* (1890), 62 L. T. 234.

*Annotation*:—*Expld. & Distd. Economic Life Assce. Soc. v. Usborne*, [1902] A. C. 147.

**335.** —[—]—(1) By a deed, £1,400 was advanced to one Gye on the security of three life policies, whereby Gye covenanted to keep up the premiums & pay interest at 3 per cent. on the loan. By a covenant in the deed, which was made between M. of the one part, G. & L., sureties, of the second part, & Gye of the third part, G. & L. covenanted with M. "that they or one of them will, during the continuance of the present security, in the event of the premiums on the said policies . . . & the interest in respect of the said principal sum of £1,400 not being paid, as to the premium within three days, & as to the interest within thirty days, of their falling due by Gye . . . duly pay the premiums . . . & also pay the interest on the said sum of £1,400. Judgment was recovered for the £1,400 against Gye:—*Held*: it operated as a merger with regard to the liability to pay future interest, & the surety was released. *Semble*: there could be no merger of interest accrued before the judgment.

(2) In the above covenant, the words, "in the event of the premiums on the policies, & the interest . . . not being paid" must be taken to mean, unless both premiums & interest are paid, liability shall attach in respect of so much as remains unpaid.—*FABER v. LATHOM (EARL)* (1897), 77 L. T. 168.

**336.** —[—]—*Mortgage.*—In a mtge. of policies of assurance the mtgor. covenanted to repay the principal money & interest at 7 per cent. on a day certain, & to pay interest at that rate, "so long as any part of the principal money should remain due upon the security" of the mtge. deed. The mtgee. subsequently recovered judgment against the mtgor. for the amount due for principal & interest on the security, & the amount recovered by the judgment, with interest thereon at 4 per cent. from the date of the judgment, was paid to him:—*Held*: notwithstanding the judgment, the mtgee. was entitled to recover upon his security the amount of the difference between 4 per cent. & 7 per cent. upon the amount of the judgment from the date thereof.—*POPPE v. SYLVESTER* (1882), 22 Ch. D. 98; 52 L. J. Ch. 54; 47 L. T. 329; 31 W. R. 116.

*Annotations*:—*Distd. Re Sneyd, Ex p. Fewings* (1883), 25 Ch. D. 338; *Arbuthnot v. Bunsilall* (1890), 62 L. T. 234. *Expld. Economic Life Assce Soc v. Usborne*, [1902] A. C. 147. *Reid. Faber v. Latham* (1897), 77 L. T. 168.

**337.** —[—]—A mtge. deed contained a covenant by the mtgor. for payment of the principal sum on the expiration of six months next after a specified day together with interest thereon at 5 per cent. *per annum* for the six months. There was a further covenant by the mtgor. that if the principal sum or any part thereof should remain unpaid after the expiration of the six months the mtgor. would so long as the same sum or any part thereof should remain unpaid pay to the mtgee. interest for the principal sum or for so much thereof as should for the time being remain unpaid at 5 per cent. *per annum*. After the

expiration of the six months the mtgee. recovered judgment against the mtgor. on the covenant for the principal sum & interest in arrear :—*Held*. the covenant being merged in the judgment, the mtgee. was as from the date of the judgment entitled only to interest on the judgment debt at the rate of 4 per cent. & was not entitled under the covenant to interest at the rate of 5 per cent. on the principal sum.—*Re SNEYD, Ex p. FEWINGS* (1883), 25 Ch. D. 338; 53 L. J. Ch. 545; 50 L. T. 109; 32 W. R. 352, C. A.

*Annotations* :—*Folld. Arbutnot v. Bunsill* (1890), 62 L. T. 234. *Consd. Economic Life Assce. Soc. v. Osborne*, [1902] A. C. 147. *Reid. Faber v. Lathom* (1897), 77 L. T. 168. *Mentd. Wales v. Carr*, [1902] 1 Ch. 860.

**338. ——— Covenant to pay interest ancillary to covenant to repay principal.**—Where a covenant for the payment of interest in a mtge. deed is an independent covenant, & not merely ancillary to the covenant for the payment of the principal, it will not be merged in a judgment.

A mtge. deed contained a covenant "that so long as the principal sum or any part thereof should remain unpaid" the mtgors. would pay interest thereon at the rate of 5 per cent. The mtgors. made default, & the mtgees. recovered judgment against them for principal & interest :—*Held* : the covenant did not merge in the judgment, & the mtgees. were entitled to interest at the rate of 5 per cent. under the covenant, & not to 4 per cent. only on the judgment debt.—*ECONOMIC LIFE ASSURANCE SOCIETY v. USBORNE*, [1902] A. C. 147; 71 L. J. P. C. 34; 85 L. T. 587, H. L. *Annotation* :—*Reid. Aman v. Southern Ry.* (1925), 42 T. L. R. 31.

*See, generally*, MORTGAGE.

**339. ——— Debenture.**—A railway co., in the year 1864, issued debentures by which they bound themselves to pay a principal sum one year after the date of issue, with interest at 6 per cent. & charged the railway & undertaking with the payment of the principal sum & interest. Soon after the expiration of the year a debenture-holder brought an action against the co. & recovered judgment for the principal debt, interest & costs. The co. was ordered to be wound up in 1868, & the debenture-holder was admitted to prove for the judgment debt & interest at 4 per cent. The debenture-holder claimed to prove for an additional 2 per cent. on the original amount of the debenture from the date of the judgment :—*Held* : the original debt was merged in the judgment, & claimant was only entitled to interest on the judgment at 4 per cent.—*Re EUROPEAN CENTRAL RY. CO., Ex p. ORIENTAL FINANCIAL CORPN.* (1876), 4 Ch. D. 33; 46 L. J. Ch. 57; 35 L. T. 583; 25 W. R. 92, C. A.

*Annotations* :—*Distd. Popple v. Sylvester* (1882), 22 Ch. D. 98. *Appld. Re Sneyd, Ex p. Fewings* (1883), 25 Ch. D. 338; *Arbutnot v. Bunsill* (1890), 62 L. T. 234. *Expld. Economic Life Assce. Soc. v. Osborne*, [1902] A. C. 147.

*See, generally*, COMPANIES, Vol. X., pp. 811 *et seq.*

**Balance order under Companies Act, 1862 (c. 89)—Whether judgment for purposes of merger.]**

#### PART IX. SECT. 7.

**b. Judgment against joint sureties.]**  
—In an action against the exors. of W. on a judgment obtained against F. as

sheriff, & A. & W. as sureties for the sheriff :—*Held* : the judgment obtained against two or more was joint : & a judgment recovered against two

or more debtors does not render them joint contractors.—*GILCHRIST v. WELLES & ARMOUR* (1864), 14 C. P. 404.—**CAN.**

—*See COMPANIES*, Vol. X., p. 921, Nos. 6314, 6315.

**Judgment as a bar to action—On same cause of action.**—*See ESTOPPEL*, Vol. XXI., pp. 198 *et seq.*  
**Res judicata.**—*See ESTOPPEL*, Vol. XXI., pp. 159 *et seq.*

#### SECT. 7.—JUDGMENT AGAINST JOINT CONTRACTORS.

**340. Joint contractors jointly & severally liable.**—*Re BARROW & GEDDES, Ex p. CHRISTY*, No. 325, *ante*.

**341. ———.**—*Re DAVISON, Ex p. CHANDLER*, No. 328, *ante*.

#### SECT. 8.—JUDGMENT AGAINST ONE OR MORE OF SEVERAL JOINT CONTRACTORS.

**As a bar to proceedings against remainder.**—*See ESTOPPEL*, Vol. XXI., pp. 218 *et seq.*

**As a bar to proof against joint estate.**—*See BANKRUPTCY*, Vol. IV., p. 433, Nos. 3900, 3907.

#### SECT. 9.—JUDGMENT AGAINST ONE OR MORE OF SEVERAL JOINT TORTEASORS.

**As a bar to action against remainder.**—*See ESTOPPEL*, Vol. XXI., pp. 221 *et seq.*

#### SECT. 10.—FOREIGN JUDGMENTS.

**As defence to action—For same cause of action.]**  
—*See CONFLICT OF LAWS*, Vol. XI., pp. 467 *et seq.*  
**Recognition.]**—*See CONFLICT OF LAWS*, Vol. XI., pp. 444 *et seq.*

#### SECT. 11.—BY WAY OF ESTOPPEL.

*See ESTOPPEL*, Vol. XXI., pp. 140 *et seq.*

#### SECT. 12.—AS AUTHORITIES.

*See Part XVII., post.*

#### SECT. 13.—OPERATION AS CONVERSION.

*See EQUITY*, Vol. XX., pp. 361 *et seq.*

#### SECT. 14.—AVAILABILITY FOR GARNISHEE PROCEEDINGS.

*See EXECUTION*, Vol. XXI., pp. 618 *et seq.*

## Part X.—Amendment and Setting Aside.

See PRACTICE.

## Part XI.—New Trial.

See PRACTICE.

## Part XII.—Appeal and Rehearing.

See PRACTICE.

## Part XIII.—Enforcement of Judgments and Orders.

### SECT. 1.—JUDGMENTS.

#### SUB-SECT. 1.—ENGLISH JUDGMENTS.

##### A. By Action.

##### (a) Whether Action lies.

**342. General rule.**—In trespass £300 damages were recovered & judgment thereon; & error brought in the Exchequer Chamber; pending which pltf. brought an action of debt in this ct. for the £300.

It [the action of debt] well lies for the record itself is yet in this ct. & the writ of error is a *supersedeas* of the execution only (*per Cur.*).—**ADAMS v. TOMLINS** (1664), 1 Lev. 153; 1 Sid. 236; T. Raym. 100; 83 E. R. 344; *sub nom.* **NORTON & ADAMS v. THOMLYNSON**, 1 Keb. 827. *Annotations*:—**Reid**, Anon. (1700), 11 Mod. Rep. 78; **Phillips v. Berry** (1707), 1 Salk. 403.

**343.** —.]—Debt lies on a judgment after error brought.—**DRAPER v. BRIDWELL** (1674), 1 Mod. Rep. 121; 3 Keb. 330; 86 E. R. 779. *Annotation*:—**Reid**, Anon. (1692), 12 Mod. Rep. 48.

**344.** —.]—Where a ct. of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. The same rule applies to inferior cts. in this country, & applies equally whether the cts. be cts. of record or not (**PARKE, B.**).—**WILLIAMS v. JONES** (1845), 13 M. & W. 628; 2 Dow. & L. 680; 1 New Pract. Cas. 227; 14 L. J. Ex. 145; 4 L. T. O. S. 318; 153 E. R. 262.

*Annotations*:—**Consd.** **Godard v. Gray** (1870), L. R. 6 Q. B. 139; **Nouvion v. Freeman** (1889), 15 App. Cas. 1. **Reid**, **Berkeley v. Elderton** (1853), 22 L. J. Q. B. 281; **Schibsbey v. Westenholz** (1870), L. R. 6 Q. B. 155; **Rousillon v. Rousillon** (1880), 14 Ch. D. 351; **Abouloff v. Oppenheimer** (1882), 10 Q. B. D. 295; **Robins v. Robins**, [1907] 2 K. B. 13; **Emanuel v. Symon**, (1908) 1 K. B. 302; **Harris v. Taylor**, [1915] 2 K. B. 580. **Mentd.** **East & West India Docks & Birmingham Ry. v. Gattke** (1851), 3 Mac. & G. 155; **South Staffordshire Ry. v. Hall** (1851), 17 L. T. O. S. 2; **R. v. L. & N. W. Ry.** (1854), 3 E. & B. 413; **London Corpn. v. Cox** (1867), L. R. 2 H. L. 239.

**345. In inferior court.—Judgment of High Court.**—An action does not lie in an inferior ct. on a judgment in the High Ct.—**MIDDLETON v. WHEELER** (1083), Comb. 220; 90 E. R. 439. *Annotation*:—**Reid**, **Otway v. Ramsay** (1737), 3 L. J. O. S. K. B. 340, n.

**County court.**—See COUNTY COURTS, Vol. XIII., p. 481.

**346. Pending writ of error.**—**ADAMS v. TOMLINS**, No. 342, *ante*.

**347.** —.]—**DRAPER v. BRIDWELL**, No. 343, *ante*.

**348.** —.]—Debt lies on a judgment pending a writ of error.—**ANON.** (1702), 7 Mod. Rep. 62; 87 E. R. 1096.

**349. Whether favoured by court.**—Debt on judgment not to be favoured.—**BIDDLESON v. WHITEL** (1764), 1 Wm. Bl. 506; 96 E. R. 293; *sub nom.* **BIDLESON v. WHYTEL**, 3 Burr. 1545.

*Annotations*:—**Mentd.** **Trinder v. Watson** (1764), 3 Burr. 1566; **Bellther v. Gibbs** (1767), 4 Burr. 2117; **Sparkes v. O'Kelly** (1808), 1 Taunt. 168.

**350.** — **Whether alternative method available.—Execution.**—**CRUTCHFIELD v. SEWORDS** (1750), Barnes, 116; 94 E. R. 833.

**351.** —.]—(1) Interest cannot be recovered on a judgment if pltf. might by proper diligence have procured payment.

(2) It is the duty of a person who recovers a judgment in a ct. of law to issue execution in the manner the law has provided, & not to bring an action upon it (**LORD TENTERDEN, C.J.**).—**BANN v. DALZEL** (1828), Mood. & M. 228; 3 C. & P. 376.

*Annotation*:—**As to** (1) **Reid**, **Ibbotson v. Fenton** (1837), 6 Ad. & El. 772.

**Compare** No. 385, *post*.

**352. By specially indorsed writ.**—In an action on a judgment, pltf. may indorse the particulars on the writ of summons under C. L. P. Act, 1852 (c. 76), s. 25, & on non-appearance, sign judgment under sect. 27.—**HODSOLL v. BAXTER** (1858), E. B. & E. 884; 28 L. J. Q. B. 61; 31 L. T. O. S. 356; 6 W. R. 686; 120 E. R. 739; *sub nom.* **BAXTER v. HODSOLL**, 4 Jur. N. S. 556, Ex. Ch.

*Annotations*:—**Apld.** **Grant v. Easton** (1883), 13 Q. B. D. 302. **Distd.** **Bailey v. Bailey** (1884), 13 Q. B. D. 855.

See, generally, PRACTICE.

**353. Against individual partners.—Judgment against partnership.**—Where pltf. has recovered judgment against a partnership firm in the name of the firm, he may bring his action on the judgment against the individual members of the firm without having recourse to the procedure provided



by R. S. C., 1875, Ord. 42, r. 8, in respect to the issue of execution.—**CLARK v. CULLEN** (1882), 9 Q. B. D. 355; 47 L. T. 307, D. C.

*See, generally, PARTNERSHIP.*

**354. Against married woman—After unsatisfied execution against separate property.]—**Where a judgment has been given before 1913 against a married woman, execution being limited to her separate property, & no stay has been granted, & the judgment remains unsatisfied, it is open to pltf. to bring a fresh action on the judgment & to recover judgment thereon for the purpose of founding bkpcy. proceedings against the married woman under Bankruptcy & Deeds of Arrangement Act, 1913 (c. 34), s. 12. *Semble*: however, s. 12 of that Act is retrospective so as to make such fresh action unnecessary.—**SHAW v. ALLEN** (1914), 30 T. L. R. 631.

*See, generally, HUSBAND & WIFE, Vol. XXVII., pp. 252–254.*

**355. Effect of agreement not to issue execution.]—**If a man enters into a rule in K. B. not to sue execution upon a judgment, & brings an action of debt upon the judgment, it is a breach of the rule (*per Cur.*).—**ANON.** (1696), 2 Salk. 596; 91 E. R. 504.

**356. What judgments—Judgment of inferior courts.]—****WILLIAMS v. JONES**, No. 344, *ante*.

—**County court.]—***See* COUNTY COURTS, Vol. XIII., p. 511.

#### (b) Defences to Action.

**357. Matter not pleaded in former action—Matter available.]—**Where a person who has become bkpt. is sued for a cause of action accruing before his bkpcy., & pending the suit & before trial obtains his certificate, he must plead it *puis darrein* continuance; & if he neglects to do so, & judgment is obtained against him, he cannot plead his certificate to an action on such judgment.—**TODD v. MAXFIELD** (1826), 6 B. & C. 105; 9 Dow. & Ry. K. B. 171; 108 E. R. 391.

*Annotation:—***Reid.** Rossi v. Bailey (1868), L. R. 3 Q. B. 621.

—*See, generally, ESTOPPEL, Vol. XXI., pp. 174 et seq.*

**358. — Matter not formerly available.]—**In a former action by pltf. against deft., deft. pleaded never indebted, but afterwards withdrew his plea, on an agreement that judgment should not be signed before May 8. On May 7, deft. registered a deed under the Bkpcy. Act, 1861 (c. 134), s. 192, containing a release from his creditors, but he did not plead it in the action. On May 8, pltf. signed judgment. In an action brought on the judgment:—*Held*: (1) the interval between the registration of the deed & the signing of judgment did not give deft. such an opportunity of pleading the deed as to disable him from availing himself of it in the second action; (2) the agreement, under which the plea of never indebted was withdrawn, precluded deft. from pleading any other plea in the former action, & that he might, therefore, now avail himself of the deed.

*Qu.*: whether, supposing deft. had had the opportunity & power of pleading the deed, & had neglected to do so, he could now avail himself of it.—**BRAUN v. WELLER** (1867), L. R. 2 Exch. 183; 36 L. J. Ex. 100; 16 L. T. 22; 15 W. R. 519.

*Annotations:—**As to* (1) **Reid.** Allen v. Carter (1870), L. R. 5 C. P. 414. *As to* (2) **Reid.** Rossi v. Bailey (1868), L. R. 3 Q. B. 621. *Generally, Mentd.* *Re Weller, Ex p. Weller* (1867), 15 W. R. 1186.

—*See, generally, ESTOPPEL, Vol. XXI., pp. 178, 179.*

**Res judicata—**As a bar to subsequent proceed-

ings.]—*See, generally, ESTOPPEL, Vol. XXI., pp. 198 et seq.*

**359. Writ of error pending.]—**It is admitted that a plea [that a writ of error is pending] would be bad in an action of debt on a judgment (**LORD DENMAN, C.J.**).—**SNOOK v. MATTOCK** (1836), 5 Ad. & El. 239; 2 Har. & W. 188; 6 Nev. & M. K. B. 783; 5 L. J. K. B. 206; 111 E. R. 1156.

*Annotations:—***Reid.** Burnaby v. Earle (1874), L. R. 9 Q. B. 490. **Mentd.** King v. Simmonds (1846), 7 Q. B. 289; Thorpe v. Plowden (1848), 2 Exch. 387; Garrard v. Tuck (1849), 8 C. B. 231; Withers v. Parker (1859), 4 H. & N. 810.

**360. —.]—**Trespass for mesne profits between July 10, 1826, & the commencement of the suit. Pleas: (a) That pltf. was not possessed of the premises *modo et forma*. (b) That the premises were the soil & freehold of deft. during all the time, etc. Replication, by way of estoppel, to each plea, that, after July 10, 1826, pltf. commenced an action of ejectment for recovery of the same premises on a demise laid July 10, 1826, for fourteen years, & a demise laid Dec. 20, 1831, for seven years, & an ouster on Dec. 27, 1831, & had judgment to recover his said terms; concluding with a prayer of judgment if deft. ought, during the said terms, to be admitted, etc.:—*Held*: (1) the replication was good; (2) a rejoinder, stating that no writ of execution was ever issued, nor had pltf. ever had possession of the premises, but that a writ of error upon the judgment was still pending & undetermined, was bad.—**DOE v. WRIGHT** (1839), 10 Ad. & El. 763; 2 Per. & Dav. 672; 113 E. R. 289.

*Annotations:—**As to* (1) **Reid.** Doe v. Wellsman (1848), 2 Exch. 368; Freeman v. Cooke (1848), 2 Exch. 654; Matthew v. Osborne (1853), 13 C. B. 919; Wilkinson v. Kirby (1854), 15 C. B. 430; Faversham v. Emerson (1855), 11 Exch. 385. *As to* (2) **Reid.** Bather v. Brayne (1849), 7 C. B. 815; Burnaby v. Earle (1874), L. R. 9 Q. B. 490. *Generally, Mentd.* Waters v. Waters (1848), 2 De G. & Sm. 591; Ryan v. Clark (1849), 14 Q. B. 65; Litchfield v. Ready (1850), Exch. 939; Doe v. Challis (1851), 17 Q. B. 166.

**Judgment obtained by fraud—Foreign judgment.]—***See* CONFLICT OF LAWS, Vol. XI., pp. 456, 457.

#### (c) Costs.

*See* PRACTICE.

#### B. By Execution.

*See, generally, EXECUTION, Vol. XXI., pp. 415 et seq.*

**Whether leave necessary.]—***See* EXECUTION, Vol. XXI., pp. 424 et seq.

**Particular forms of execution—Writ of fieri facias.]—***See* EXECUTION, Vol. XXI., pp. 470 et seq.

—**Writ of elegit.]—***See* EXECUTION, Vol. XXI., pp. 556 et seq.

—**Writ of capias ad satisfaciendum.]—***See* EXECUTION, Vol. XXI., pp. 580 et seq.

—**Writ of delivery.]—***See* EXECUTION, Vol. XXI., pp. 583 et seq.

—**Writ of possession.]—***See* EXECUTION, Vol. XXI., pp. 583 et seq.

—**Writ of sequestration.]—***See* EXECUTION, Vol. XXI., pp. 591 et seq.

**Equitable execution—Appointment of receiver.]—***See* RECEIVERS.

#### C. By Charging Order.

**361. Judgment for payment at future date.]—****BAGNALL v. CARLTON**, No. 312, *ante*.

*See, generally, EXECUTION, Vol. XXI., pp. 647 et seq.*



**Sect. 1.—Judgments: Sub-sect. 1, D., E., F. & G.; sub-sect. 2. Sects. 2 & 3: Sub-sects. 1 & 2.]**

**D. By Garnishee Proceedings.**

See, generally, EXECUTION, Vol. XXI., pp. 623 et seq., Nos. 2089 et seq.

**E. By Proceedings in Bankruptcy.**

See, generally, BANKRUPTCY, Vol. IV., pp. 90 et seq.

**F. Under Judgments Extension Act, 1868.**

See CONFLICT OF LAWS, Vol. XI., pp. 469 et seq.

**G. By Attachment and Committal.**

See CONTEMPT OF COURT, Vol. XVI., pp. 46 et seq.

## SUB-SECT. 2.—FOREIGN AND COLONIAL JUDGMENTS.

**Whether enforceable in England.]—See CONFLICT OF LAWS, Vol. XI., pp. 444 et seq.**

**Mode of enforcement.]—See CONFLICT OF LAWS, Vol. XI., pp. 466, 467.**

## SECT. 2.—DECREES.

**362. Whether within Judgments Act, 1838 (c. 110), s. 18—Decree for specific performance—Payment of purchase-money.]—Decree for specific performance, with references to the Master to compute interest & tax costs, & ordering debt. to pay purchase-money & interest & costs when ascertained:—Held: this constituted a judgment debt.**

The decree in this case was of a higher nature than a mere judgment or decree *quod computet*. It was substantially an order to pay a definite sum & a final adjudication. It must be placed on the footing of a judgment (KNIGHT BRUCE, V.-C.).—BEAUFORT (DUKE) v. PHILLIPS (1847), 1 De G. & Sm. 321; 9 L. T. O. S. 352; 11 Jur. 600; 63 E. R. 1087.

**Annotations:—**Distd. Chadwick v. Holt (1856), 8 De G. M. & G. 584; Garner v. Briggs (1858), 27 L. J. Ch. 483. **Refd.** Taylor v. Roe, [1894] 1 Ch. 413.

**363. — Unascertained sum—Decree for account.]—A decree for payment of what shall be found due to pltf. upon an account directed by the decree does not entitle him to a charging order under above sect.—CHADWICK v. HOLT (1856), 8 De G. M. & G. 584; 26 L. J. Ch. 76; 27 L. T. O. S. 286; 2 Jur. N. S. 918; 4 W. R. 791; 44 E. R. 515, L. J.**

**Annotation:—**Consd. Clarke v. Clarke (1873), L. R. 3 P. & D. 57.

**Foreign and colonial decrees.]—See CONFLICT OF LAWS, Vol. XI., pp. 470, 471.**

## SECT. 3.—ORDERS.

### SUB-SECT. 1.—IN GENERAL.

See, now, R. S. C., Ord. 42, r. 24.

**364. Whether within Judgments Act, 1838 (c. 110), s. 18—"Costs, charges & expenses."]**—(1) The above Act does not authorise a party to issue execution for money awarded by an arbitrator.

(2) The words "moneys or costs, charges or

expenses," in the above sect. mean money decreed or ordered to be paid, together with the costs, etc., to be ascertained on taxation by the officer of the ct., & no order to pay costs is requisite after taxation.—JONES v. WILLIAMS (1841), 8 M. & W. 349; 9 Dowl. 702; 10 L. J. Ex. 253; 5 Jur. 895; 151 E. R. 860; *previous proceedings* (1839), 11 Ad. & El. 175.

**Annotations:—**As to (1) **Refd.** Hare v. Fleay (1851), 15 Jur. 1038. As to (2) **Consd.** Taylor v. Roe, [1894] 1 Ch. 413. **Refd.** Doe d. Harrison v. Hampson (1847), 4 C. B. 745; *Re* Lilley v. Harvey (1849), 14 Q. B. 403; *Widgery v. Tepper, Hall v. Tepper* (1877), 6 Ch. D. 364. **Generally, Mentd.** Nash v. Swinburne (1842), 3 Man. & G. 853.

**365. — Order for payment into court.]—***Semble*: an order of a ct. of equity for the payment of money into the bank in the name of the Accountant-General, to the credit of a cause depending in that ct., is not an order to which the effect of a judgment is given by the above sect.—GIBBS v. PIKE (1841), 8 M. & W. 223; 9 Dowl. 731; 10 L. J. Ex. 309; 151 E. R. 1019; *subsequent proceedings* (1842), 9 M. & W. 351.

**366. — Order for payment of solicitor's bill—After taxation.]—**By rule of ct., the costs of an attorney against his client were referred to taxation by the master, on the usual undertaking to pay what should be found due. The master having made his *allocatur*, & the money not having been paid, the ct. made an order that the client should pay the money, but that the attorney should abandon his right to move for an attachment; the purpose of applying for such order being that the attorney might become a judgment creditor under the above sect.—NEALE v. POSTLETHWAITE (1841), 1 Q. B. 243; 4 Per. & Dav. 623; Woll. 144; 10 L. J. Q. B. 134; 5 Jur. 747; 113 E. R. 1122.

**Annotations:—****Refd.** Hodson v. Patterson (1842), 4 Man. & G. 333; Doe d. Harrison v. Hampson (1847), 4 C. B. 745. **Mentd.** Wilson v. Foster (1843), 6 Man. & G. 149.

See, generally, SOLICITORS.

**367. — Costs—Under interpleader order.]—**A party entitled to costs under an interpleader order is not bound to take out execution under the Interpleader Act, 1831 (c. 58), s. 7, but may make the order a rule of ct., & take out execution under the above sect.—CETTI v. BARTLETT (1842), 9 M. & W. 840; 1 Dowl. N. S. 928; 11 L. J. Ex. 293; 152 E. R. 356.

**Annotation:—****Refd.** Dantel v. Barry (1843), 12 L. J. Q. B. 113.

See, generally, INTERPLEADER, Vol. XXIX, pp. 497 et seq.

**368. — Costs of the day.]—**Where debt. had obtained a rule for the costs of the day for not proceeding to trial, & the master, by his *allocatur*, indorsed on the rule, had ascertained the amount of such costs, the ct. thought it unnecessary to grant debt. a rule for the payment of that amount, in order to entitle him to issue execution for it under the above sect.—HODSON v. PATTERSON (1842), 4 Man. & G. 333; 134 E. R. 136; *sub nom.* HODGSON v. PATTERSON, 5 Scott, N. R. 76; 11 L. J. C. P. 289.

**Annotations:—****Refd.** Wright v. Burroughes (1844), 13 L. J. Q. B. 248; Doe d. Harrison v. Hampson (1847), 4 C. B. 745; Taylor v. Roe, [1894] 1 Ch. 413.

**369. — Interlocutory order.]—TAYLOR v. ROE, No. 372, post.**

**370. — Unascertained sum.]—**The ct. refused to make an order, under the above sect., for the payment of a sum alleged to have become payable under an award, where the money was not ascertained to be due & payable at the time of

**PART XIII. SECT. 3, SUB-SECT. 1.**  
**a. Duty of court to enforce—Until set aside—Even when wrong.]—**Where

the ct. having jurisdiction over the subject matter makes a wrong order, nevertheless, while such order stands,

it is the duty of the ct. to enforce it.—NIBBET v. NIBBET (1898), 24 V. L. R. 340.—AUS.

the making of the award.—**GRAHAM v. DARCEY** (1848), 6 C. B. 537; 6 Dow. & L. 385; 18 L. J. C. P. 61; 12 L. T. O. S. 149; 136 E. R. 1358.

**371. — Order against executor—To make good sum to estate.**—(1) A decree in the ct. of equity, registered in the Ct. of Common Pleas, under the above Act, declared that the exor. of a testator was liable to make good to testator's estate a certain sum of money, & that the exor. should be charged with the amount in his account of the personal estate:—*Held*: this decree did not constitute a judgment debt.

(2) In a suit to administer the estate of the deceased exor., a decree, registered under the above Act, directed that an account should be taken of what was due to testator's estate, & that pltf. should go in & prove as a creditor for the amount certified to be so due:—*Held*: pltf. could not claim as a judgment creditor, & was not entitled to any priority over specialty & simple contract creditors.—**GARNER v. BRIGGS** (1858), 27 L. J. Ch. 483; 31 L. T. O. S. 68; 4 Jur. N. S. 230; *sub nom.* **GARNER v. BRIGGS**, **GARNER v. MOORE**, 6 W. R. 378.

*Annotation*:—*Reid*, Taylor v. Roe, [1894] 1 Ch. 413.

**372. — Interlocutory order—For payment of costs.**—An interlocutory order directing the payment of costs by one person to another comes within the above sect., & carries interest on the costs thereby awarded as from the date of such an order.—**TAYLOR v. ROE**, [1894] 1 Ch. 413; 63 L. J. Ch. 282; 70 L. T. 232; 42 W. R. 426; 38 Sol. Jo. 142; 3 R. 306.

*Annotation*:—*Mentd.* Shrago v. Dighton, [1924] 1 K. B. 274.

— **To carry interest.**—*See* Nos. 420–430, 440–447, *post*.

**373. Leave to enforce—Whether necessary.**—It is not necessary to apply for leave to issue execution upon a judge's order, under the above sect. But *semble*: a demand of the costs should be made before execution issued.—**WALLIS v. SHEFFIELD** (1839), 7 Dowl. 793; 9 L. J. Ex. 2; 3 Jur. 1002.

**374. — Under Courts (Emergency Powers) Act, 1914 (c. 19), s. 1 (1), rule 2 (1)—To what court application.**—By the above rule, the ct. to which an application is made under s. 1 (1) of the Act for leave to enforce an order for the payment of money shall be the ct. by which the order has been made or in which it is being sought:—*Held*: where the ct. to which the application must be made is the Ct. of Appeal, that Ct. will refer the facts to a master for inquiry & report, & will act on such report.—**EVANS v. MAIN COLLIERY CO., LTD.** (1914), 31 T. L. R. 127, C. A.

**375. By counterclaim.**—**PHILPOTT v. LEHAIN**, No. 376, *post*.

#### SUB-SECT. 2.—BY ACTION.

*See* R. S. C., Ord. 42, r. 24.

**376. Order for payment of costs.**—Costs payable under a judge's order can be recovered by action or counterclaim.—**PHILPOTT v. LEHAIN** (1876), 35 L. T. 855.

*Annotations*:—*Apld.* Norton v. Gregory (1895), 73 L. T. 10. *Reid.* Godfrey v. George, [1896] 1 Q. B. 48.

**377. — Order of Judicial Committee—Though in collateral proceeding to pending suit.**—Debt will lie on the final order of the Judicial Committee of the Privy Council for payment of costs, notwithstanding the order is made in a proceeding collateral to the original suit; & that suit is still undetermined.—**HUTCHINSON v. GILLESPIE** (1856), 11 Exch. 798; 25 L. J. Ex. 103;

26 L. T. O. S. 275; 2 Jur. N. S. 403; 4 W. R. 302; 156 E. R. 1055.

*Annotations*:—*Apld.* Marbella Iron Ore Co. v. Allen (1878), 47 L. J. Q. B. 601. *Consd.* Bailey v. Bailey (1884), 13 Q. B. D. 855. *Reid.* Seldon v. Wilde, [1910] 2 K. B. 9.

**378. — Order on judgment by House of Lords.**—An action will lie on an order of the House of Lords directing an unsuccessful applt. to pay resp.'s costs.

Deft. A. was trustee in bkpcy. of B., who had before his bkpcy. given notice of appeal to the House of Lords against a judgment of the Ct. of Exch. Chamber in favour of pltf's., against whom B. had brought an action, & obtained judgment in the ct. below. Deft. having been added as a co-pltf. with B. by an order made in the action after his appointment as trustee in the bkpcy., prosecuted as applt. the appeal to the House of Lords. The House of Lords dismissed the appeal, & further ordered "that applt. A., trustee in bkpcy. of applt. B., do pay or cause to be paid to resp's. their costs":—*Held*: pltf's. could maintain an action upon this order, & it imposed a personal liability upon A.—**MARBELLA IRON ORE CO. v. ALLEN** (1878), 47 L. J. Q. B. 601; 38 L. T. 815; 42 J. P. 679.

*Annotation*:—*Reid.* West Ham Union Grdns. v. St. Matthew, Bethnal Green, [1895] 1 Q. B. 662.

**379. — Interlocutory order.**—Where the ct. has made an interlocutory order for payment of costs, the party to whom they are payable may maintain an action to recover the amount from the party ordered to pay the costs, & may issue a bkpcy. notice against him upon a judgment so obtained.—*Re* **BOYD, Ex p. McDERMOTT**, [1895] 1 Q. B. 611; 64 L. J. Q. B. 439; 72 L. T. 348; 2 Mans. 166; 14 R. 364.

*Annotations*:—*Reid.* Norton v. Gregory (1895), 73 L. T. 10; Pritchett v. English & Colonial Syndicate, [1899] 2 Q. B. 428; Savill v. Dalton, [1915] 3 K. B. 174.

**380. — Order of Probate Division.**—In an action in the Probate Div. an order was made by the registrar that proceedings should be discontinued, & that deft. should pay pltf.'s taxed costs. The costs were taxed, & an order was made by the President of the Probate Div. that deft. should pay to pltf. £127, the amount of the taxed costs. Pltf. sued deft., in the Q. B. Div., upon a specially indorsed writ, to recover that sum of £127, & obtained leave to sign final judgment under R. S. C., Ord. 14:—*Held*: an action could be brought in the Q. B. Div., upon the order of the Probate Div., & leave to sign final judgment under Ord. 14 was properly given.—**NORTON v. GREGORY** (1895), 73 L. T. 10; 11 T. L. R. 439; 14 R. 735, C. A.

*Annotations*:—*Consd.* Robins v. Robins, [1907] 2 K. B. 13. *Reid.* Godfrey v. George, [1896] 1 Q. B. 48; Ivimey v. Ivimey, [1908] 2 K. B. 260.

**381. — By solicitor—On application to strike off rolls.**—An action will lie upon an order of the ct. by which a solr. is ordered to pay the costs of an application to strike him off the rolls, notwithstanding the fact that an unsuccessful application to attach him for disobedience to the order has been made by the person to whom he was ordered to pay the costs.—**GODFREY v. GEORGE**, [1896] 1 Q. B. 48; 65 L. J. Q. B. 249; 44 W. R. 245; *sub nom.* **GODFREY v. G.**, 73 L. T. 599; 40 Sol. Jo. 117, C. A.

*Annotations*:—*Consd.* Furber v. Taylor, [1900] 2 Q. B. 719. *Expld.* Ivimey v. Ivimey, [1908] 2 K. B. 260. *Consd.* Seldon v. Wilde, [1911] 1 K. B. 701. *Reid.* Pritchett v. English & Colonial Syndicate, [1899] 2 Q. B. 428; Savill v. Dalton, [1915] 3 K. B. 174.

**382. — On motion for attachment.**—An order was made by a judge in the Ch. Div. that deft., a solr., should pay to pltf., the costs

**Sect. 3.—Orders: Sub-sects. 2, 3, 4, 5, 6, 7 & 8. Sects. 3 & 4. Parts XIV. & XV.]**

of a motion by plff. for the attachment of deft. for contempt of ct. in not having delivered to plff. a bill of costs pursuant to an order for taxation of costs. The costs of the motion having been taxed, plff. sued deft. in the K. B. Div. to recover the amount thereof:—*Held*: the order for costs was not made in a criminal or quasi-criminal matter & the action was maintainable.—*SELDON v. WILDE*, [1911] 1 K. B. 701; 80 L. J. K. B. 282; 104 L. T. 194, C. A.

*Annotation*.—*Consd. Scott v. Scott*, [1912] P. 241.

**383. — Order of county court.**—An action is not maintainable upon an order of a county ct. for payment of costs.—*FURBER v. TAYLOR*, [1900] 2 Q. B. 719; 69 L. J. Q. B. 898; 83 L. T. 308; 48 W. R. 689, C. A.

*Annotation*.—*Consd. Savill v. Dalton*, [1915] 3 K. B. 174.

**384. — Order of Divorce Court.**—An action in the K. B. Div. will not lie to recover a sum payable for costs under an order of the Divorce Ct., but such order can only be enforced by the methods prescribed by the Divorce rules & regulations.—*IVIMEY v. IVIMEY*, [1908] 2 K. B. 260; 77 L. J. K. B. 714; 99 L. T. 75; 62 Sol. Jo. 482, C. A.

*Annotation*.—*Refd. Leavis v. Leavis*, [1921] P. 299.

**385. Garnishee order.**—An action for debt will lie on a garnishee order, but should not be resorted to if the amount can be recovered by execution under R. S. C., Ord. 45, r. 3.

A garnishee order absolute had been obtained, under Ord. 45, r. 3, against a limited co., having property abroad, but none in this country on which execution could be levied:—*Held*: under R. S. C., Ord. 42, r. 24, the garnisher could maintain an action on the garnishee order for the debt thereby ordered to be paid to him by the co., the garnishees, with a view to his presenting a petition, as a judgment creditor, for winding up the co.—*PRITCHETT v. ENGLISH & COLONIAL SYNDICATE*, [1899] 2 Q. B. 428; 68 L. J. Q. B. 801; 81 L. T. 206; 47 W. R. 577; 43 Sol. Jo. 602, C. A.

*Annotations*.—*Refd. Furber v. Taylor*, [1900] 2 Q. B. 719; *Gelsse v. Taylor*, [1905] 2 K. B. 658; *Savill v. Dalton*, [1915] 3 K. B. 174.

**386. Order for payment of alimony—Allmony pendente lite.**—An order to sign final judgment under R. S. C., Ord. 14, r. 1, will not be made where the action is for arrears of alimony *pendente lite*, payable under an order of the Probate & Divorce Div.—*BAILEY v. BAILEY* (1884), 13 Q. B. D. 855; 53 L. J. Q. B. 583, C. A.; *affg.*, 50 L. T. 722, D. C.

*Annotations*.—*Consd. Re Otway, Ex p. Otway* (1888), 58 L. T. 855; *Westmoreland Green & Blue Slate Co. v. Feilden*, [1891] 3 Ch. 15. *Expld. Norton v. Gregory* (1895), 73 L. T. 10. *Apld. Robins v. Robins*, [1907] 2 K. B. 13. *Expld. Ivimey v. Ivimey*, [1908] 2 K. B. 260; *Beatty v. Beatty*, [1924] 1 K. B. 807. *Refd. Linton v. Linton* (1885), 15 Q. B. D. 239; *Chalk, Webb v. Tennent* (1887), 57 L. T. 598; *Seldon v. Wilde*, [1910] 2 K. B. 9; *Leavis v. Leavis*, [1921] P. 299. *Mentd. Watkins v. Watkins* (1896), 12 T. L. R. 165.

**387. — Arrears of permanent alimony.**—No action will lie in the K. B. Div. to recover arrears of permanent alimony payable under an order of the Probate & Divorce Div., such an order not being a final & conclusive judgment upon which an action of debt to enforce it may be maintained.—*ROBINS v. ROBINS*, [1907] 2 K. B. 13; 76 L. J. K. B. 649; 96 L. T. 787; 23 T. L. R. 428.

*Annotations*.—*Refd. Beatty v. Beatty*, [1924] 1 K. B. 807. *Mentd. Jeffries v. Jeffries* (1907), 51 Sol. Jo. 468.

**388. — Arrears due at husband's death.**—Where an order has been made against a husband for judicial separation & for payment of alimony,

his widow may recover against his estates if solvent, any arrears of alimony due at his death.

Because the ct. to deal with the order during the husband's lifetime is the Divorce Ct., that is, in my judgment, no reason for holding that arrears cannot be enforced as a debt after the jurisdiction of that ct. has come to an end by reason of the husband's death (*SARGANT, J.*).—*Re STILLWELL, BRODRICK v. STILLWELL*, [1916] 1 Ch. 365; 85 L. J. Ch. 314; 114 L. T. 604; 32 T. L. R. 285; 60 Sol. Jo. 322.

*Annotations*.—*Apld. Re Naters, Ainger v. Naters* (1919), 88 L. J. Ch. 521. *Folld. Firman v. Royal*, [1925] 1 K. B. 681. *Refd. Maconachie v. Maconachie, Maconachie v. Maconachie & Blake* (1916), 33 T. L. R. 50.

*See, generally, HUSBAND & WIFE*, Vol. XXVII., pp. 540 *et seq.*, 564, 565.

**389. Order for payment of money—Order of county court—Exercising bankruptcy jurisdiction.**—An action is maintainable upon an order for the payment of money made by a county ct. in the exercise of its bkpcy. jurisdiction.—*SAVILL v. DALTON*, [1915] 3 K. B. 174; 84 L. J. K. B. 1583; 113 L. T. 477; 59 Sol. Jo. 562; [1915] H. B. R. 154, C. A.

**Balance order.**—*See COMPANIES*, Vol. IX., p. 921, Nos. 6314, 6315.

**Whether writ may be specially indorsed.**—*See PRACTICE*.

**Judgment against debtor & surety—Time given after judgment.**—*See GUARANTEE*, Vol. XXVI., p. 183, Nos. 1407, 1408.

**SUB-SECT. 3.—BY EXECUTION.**

*See, generally, EXECUTION*, Vol. XXI., pp. 415 *et seq.*

**Whether leave necessary.**—*See EXECUTION*, Vol. XXI., pp. 424 *et seq.*

**Particular forms of execution—Writ of fieri facias.**—*See EXECUTION*, Vol. XXI., pp. 470 *et seq.*

**Writ of elegit.**—*See EXECUTION*, Vol. XXI., pp. 556 *et seq.*

**Writ of capias ad satisfaciendum.**—*See EXECUTION*, Vol. XXI., pp. 580 *et seq.*

**Writ of delivery.**—*See EXECUTION*, Vol. XXI., pp. 583 *et seq.*

**Writ of possession.**—*See EXECUTION*, Vol. XXI., pp. 585 *et seq.*

**Writ of sequestration.**—*See EXECUTION*, Vol. XXI., pp. 591 *et seq.*

**Equitable execution—Appointment of receiver.**—*See RECEIVERS*.

**SUB-SECT. 4.—BY PROCEEDINGS IN BANKRUPTCY.**

**Whether a "final judgment."**—*See BANKRUPTCY*, Vol. IV., pp. 90 *et seq.*; & *generally, Part II., Sect. 2, ante.*

**SUB-SECT. 5.—BY CHARGING ORDER.**

*See, generally, EXECUTION*, Vol. XXI., pp. 647 *et seq.*

**SUB-SECT. 6.—BY GARNISHEE PROCEEDINGS.**

*See, generally, EXECUTION*, Vol. XXI., pp. 628 *et seq.*, Nos. 2089 *et seq.*

SUB-SECT. 7.—UNDER JUDGMENTS EXTENSION ACT, 1868.

See CONFLICT OF LAWS, Vol. XI., pp. 469 *et seq.*

SUB-SECT. 8.—BY ATTACHMENT AND COMMITTAL.

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 38 *et seq.*, 46 *et seq.*

SECT. 3.—TIME FOR ENFORCING.

See, generally, LIMITATION OF ACTIONS.

SECT. 4.—COSTS.

See PRACTICE.

Part XIV.—Registration.

**Of judgment.]**—See, generally, EXECUTION, Vol. XXI., pp. 566 *et seq.*; EXECUTORS, Vol. XXIII., pp. 353, 354; & see, now, Law of Property Act, 1925 (c. 20), s. 195 (3); Land Charges Act, 1925 (c. 22), ss. 6, 7.

— **In Middlesex.]**—See EXECUTION, Vol. XXI., pp. 567, 568, Nos. 1429–1431.

**390. — In Yorkshire.]**—In 1848, A.'s judgment was obtained & registered in Yorkshire.

In 1850, B.'s judgment was obtained & registered both in Yorkshire & in the Common Pleas. After this, A. for the first time registered his judgment in the Common Pleas:—*Held*: A.'s judgment had priority over B.'s as to lands in Yorkshire.—*NEVE v. FLOOD* (1864), 33 Beav. 666; 4 New Rep. 207; 34 L. J. Ch. 89; 10 L. T. 520; 10 Jur. N. S. 607; 12 W. R. 897; 55 E. R. 527.

**Of lis pendens.]**—See Land Charges Act, 1925 (c. 22), ss. 1–3; SALE OF LAND.

Part XV.—Satisfaction of Judgments and Orders.

**391. What amounts to—Whether cross demand.]**—By satisfaction of a judgment is meant that the judgment is discharged by money paid on account of the judgment, not the existence of a cross-demand against the judgment creditor (*PARKE, B.*).—*COOKE v. CROFTS* (1843), 1 Dow. & L. 360; 1 L. T. O. S. 316; 7 Jur. 679.

**392. — Whether payment into court.]**—*CRAWFORD v. SCOTT* (1843), 1 L. T. O. S. 432.

**393. — Judgment as security for larger sum than nominal amount—Payment of nominal amount.]**—Deft. being indebted to pltf. in the sum of £1070, agreed to allow a judgment he had before given for £500 to stand as security for the payment of the £1070. After the passing of Judgments Act, 1835 (c. 110), a third person purchased deft.'s land with notice. Deft. afterwards died:—*Held*: deft. in his lifetime would not have been entitled to have satisfaction entered on the roll on payment of £500 & interest, & a purchaser with notice stood in the same position.—*CRAFTS v. WILKINSON* (1843), 4 Q. B. 74; 3 Gal. & Dav. 280; 12 L. J. Q. B. 153; 7 Jur. 105; 114 E. R. 825.

— **Seizure by sheriff—Under writ of fieri facias.]**—See EXECUTION, Vol. XXI., p. 508.

**394. Whether presumed—After lapse of time.]**—Where a judgment is still standing out, & no satisfaction entered, this ct. will not, merely on a presumption from length of time, decree it to be satisfied.—*KEMYS v. RUSCOMB* (1740), 2 Atk. 45; 26 E. R. 424.

**395. — Twenty years.]**—Twenty years affords a presumption of payment on a judgment.

—*CURTIES v. FITZPATRICK* (1796), Peake, Add. Cas. 92, N.P.

**396. Entry of—Nunc pro tunc—After death of plaintiff—Satisfaction acknowledged.]**—*DARLOW v. WHARTON (DUKE)* (1739), Barnes, 258; 94 E. R. 904.

**397. — — — —.]**—Pltf. obtained judgments against deft. in two actions in this ct., & deft. obtained a judgment against pltf. in the Ct. of K. B.:—*Held*: deft., upon acknowledging satisfaction for the amount of the judgments in this ct., on the judgment she had obtained against pltf. in the Ct. of K. B., might enter satisfaction on the judgment rolls in the two actions in this ct., although pltf. had died, & more than two years had elapsed before judgment had been entered up against her in the Ct. of K. B., the verdict having been obtained in her lifetime, subject to a reference, & a rule nisi to reduce the damages awarded by the arbitrator being pending at the time of her death.—*BRIDGES v. SMYTH* (1831), 8 Bing. 29; 1 Dowl. 242; 1 Moo. & S. 93; 1 L. J. C. P. 33; 131 E. R. 311.

*Annotations*:—*Consd.* Miles v. Bough (1846), 6 L. T. O. S. 325. *Refd.* Green v. Cobden (1837), 4 Scott, 486. *Mentd.* Scott v. De Richebourg (1851), 11 C. B. 447.

**398. — Proof of satisfaction—Plaintiff abroad.]**—Where a judgment has been satisfied, & pltf. is out of the country, so that the usual warrant to enter up satisfaction on the roll cannot be obtained, deft. must clearly prove that the judgment is satisfied before satisfaction can be entered.—*DE BASTOS v. WILLMOTT* (1835), 1 Hodg. 15.

PART XV.

**d. What amounts to.]**—*SEWELL v. BURPE* (1847), 3 Kerr, 363.—CAN.

**e. — Set-off.]**—*GRANT v. MCALPINE* (1881), 46 U. C. R. 284.—CAN.

**f. — Whether part payment.]**—Part payment of a judgment must, to be an extinguishment thereof, be expressly accepted by the creditor in satisfaction.—*MASON v. JOHNSTON* (1893), 30 A. R. 412.—CAN.

**g. Effect of.]**—A judgment having been satisfied cannot be revived, unless by express agreement.—*MACQUIRE v. CARR* (1896), 28 N. S. R. (16 R. & G.) 431.—CAN.

**h. How ascertained.]**—The question whether a judgment has been satisfied or not cannot be inquired into in a summary way.—*ARMSTRONG v. DUNLAP* (1892), 24 N. S. R. 334.—CAN.

**k. Vacating entry—Grounds for.]**—

In a class suit, in which a decree has been made, although pltf.'s claim has been paid, the bill will not be dismissed nor a *lis pendens* vacated, where other persons may be entitled to the benefit of the decree, & to retain the *lis pendens*.—*ARNERY v. THORNTON* (1874), 6 P. R. 190.—CAN.

**l. — — —.]**—*ONTARIO LIME ASSOCN. v. GRIMWOOD* (1910), 2 O. W. N. 51; 22 O. L. R. 17.—CAN.

**m. Debtor wrongfully discharged—**

**399. — Power of court to compel.]**—The ct. or a judge will compel a pltf., who has received satisfaction of his judgment, to execute the proper satisfaction process, in order to have the entries of it on the registers duly vacated: & when the judgment is vacated, the entries of it are in effect vacated.—*FISH v. TINDAL* (1862), 10 W. R. 801.

—.]—*Sec. generally, PRACTICE.*

**400. Vacating entry—Grounds for—Whether combination to deprive attorney of costs.]**—Where, in an action of replevin, pltf. obtained a verdict, & afterwards directed satisfaction to be entered on the roll, the ct. would not cause such entry to be vacated on the application of pltf.'s attorney, on the ground that pltf. & deft. had combined together to deprive such attorney of his costs.—*ABBOTT v. RICE* (1825), 3 Bing. 132; 10 Moore, C. P. 489; 3 L. J. O. S. C. P. 202; 130 E. R. 463.

**401. — — —.]**—Motion to set aside the satisfaction entered on the roll on ground of collusion between pltf. & deft. to deprive the attorney of his costs. In motions of this kind there must be gross fraud shown, or the ct. will not interfere.

Every case of this kind must depend on its particular circumstances; & no doubt a very strong case of fraud should be made out before the ct. will interfere; but this is a case of gross fraud & collusion between the parties to deprive the attorney of his costs. It is said that the attorney must look to other parties but pltf. for his costs as he did not retain the attorney; that is not made out: & here we see pltf. taking advantage of the verdict in his favour to get the six pounds (*per cur.*).—*PERRY v. ALLEN* (1845), 6 L. T. O. S. 174.

**Set-off of judgments.]**—*See SET-OFF.*

## Part XVI.—Interest on Judgments and Orders.

### SECT. 1.—WHEN ALLOWED.

*See R. S. C., Ord. 42, r. 16, Ord. 55, rr. 62–61.*

**402. General rule.]**—Interest is not allowed on a judgment, except under special circumstances, & where there is no imputation on the creditor; & therefore, interest was refused on a judgment where the creditor, being also mtgee., had been in the receipt of the rents & profits of the mortgaged estates; & the propriety of his conduct was questioned with respect to the manner in which he had become such mtgee., & with respect to his accounts, both as such mtgee., & also as solr., agent, & steward, to the mtgor.—*LEWES v. MORGAN* (1829), 3 Y. & J. 394; 148 E. R. 1233.

**403. Jurisdiction to allow—Judicial committee of Privy Council.]**—Where a decree of the Ct. of Appeal, affirmed by an Order in Council had ordered the repayment of moneys received by applt. in excess of his salary as manager of a co., but was silent as to interest on the sums so overdrawn:—*Held*: the ct. had power to order interest on further directions as a matter of discretion, but that as it appeared from the judgment of their Lordships that the Order in Council intentionally omitted a direction to that effect, the discretion of the ct. below should be overruled. As no claim for interest was made at the commencement of the action, it should be charged only on the amount decreed from the date of the decree of the Ct. of Appeal.—*BURLAND v. EARLE*, [1905] A. C. 590; 74 L. J. P. C. 156; 93 L. T. 313, P. C.

**404. In account—Judgment for assault.]**—*ANON.* (1678), *Freem. Ch.* 37; 22 E. R. 1043, L. C.

**405. — Judgment for slander.]**—*ANON.* (1678), *Freem. Ch.* 37; 22 E. R. 1043, L. C.

**406. Order lost & redrawn—Entered nunc pro tunc.]**—*WILLIAMSON v. HENSHAW* (1747), 1 Dick. 129; 21 E. R. 217.

**407. If reserved by decree.]**—Unless interest be reserved by the decree, the ct. cannot give it; but the cause was reheard merely to introduce a reservation of interest.—*HERLE v. GREENBANK* (1763), 1 Dick. 370; 21 E. R. 312, L. C.

**408. Action for debt on judgment.]**—In a debt on a judgment affirmed in error, the jury, by way of damages, may give interest upon the sum recovered by the judgment from the time of signing it; where, by the practice of the ct. in which error is brought such interest is not allowed in costs upon the affirmance.—*ENTWISTLE v. SHEPHERD* (1787), 2 Term Rep. 78; 100 E. R. 43.

**409. —.]**—*THOMAS v. EDWARDS* (1796), 3 Anst. 804; 145 E. R. 1045.

*Annotation*—*Expld.* *Gaunt v. Taylor* (1834), 3 My. & K. 302.

**410. Effect of unnecessary delay.]**—Interest after judgment is not usually allowed. But if the other party occasioned unnecessary delay I see no reason why in equity interest after judgment might not run (*SIR W. SCOTT*).—*THE EXETER* (1799), 1 Ch. Rob. 173; 165 E. R. 139.

**411. — In enforcing judgment.]**—*BANN v. DALZEL*, No. 351, *ante*.

**412. Trover for bills of exchange.]**—In trover for bills of exchange, the Ct. of Exch. Chamber allowed interest from the date of the final judgment

*Judgment restored.]*—The ct. will restore a judgment discharged without consideration upon false pretences of deft., upon an affidavit, a balance being due.—*PONCIA v. McDONNELL* (1853), 2 N. S. R. (James) 55.—*CAN.*

*n. Discharge of arrested debtor—Without creditor's authority.]*—Deft., having been arrested under execution issued on a judgment recovered against him by pltf., was discharged from arrest without the authority of pltf. or her solr.:—*Held*: such unauthorised discharge did not constitute a satisfaction of the judgment, & was no answer to an action to revive the judgment.—*CONRAD v. SIMPSON* (1907), 2 E. L. R. 63; 3 E. L. R. 115; 41 N. S. R. 468.—*CAN.*

*o. Feigned issue—Levy on property.]*—On a feigned issue, directed to try whether by the agreement & intent of the parties a certain judgment had been fully satisfied by a settlement made between them in July, 1846, a levy on all deft.'s property on Oct. 9, 1843, appeared in evidence:—*Held*: under the terms of the issue deft. could not avail himself of such levy as any satisfaction of the judgment.—*LUNT v. ESTABROOKS* (1846), 3 Kerr, 291.—*CAN.*

### PART XVI. SECT. 1.

**402 i. General rule.]**—The ct. will not order satisfaction to be entered upon a judgment, without payment of interest.—*LOGAN v. SECORD* (1824),

Tay. 173.—*CAN.*

*p. Judgment by default.]*—Judgment in default of a plea cannot include interest subsequent to the issue of the writ although judgment in default of appearance may.—*MARTEL v. DUBORD* (1885), 3 Man. L. R. 598.—*CAN.*

*q. —.]*—*GILLIES v. McDONALD* (1891), 23 N. S. R. 411.—*CAN.*

*r. —.]*—*EWING v. LATIMER* (1903) 5 Terr. L. R. 499.—*CAN.*

*t. When judgment stayed—Pending appeal.]*—Deft. obtained leave to appeal to Privy Council on paying into ct. amount of judgment with one year's interest, appeal was kept pending two & a half years & then lapsed for want



upon all such bills as had been received before the judgment, & upon all such as had been received afterwards from the time of the receipt.—*ATKINS v. WHEELER* (1806), 2 Bos. & P. N. R. 205; 127 E. R. 603, Ex. Ch.

**413. In administration action—Creditor prevented from rendering judgment available—By proceedings in suit.**—Where an action was brought on bonds, & a *cognovit* was given in the action, & judgment entered up for the principal & interest then due:—*Held*: it was not competent to the representatives of the obligor, at the distance of ten years afterwards, in a suit for the administration of the obligor's assets, to question the validity of the bonds on the ground of usury.

In the administration of assets, interest is not allowed on a judgment debt, merely on the ground that the creditor has been prevented from rendering available his judgment, by the decree & proceedings in the suit, though the debt may, by those means, have been withheld from him for several years.—*BERRINGTON v. EVANS* (1831), 1 You. 276; 159 E. R. 996.

*Annotations*:—*Reid*. Taylor v. Taylor (1849), 8 Hare, 120. *Mentd.* Whitaker v. Wright (1843), 2 Hare, 310.

**414. — Creditors' suit.**—Where exors., having money of their testator to la out at interest, lend that money on an agreement that the borrower shall give a mtge. to secure the repayment, & the borrower dies without having repaid the money, & without having given any mtge. or security, & a judgment is obtained at law for the debt against his exors.; no interest will be allowed on the judgment in the master's office, in a creditors' suit, to the party claiming under the judgment.

A common judgment at law does not carry interest generally at law or in equity; but in cases in equity where a party asks indulgence from the ct., as, an extension of time, there the ct. will impose on him the condition of paying interest; for where specialty creditors are restrained from proceeding at law to recover a specialty debt, because of a suit in equity, there, *semble*: the ct. will not grant the injunction without making the exors. allow interest to the specialty creditors who are restrained by the injunction from recovering their debts & interest at law.—*GAUNT v. TAYLOR* (1834), 3 My. & K. 302; 3 L. J. Ch. 135; 40 E. R. 115; *subsequent proceedings* (1843), 2 Hare, 413.

*Annotations*:—*Consd.* Booth v. Leleoster (1838), 3 My. & Cr. 459. *Reid*. Hyde v. Price, Hart v. Cradock (1837), 8 Sim. 578; Lainsou v. Lainsou (1853), 22 L. T. O. S. 150; Taylor v. Roe, [1894] 1 Ch. 413.

**415. — Costs to be taxed & paid out of estate.**—Where, in an administration action, costs have been directed to be taxed, & when taxed to be paid by the trustees out of testator's estate, with a direction for division of the balance of the fund after such payment amongst the persons beneficially entitled, interest is not, in the absence of special direction payable on the costs.—*Re MARSDEN'S ESTATE, WITHINGTON v. NEUMANN* (1889), 40 Ch. D. 475; 58 L. J. Ch. 260; 60 L. T. 696; 37 W. R. 525.

Interest on debt in administration of insolvent

of prosecution.—*Held*: plff. was entitled to issue execution for interest accrued from expiration of the year for which it had been paid into ct. to date of arrival of certificate from Privy Council that appeal had lapsed.—*SMART v. O'CALLAGHAN* (1878), 4 V. L. R. 448.—*AUS.*

*a.* — *J.*—The question of allowing interest for time judgment has been

stayed pursuant to Supreme & Exchequer Cts. Act, s. 6, is a matter which the ct. will dispose of *ex mero motu*.—*McQUEEN v. PHOENIX MUTUAL FIRE INSURANCE CO.*, Cass. Dig. 2nd ed. 688.—*CAN.*

*b. Undeferred action.*—*TEPPER v. FARMERS MUTUAL FIRE INSURANCE CO.*, [1924] 3 W. W. R. 440.—*CAN.*

*c. Interest on judgment against prin-*

estates, *see, generally*, EXECUTORS, Vol. XXIV., pp. 819, 820.

**416. Warrant of attorney—Mortgage.**—*J.* executed a warrant of attorney to confess judgment; the defeasance recited a mtge. made by M. to A., with a proviso for redemption on payment of the principal on a day named, with interest in the meantime; the defeasance further recited, that *J.* gave the warrant of attorney as a security for the payment of the interest after the rate, at the time, & in manner appointed by the mtge. deed; & that it was intended that judgment should be entered up forthwith; it further provided, that no execution should be issued till default should be made in payment of the interest at the times, etc. (as before); but that, if default should be made in such payment, execution might be issued, at any time & from time to time thereafter, for all the arrears of interest then due, & thenceforth to accrue due. Judgment was entered up on the warrant. The interest due up to the day named in the mtge. inclusively was paid soon after that day. Afterwards, demand was made on *J.* for payment of interest accruing after the day. On application to the ct. to order satisfaction to be entered on the roll:—*Held*: the motion was at all events premature, execution not having issued; & it was not sufficiently clear, from the defeasance, that the warrant of attorney was intended to cover only the interest up to the day named, inclusively, for the ct. to interfere.—*ATKINSON v. JONES* (1835), 2 Ad. & El. 439; 111 E. R. 170.

**417. Under Judgments Act, 1838 (c. 110), ss. 17, 18—Costs ordered to be paid.**—Under the above sects. interest is recoverable on costs which one party is ordered to pay to another, but not on costs directed to be raised out of an estate.—*A.-G. v. NETHERCOTE* (1841), 11 Sim. 529; 10 L. J. Ch. 162; 59 E. R. 978.

*Annotations*:—*Reid*. *Re Marsden's Estate, Withington v. Neumann* (1889), 40 Ch. D. 475; Taylor v. Roe, [1894] 1 Ch. 413.

**418. — Costs ordered to be raised out of estate.**—*A.-G. v. NETHERCOTE*, No. 417, *ante*.

**419. — Administration action.**—*Re MARSDEN'S ESTATE, WITHINGTON v. NEUMANN*, No. 415, *ante*.

**420. — On cause of action & costs.**—Sect. 117 of the above Act gives interest on all judgments & therefore applies as well to judgments intrinsic to the actions as to judgments for costs.—*PITCHER v. ROBERTS* (1842), 12 L. J. Q. B. 178; 7 Jur. 466.

*Annotation*:—*Reid*. Taylor v. Roe, [1894] 1 Ch. 413.

**421. — On costs of nonsuit.**—Under sect. 17 of the above Act interest may be recovered on a judgment for costs of nonsuit.—*NEWTON v. CONYNGHAM (LORD)* (1848), 17 L. J. C. P. 288; 11 L. T. O. S. 294, Ex. Ch.

*Annotations*:—*Reid*. Taylor v. Roe, [1894] 1 Ch. 413. *Mentd.* Ward v. Boddington (1848), 12 L. T. O. S. 27.

**422. — Payment out of particular fund.**—Where the ct. orders payment out of a particular fund it is tantamount to a decision, not only that such fund is liable to make such payment, but also the interest directed to be computed thereon.

*principal—Not allowed against bail.*—Bail are only liable for the sum sworn to & costs, & the ct. will not allow interest on the judgment against the principal in an action or other recognisance.—*BYRON v. BATSON & FLAUG* (1878), 18 N. B. R. (2 P. & B.) 396.—*CAN.*

*d. Verdict subject to award.*—When a verdict is given subject to an award,



**Sect. 1.—When allowed. Sect. 2.]**

—**DAVIS v. BROWNE** (1851), 14 Beav. 127; 18 L. T. O. S. 33; 51 E. R. 235; *on appeal, sub nom. TORRE v. BROWNE* (1855), 5 H. L. Cas. 555, H. L.

**Annotations.**—**Mentd.** *Booth v. Coulton* (1861), 2 Giff. 514; *Edwards v. Warden* (1876), 1 App. Cas. 281; *Wheatly v. Davies* (1876), 35 L. T. 306; *Re Hiscoc, Hiscoc v. Waite* (1902), 71 L. J. Ch. 347.

**423.** —[**Ptff. having issued execution for debt & costs at the time the above Act came into operation, before the amount thereof was satisfied but after that Act came into operation, issued a fresh writ of execution for the interest upon the judgment debt only, & subsequently received under the first execution the debt & costs:—Held: debt. was not entitled to enter up satisfaction on the judgment until the interest was paid upon the second writ of execution.**—**BISHOP v. HATCH** (1852), 19 L. T. O. S. 122; 16 Jur. 1044.

**424.** — **Judgment to secure annuity.]—Held: a judgment given for securing an annuity, carries interest under sect. 17 of the above Act.**—**KNIGHT v. BOWYER** (1859), 4 De G. & J. 619; 45 E. R. 241, L. J.

**425.** — **Order for payment of money—Whether chief clerk's certificate included.]—P. carried in a claim as an incumbrancer upon real estate in respect of an annuity, & in Nov. 1855, the chief clerk certified £1,002 to be due to him for arrears. The cause did not come on for further consideration till July, 1858. P. then claimed interest on the £1,002 from the date of the certificate as against subsequent incumbrancers:—Held: (1) as the payment of the arrears had been delayed merely through hindrances in the prosecution of the suit, & not in consequence of misconduct or improper attempts to evade payment, interest ought not to be allowed, & that Civil Procedure Act, 1833 (c. 42), s. 28, did not alter the case; (2) the chief clerk's certificate, though adopted by the judge, was not an order for payment of money within Judgments Act, 1838 (c. 110), s. 18, so as to make the sum found due carry interest.**—**MANSFIELD (EARL) v. OGLE** (1859), 4 De G. & J. 38; 28 L. J. Ch. 422; 33 L. T. O. S. 84; 5 Jur. N. S. 419; 7 W. R. 423; 45 E. R. 15, L. J.

**Annotations.**—*As to (1) Apld. Blogg v. Johnson* (1867), 2 Ch. App. 225. **Expld. & Distd.** *Re Salvin, Worsley v. Marshall*, [1912] 1 Ch. 332.

**426.** — **Costs of mortgagee in foreclosure action.]—The effect of sect. 17 of the above Act is that interest at the rate of four per cent. is a debt necessarily attached to every judgment debt, & recoverable at law as a debt; & the judgment creditor is not confined to the remedy by way of execution mentioned in the sect.**

Therefore, where, in the case of a deceased insolvent debtor who became insolvent before 1809, a sum of money subsequently came to the hands of the assignee, out of which the principal of all the debts entered in debtor's schedule was paid:—**Held: the judgment debts were not satisfied within the meaning of sect. 92 (since repealed) of that Act until interest was paid, & the assignee was ordered to pay interest before handing over any surplus to the representatives**

of the insolvent.—*Re CLAGETT, Ex p. LEWIS* (1887), 36 W. R. 653, C. A.

**427.** — **Consent order for payment of debt by equal instalments.]—A mtgee. is not entitled, in carrying in his accounts under a foreclosure judgment, to charge interest on his taxed costs unless they are directed to be added to his security, & then they carry interest from the date of the taxing master's certificate, & not from the date of the judgment.**

An action by a mtgor. against a mtgee. to set aside the mtge. having been dismissed with costs, which were ordered to be paid by ptff. to debt., judgment was given for foreclosure on debt., counterclaim, & an account was directed of what was due to debt. for principal, interest (the mtge. reserving 5 per cent.), & the taxed costs of the action. On appeal the judgment was affirmed with costs, the Ct. of Appeal giving debt. leave to add the taxed costs of the appeal to his security. In carrying in his accounts debt. charged ptff. with interest at 4 per cent. on the taxed costs under the original judgment from the date of the judgment, & also interest at 4 per cent. on the taxed costs of the appeal from the date of the judgment of the Ct. of Appeal:—**Held: no interest on the costs under the original judgment could be charged by debt., the mtgee.; but as to the costs of the appeal, interest at 4 per cent. was chargeable, though only from the date of the taxing master's certificate, & not from the date of the judgment of the Ct. of Appeal.**—**EARDLEY v. KNIGHT** (1889), 41 Ch. D. 537; 58 L. J. Ch. 622; 60 L. T. 780; 37 W. R. 704.

**Annotation.**—*Refd. Re Drax, Savile v. Drax*, [1903] 1 Ch. 781.

**428.** — —[**Under a consent order for judgment for a fixed sum with taxed costs by way of settlement of an action for breach of promise of marriage & an action for moneys lent, the total amount was agreed to be paid by "eight equal payments half-yearly," & execution was not to issue except in default of such payments. A claim was made, after payment of the instalments, for interest upon the full amounts, under the above sects. for interest upon a judgment debt:—Held: the order could not be construed so as to include interest, since the instalments were to be of equal amounts, & when these had been duly paid no execution could issue for any further amount as interest.**—**CAUDERY v. FINNERTY** (1892), 61 L. J. Q. B. 496; 66 L. T. 684; 8 T. L. R. 532, D. C.

**429.** — **Interlocutory order for costs.]—TAYLOR v. ROE**, No. 372, *ante*.

**430.** — **Judgment in representative action—Liability of contractors not joined as parties.]—Ptff. in Nov. 1920, insured his sailing vessel on hull & materials for £35,000, on a voyage from Newport Mews to Gothenburg against risks of "mines only, Norwegian conditions, including missing." During the currency of the policy the vessel was lost & a claim was made under the policy for the loss of the vessel, & it was arranged that the action which had been started to enforce the claim should be treated as a representative action. Four of the several insurance cos. taking part in the insurance were made formal defts. in the action, & the**

29 & 30 Vict. c. 42, s. 2, does not authorise the charging of interest on the sum awarded from the time of taking the verdict.—**HOPK v. BEATTY** (1876), 7 P. R. 39.—**CAN.**

**a. Mistake as to date of payment—Debtor's default—Relief granted but interest payable.]—LOVEJOY v. MERCER** (1911), 18 O. W. R. 178; 2 O. W. N. 531; 23 O. L. R. 29.—**CAN.**

**i. By verdict of jury.]—Interest is in practice much more frequently allowed by our juries, than English authority would seem to warrant.**—**SPENCE v. HECTOR** (1865), 24 U. C. R. 277.—**CAN.**

**g. —.]—BURFERT, CARVILL** (1875), 16 N. B. R. (3 Pags) 235.—**CAN.**

**b. Judgment on petition of right.]**

—Interest may be allowed against the Crown upon a judgment on a petition of right arising *ex contractu* in the Province of Quebec in the absence of any express undertaking by the Crown to pay the same, or any statutory enactment authorising such allowance. But such interest should only be computed from the date when the petition of right is filed in the office of the

underwriters who had subscribed the policy & were not sued agreed that defts. should defend the claim as representing all the underwriters. The agreement recited that the underwriters were desirous of having their liability legally determined, & provided that, in consideration of the assured abstaining, at their request, from bringing any action in respect of the claim other than that already commenced against the four defts. cos., they would be bound by the result of that action as if separate actions had been brought against them, & such separate actions had been, upon their application, consolidated under the usual consolidation order. The agreement also provided that if by any judgment the said four defts. should become liable in the action to pay any sum or sums for principal, interest, or otherwise in respect of the claim under the policy, the other underwriters would pay the ratable proportion due from them respectively. The action against the four defts. was heard by ROWLATT, J., in July, 1923, & resulted in judgment for pltf. Defts. appealed, but the Ct. of Appeal affirmed the judgment of ROWLATT, J., in favour of pltf. The money due under the judgment of ROWLATT, J., was deposited in the joint names of the solrs. of the parties & earned interest at the rate of 2 per cent. About 150 days elapsed between the date of the judgment of ROWLATT, J., & the decision of the Ct. of Appeal, dismissing the appeal, & pltf. in that action claimed interest (to be reckoned in accordance with sect. 17 of the above Act) at 4 per cent. Defts. in the present action refused to pay their proportionate part of that interest, although willing to pay their share of the principal sum received. They claimed that they were only liable for their proportionate shares of sums actually given in the judgment of ROWLATT, J.:—*Held*: defts. were bound by the result of the representative action. The result of that action was that a judgment was obtained, & by operation of the above Act interest was added to the sum given in the judgment until date of payment. Defts. were therefore liable to pay their share of the interest claimed, & there was nothing in the agreement to preclude or minimise that liability. Defts. were liable not only for interest expressly awarded in the judgment, but also to interest added to the judgment by operation of the statute.—*ZACHARIASSEN v. LONDON GENERAL INSURANCE CO., LTD.* (1925), 133 L. T. 604; 41 T. L. R. 463; *sub nom.* LACHARIASSEN v. LONDON GENERAL INSURANCE CO., LTD., 69 Sol. Jo. 542.

*See, also*, Nos. 440–447, *post*.

#### 431. Action transferred to Admiralty Division.]

—Where an action is transferred to the Admty. Div. by consent of the parties for the assessment

of damages, the registrar & merchants are entitled, in accordance with the practice of the Admty. Div., to give interest in addition to the actual damages, even where such interest would not be given in the division from whence the action is transferred.—*THE GERTRUDE, THE BARON ABERDARE* (1888), 13 P. D. 105; 59 L. T. 251; 36 W. R. 616; 4 T. L. R. 431; 6 Asp. M. L. C. 315, C. A.

*Annotations*:—*Mentd.* *The Orwell* (1888), 13 P. D. 80; *The Rosalind* (1920), 90 L. J. P. 126.

432. Effect of satisfaction of original debt.]—*AMAN v. SOUTHERN RY. CO.*, No. 331, *ante*.

#### SECT. 2.—DATE FROM WHICH INTEREST RUNS.

433. In case of appeal—Date when judgment affirmed.]—Interest runs from the time of the affirmance of the judgment in error.—*WELFORD v. DAVIDSON* (1767), 4 Burr. 2127; 98 E. R. 110. *Annotation*:—*Refd.* *Frith v. Leroux* (1787), 2 Term Rep. 57.

434. — Date of judgment appealed from.]—*JAMES v. EMERY*, No. 476, *post*.

435. — — — — —.]—In appellate proceedings interest upon the accumulated sum of principal & interest is chargeable on the debtor from the date of a judgment in the Ct. of Session to the date of the judgment in the Ct. of Appeal, although resp. has obtained an inhibition against the lands of applt. before the date of the original judgment.—*GRAHAM v. KEBLE* (1820), 2 Bli. 120; 4 E. R. 274, H. L.

*Annotation*:—*Mentd.* *Rowe v. Young* (1820), 2 Rii. 391.

436. — Date of judgment of Court of Appeal—Judgment reversed & damages allowed.]—*BORTHWICK v. ELDERSLIE S.S. CO.* (No. 2), No. 486, *post*.

437. — No interest claimed.]—*BURLAND v. EARLE*, No. 403, *ante*.

438. Debt accruing due after judgment.]—A creditor is not entitled under general order 46 of Aug. 1841, to interest "from the date of the decree," on a debt which accrues due subsequently.—*LAINSON v. LAINSON* (No. 2) (1853), 18 Beav. 7; 23 L. J. Ch. 170; 22 L. T. O. S. 150; 17 Jur. 1044; 52 E. R. 3.

*Annotation*:—*Fold.* *Re Salvin*, *Worsley v. Marshall*, [1912] 1 Ch. 332.

439. — — — — —.]—By a settlement made in 1897 on the marriage of his brother, testator covenanted to pay to the trustees thereof an annuity of £400 during the joint lives of the brother & his wife. The annuity was paid down to the quarter preceding testator's death, which took place in Oct. 1902. After his death an administration action was commenced by the residuary legatees under his will, & accounts & various inquiries were

Secretary of State.—*LAINE v. R.* (1896), 5 Exch. C. R. 103.—*CAN.*

k. On sale of land under execution—Where surplus remains—After payment of debt & costs.]—No claim for interest arises upon a recorded judgment until lands are actually sold under execution & there is a surplus after paying the debt & costs.—*FLEIGER v. TAYLOR* (1853), 2 N. S. R. (James) 137.—*CAN.*

l. Interlocutory order for costs.]—An interlocutory order directing payment of costs by one person to another carries interest on the costs thereby awarded as from the date of such order.—*ALEXANDER v. CURRAGH*, [1915] 1 I. R. 273.—*IR.*

#### PART XVI. SECT. 2.

434 i. In case of appeal—Date of judgment appealed from.]—*QUINLAN*

v. UNION FIRE INSURANCE CO. (1883), 8 A. R. 376.—*CAN.*

434 ii. — — — — —.]—*EXCHANGE BANK v. SPRINGER, EXCHANGE BANK v. BARNES* (1886), 13 A. R. 390.—*CAN.*

434 iii. — — — — —.]—Pltf. obtained a verdict at the trial, but the judge dismissed the action. The Full Ct. allowed pltf.'s appeal, & ordered that judgment be entered in pltf.'s favour for the amount of the verdict:—*Held*: pltf. was entitled to interest from the date of the verdict.—*GORDON v. CITY OF VICTORIA CORPN.* (1900), 7 B. C. R. 339.—*CAN.*

434 iv. — — — — —.]—Where a judgment gives damages for trespass, with a reference to ascertain the amount, interest on its amount so ascertained should run from the date of the judgment & the unsuccessful party should not be entitled to the benefit of the

delay gained by an appeal.—*DEISLER v. SPRUCE CREEK POWER CO.* (1915), 33 W. L. R. 231; 9 W. W. R. 548; 22 B. C. R. 318.—*CAN.*

m. — Date of judgment of Court of Appeal.]—Where any judgment of a ct. below has been changed, interest should only be allowed on the judgment from the date of the judgment of the Ct. of Appeal.—*SHELDON v. EGAN* (1908), 18 Man. L. R. 221.—*CAN.*

n. — Date of judgment of Supreme Court—Judgment reversed & damages allowed.]—*ROWAN v. TORONTO RY. CO.* (1918), 43 O. L. R. 164; 43 D. L. R. 564.—*CAN.*

o. Costs—From date of taxation.]—Where the formal judgment decreed that "defts. do pay forthwith after taxation thereof to pliffs. the costs"—*Held*: there was no judgment debt until the taxation was had, & therefore

**Sect. 2.—Date from which interest runs. Sect. 3.]**

directed. By a certificate of the master dated Apr. 30, 1908, the arrears of the annuity were found to be £2,158 6s. 6d., & the whole arrears were not finally paid until Aug. 24, 1910:—*Held*: interest was payable at 4 per cent. upon the arrears of the annuity from the date of the judgment, in accordance with the provisions of R. S. C., Ord. 55, rr. 62, 63, & on such parts as accrued due subsequently to the judgment, from the dates when they respectively accrued due down to actual date of payment in all cases.

The rule of practice stated in *Mansfield (Earl) v. Ogle*, No. 425, *ante*, that, as a general rule, no interest will be allowed on arrears of an annuity, is applicable in the case of a foreclosure or redemption action as between incumbrancers, & as against the property charged, but has no application to the working out of a judgment in an action for the administration of the estate of the grantor of an annuity.—*Re SALVIN, WORSLEY v. MARSHALL*, [1912] 1 Ch. 332; 81 L. J. Ch. 248; 28 T. L. R. 190; 56 Sol. Jo. 241; *sub nom. Re SALVIN, WORSLEY v. MARSHALL*, 106 L. T. 35.

**440. Under Judgments Act, 1838 (c. 110), ss. 17, 18—From entry.]**—The time of "entering up judgment" referred to by sect. 17 of the above Act, is that at which the *incipitur* is entered in the master's book; therefore, where the *incipitur* was entered on Jan. 8, in pursuance of the master's *allocatur* for £630, but upon subsequent application by *pltf.* for a review of the taxation of costs, the amount was increased to £643, by which sum the judgment was amended on May 30, the date of the judgment being left unaltered:—*Held*: *pltf.* was entitled to interest from Jan. 8, & not from May 30 only.—*FISHER v. DUDDING* (1841), 3 Man. & G. 238; 9 Dowl. 872; 3 Scott, N. R. 516; 10 L. J. C. P. 323; 133 E. R. 1131.

*Annotations*.—*Fold*, *Newton v. Grand Junction Ry.* (1846), 16 M. & W. 139. *Mentd.* *Ouchterlony v. Gibson* (1841), 5 Man. & G. 579.

**441. ———.]—Interest runs on a judgment debt, under sect. 17 of the above Act, from the time of the entry of the *incipitur*, & not merely from the final completion of the judgment, after of**

*Co.*  
L. J. Ex. 276; 153 E. R. 1133.

**442. — Where account ordered—From date of master's certificate.]**—By a decree the lands of *deft.* were declared chargeable with £40 a year, & the master was directed to take an account of the arrears, & *deft.* was ordered to pay what should be found due:—*Held*: *deft.* was not, under the above sects., liable to pay interest on the amount due, from the date of the decree to the date of the master's report.—*A.-G. v. CARRINGTON (LORD)* (1843), as reported in 6 Beav. 454; 49 E. R. 901.

*Annotations*.—*Mentd.* *Malins v. Price* (1845), 9 Jur. 650; *Hardy v. Hull* (1853), 17 Beav. 353; *Bogbie v. Fenwick* (No. 2) (1871), 24 L. T. 62.

**443. — Creditors' administration suit—From proof of debts.]**—A decree made in a creditor's administration suit operates as a judgment in

favour of creditors, & when, in the case of a deficient estate, the available assets have been apportioned amongst & directed to be paid to certain creditors who have proved their debts, but some of such creditors have left unclaimed for many years the sums directed to be paid, the creditors named in the decree have a vested right to the sums originally apportioned to them, & the ct. has no jurisdiction to order payment of those apportioned sums, however long they may have been left in ct. unclaimed, to any one but the creditors to whom they were apportioned by the decree, or their representatives. Where, many years after the administration decree in such a suit, funds had accrued to the estate, & some only of the creditors named in the decree, or their representatives, appeared in answer to advertisements:—*Held*: the creditors whose debts carried interest were entitled to interest on the unpaid balances of the debts from the date of the master's report certifying the proof of their debts, except those creditors who had left the sums apportioned to them unclaimed, & who were not entitled to interest on the sums so left unclaimed by their own neglect.—*ASHLEY v. ASHLEY* (1877), 4 Ch. D. 757; 46 L. J. Ch. 322; 36 L. T. 200; 25 W. R. 356, C. A.

*Annotations*.—*Mentd.* *Re Higginson & Dean, Ex p. A.-G.*, [1899] 1 Q. B. 325; *Wilson v. Church* (1911), 106 L. T. 31.

**444. — Salvage award.]**—Since the incorporation of the Ct. of Admty. in the High Ct. of Justice, an award of salvage is a judgment debt, & as such bears interest from the date of entry of judgment, the taxed costs bearing interest from the date of signing of the *allocatur*.—*THE JONES BROTHERS* (1877), 46 L. J. P. 75; 37 L. T. 164; 3 Asp. M. L. C. 478.

**445. — Damages to be ascertained by referee.]**

—By a consent order dated July 18, 1910, an action for an injunction to restrain a trespass on mines & for damages was compromised on the terms that it should be referred to a special referee to ascertain the damages, & *defts.* were to pay the amount so found. On June 1, 1911, the special referee reported that £1,515 was payable by *defts.* to *pltf.*. Upon motion by *pltf.* that the referee's be adopted, the question was raised as to whether interest was payable on the damages, & from what date:—*Held*: (1) as the order of July 18, 1910, was not one whereby a sum of money was payable by *defts.* to *pltf.* within sect. 18 of the above Act, inasmuch as a further order was necessary, interest on the damages was not payable from the date of the order; but, (2) there being in effect an agreement to pay on certificate, interest at £4 per cent. on the sum certified ran from the date of the referee's report on June 1, 1911.—*ASHOVER FLUOR SPAR MINES, LTD. v. JACKSON*, [1911] 2 Ch. 355; 80 L. J. Ch. 687; 105 L. T. 334; 27 T. L. R. 530; 55 Sol. Jo. 649.

**446. — Judgment on claim for unliquidated damages.]**—A judgment recovered in an action for damages for breach of a covenant, after the death of the covenantor, is a debt which may be levied with interest upon the real estate of the

interest could be computed on the costs only from date of taxation.—*STAR MINING & MILLING CO., LTD., LIABILITIES v. BYRON N. WHITE CO* (1910), 15 B. C. R. 11; *revid.*, on appeal, 15 B. C. R. 161.—*CAN.*

*p.* Where cognovit entered into—From date of cognovit.—Where *deft.* gave a confession in May, 1856, containing an agreement that judgment might be entered at once, but no execution to issue until default in payment of a

sum named on June 1, then next, "with interest thereon from this day till paid," & judgment was not entered till Apr. 1857.—*Held*: *pltf.* were entitled to interest from the date of the cognovit.—*RAMSAY v. CARRUTHERS* (1863), 23 U. C. R. 21.—*CAN.*

*q.* Where verdict obtained—& rule nisi for new trial granted & discharged.—From date of verdict.—Where a verdict was obtained on a policy of guarantee,

including interest up to that time, & a rule nisi for a new trial was granted & afterwards discharged:—*Held*: interest should be allowed on the amount of the policy, but not on the amount of the verdict, from the date of the verdict till the rule was discharged.—*COMMERCIAL BANK v. EUROPEAN ASSURANCE SOCIETY* (1871), N. B. Dig. 445.—*CAN.*

*r.* In indorsing writ of execution.—From day of pronouncing judgment.—

covenantor in the hands of his devisees, where his personal estate is found insufficient.

A devise to pay debts does not enhance the amount of the demand, or entitle the party to interest where he shall not have interest independent of the devise, but having the amount unaffected by it, it leaves a new fund for the payment of the debt, & that is the way in which the ct. deals with those cases. As against the devisees, the amount of the demand is not liquidated until judgment is recovered. . . . Where more was claimed than was established, it is the judgment which for the first time ascertains the amount of the damages, & there can be no legal demand for interest under the statute until judgment is recovered. Therefore I cannot give more interest than upon the amount of the judgment (WIGRAM, V.-C.).—*MORSE v. TUCKER* (1846), 5 Hare, 79; 15 L. J. Ch. 162; 6 L. T. O. S. 389; 10 Jur. 173; 67 E. R. 835.

*Annotations*:—*Mentd.* *Re St. George's Steam Packet Co., Hamer's Devisees' Case* (1852), 2 De G. M. & G. 366; *Varlo v. Faden* (1859), 1 De G. F. & J. 211.

**447. — Judgment on claim where no damages claimed.**—By the deed of assocn. of a mutual marine assurance assocn., each member covenanted with the others to pay his proportion of any sum recoverable from the assocn., subject to the rules thereof. By the rules, the committee of management were to settle all claims, & order payment thereof, & the secretary was to draw on the members for their respective proportions. A loss occurred, in respect of which the assocn. disputed their liability to pay anything, & refused to settle the claim:—*Held*: the insured had a remedy in equity against the assocn.

Interest on the amount recovered was granted only from the date of the decree, as the bill contained no prayer for damages.—*HARVEY v. BECKWITH* (1861), 2 Hem. & M. 429; 4 New Rep. 90; 12 W. R. 819; 71 E. R. 530; *affd.* without affecting this point, 4 New Rep. 258, L. J.

*Annotations*:—*Mentd.* *Pepper v. Green* (1865), 2 Hem. & M. 478; *Wright v. Ward* (1871), 21 L. T. 439.

**448. Costs—Former rule—From date of certificate—Costs payable under decree or order in Chancery—Payment of costs delayed.**—Where the payment of taxed costs was unavoidably delayed:—*Held*: under Solicitors Act, 1860 (c. 127), s. 27, interest was payable on such costs from the date of the taxing master's certificate.—*CARTER v. CARTER* (1863), 2 New Rep. 512; 8 L. T. 692.

**449. — — — — —**—THE JONES BROTHERS, No. 444, *ante*.

**450. — — — — —**—Interest on a judgment for costs runs from the date of the master's certificate of taxation, & not from the time of entering up the judgment.—*SCHROEDER v. CLEUGH* (1877), 46 L. J. Q. B. 365; 35 L. T. 850.

*Annotation*:—*N.F.* *Boswell v. Coaks* (1887), 57 L. J. Ch. 101.

**451. — Present rule—From date of judgment.**—As a general rule, in the absence of any special order, interest at the rate of £4 per cent. *per annum* is payable on the costs of an action from the date of the judgment.—*LANDOWNERS'*

*WEST OF ENGLAND & SOUTH WALES LAND DRAINAGE & INCLOSURE CO. v. ASHFORD* (1884), 33 W. R. 41.

*Annotation*:—*Folld.* *Boswell v. Coaks* (1887), 57 L. J. Ch. 101.

**452. — — — — —**—The costs of an action bear interest from the date of the judgment, & not from the date of the *allocatur* only.—*PYMAN & CO. v. BURT* (1884), 28 Sol. Jo. 428; *Bitt. Rep.* in Ch. 97.

*Annotations*:—*Folld.* *Re London Wharfing & Warehousing Co.* (1885), 53 L. T. 112. *Refd.* *Eardley v. Knight* (1889), 60 L. T. 780; *Taylor v. Roe*, [1894] 1 Ch. 413.

**453. — — — — —**—Where costs are given by a judgment & taxed, interest on such costs runs from the date of the judgment, & not from the date of the taxing master's certificate.—*Re LONDON WHARFING & WAREHOUSING CO.* (1885), 54 L. J. Ch. 1137; 53 L. T. 112; 33 W. R. 836.

*Annotation*:—*Refd.* *Boswell v. Coaks* (1887), 57 L. J. Ch. 101.

**454. — — — — —**—An action dismissed, or on which judgment is given in favour of plffs., although at an end so far as the ascertainment of the rights of the parties to it is concerned, is still pending for the purpose of enforcing the judgment pronounced in it & working out the rights under the judgment. Where an action was dismissed with costs before Oct. 1883 (when R. S. C., 1883, came into force), but the taxation of costs had not been completed till after that date:—*Held*: the action was still a pending proceeding within the preface to R. S. C., 1883, & those rules accordingly applied, with the result that interest upon the costs was held to run, not from the date of the taxing master's certificate, in accordance with the rules in force at the commencement of, & judgment in, the action, but from the date of the judgment.—*BOSWELL v. COAKS* (1887), 57 L. J. Ch. 101; 57 L. T. 742; 36 W. R. 65, C. A.

*Annotation*:—*Refd.* *Taylor v. Roe*, [1894] 1 Ch. 413.

**455. — — — — —**—Costs of mortgagee in foreclosure action.]—*EARDLEY v. KNIGHT*, No. 427, *ante*.

Power of court to antedate judgment.]—*See PRACTICE.*

### SECT. 3.—RATE OF INTEREST.

*See* R. S. C., Ord. 42, r. 16.

**456. Four per cent.—General rule.**—As to the rate of interest under a decree; which fluctuated in LORD HARDWICKE'S time, according to the nature of the fund: but which is now generally four per cent.—*DENTON v. SHELLARD* (1751), 2 Ves. Sen. 239; 28 E. R. 154, L. C.

**457. — — — — —**—*LEVY v. LANGRIDGE*, No. 181, *post*.

**458. — — — — —**—*LANDOWNERS' WEST OF ENGLAND & SOUTH WALES LAND DRAINAGE & INCLOSURE CO. v. ASHFORD*, No. 451, *ante*.

**459. — — — — —**—*Re HUNT, HARVEY'S CLAIM* (1902), 86 L. T. 504.

— Interest at higher rate payable under contract—Whether contract merged in judgment.]—*See* Nos. 333–339, *ante*.

**460. Five per cent.—In special circumstances.**—In 1795, two separate annuities for the lives of

In indorsing a writ of execution to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment.—*KELEHER v. MCGIBBON* (1883), 10 P. R. 89.—*CAN.*

*l. From entry.*—*McLAREN v. CANADA CENTRAL RY. CO.* (1884), 10 P. R. 328.—*CAN.*

*a. From verdict.*—*Semble*: interest is to be allowed between the date of J.—VOL. XXX.

the verdict & the judgment:—*WILSON* (1893), 15 P. R. 349.—*CAN.*

### PART XVI. SECT. 3.

**456 i. Four per cent.—General rule.**—The interest carried by a judgment is four per cent. *per annum*.—*FOLEY v. WEBSTER* (1893), 3 B. C. R. 30.—*CAN.*

**456 ii. — — — — —**—*ROYAL TRUST CO. v. BAIE DE CHALCUM RY. CO.* (1908), 13 Exch. C. R. 9.—*CAN.*

**456 iii. — — — — —**—*CASE v. GODIN* (1914), 29 W. L. R. 763; 7 W. W. R. 396; 20 D. L. R. 19; 21 Man. L. R. 788.—*CAN.*

*b. Six per cent.*—Action on promissory note.]—*ST. JOHN v. RYKERT* (1884), 10 S. C. R. 278.—*CAN.*

*c. — — — — —*—In an action on a promissory note plffs., in their statement of claim, claimed interest

**Sect. 3.—Rate of interest. Sect. 4: Sub-sect. 1.]**

the grantors, were charged on the dividends of a sum of stock, to which the grantors eventually became absolutely entitled. The annuities were secured by the joint & several bonds of the grantors, & also by judgments. In 1797 the stock was brought into ct. under an order made in a suit instituted by one of the annuitants, & the dividends had since been accumulated. The grantors both died intestate, the survivor dying in 1810, & no administration was taken out to either of them till 1834. The annuitants were the only claimants upon the fund:—*Held*: they were entitled to interest on the arrears of the annuities from 1810 up to the date of the report, & such interest was to be at the rate of £5 per cent.

It appears to me, that if the action could have been brought at law under the circumstances which effect this case, it would have been an extremely reasonable thing to have allowed the jury to give interest by way of damages on the judgment; & if this ct. is to exercise discretion in this case, it would be strange indeed not to allow the creditors interest on the amount of the arrears (SHADWELL, V.-C.).—*HYDE v. PRICE, HART v. CRADOCK* (1837), 8 Sim. 578; *Coop. Pr. Cas.* 193; 6 L. J. Ch. 358; 1 Jur. 735; 59 E. R. 229.

*Annotations*:—*Consd. Re Powell's Trust* (1852), 10 Haro. 134. *Reid. Morse v. Tucker* (1846), 5 Haro. 79; *A.-G. v. Ludlow Corpn.* (1849), 1 H. & Tw. 216.

**461. Six per cent.**—Judgment by consent on promissory note.—*Claim in company winding up.*—In 1859 H. commenced an action against the A. C. Insurance Co. to recover the sum of £3,000 & interest at six per cent., the payment of which was secured to him by a promissory note of the co. In Mar. 1860, however, it was arranged that the loan of £3,000 should be continued for a period of about two years, & that the co. should withdraw their pleas in the action & allow H. to recover judgment at once, but that the judgment should not be registered or the £3,000 called in unless default was made in payment of interest. At the making of this arrangement no mention was made as to the rate of interest, but one of the directors of the co. & H.'s solrs. made affidavits in which they stated in effect that it was fully understood that the loan was to be continued on the same terms as if the action had not been brought, excepting that as a collateral security H. should be placed in a position to sign judgment. In pursuance of this arrangement H. recovered judgment against the co. on Apr. 17, 1861, for the sum of £3,537 10s. 11d. In the winding up of the co. H. claimed to prove for this sum, together with interest thereon at the rate of six per cent. from Apr. 17, 1861:—*Held*: he was entitled to six per cent. interest on £3,000 from the date of the judgment until payment of the debt.—*Re AGRICULTURIST CATTLE INSURANCE CO., Ex p. HUGHES* (1872), 4 Ch. D. 34, n.; 25 W. R. 92, n.; L. J. J. *Annotations*:—*Expld. & Distd. Re European Central Ry., Ex p. Oriental Financial Corpn.* (1876), 4 Ch. D. 33; *Re Sneyd, Ex p. Fowings* (1883), 32 W. R. 352.

**SECT. 4.—APPEALS.****SUB-SECT. 1.—WHEN JUDGMENT AFFIRMED.**

**462. Replevin bond.**—No interest given on affirmance of a judgment on a replevin bond.—*ANON.* (1811), 4 Taunt. 30; 128 E. R. 238.

at the rate of seven per cent., without showing any legal right to more than six per cent. *Ptfs.* entered judgment for default of defence for the full amount of the principal & interest

claimed:—*Held*: there was no objection to the *ptfs.* limiting their claim to six per cent. on signing judgment.—*BANK OF HAMILTON v. HARVEY* (1885), 11 P. R. 145.—*CAN.*

**463. Money lent.**—Interest is not allowed upon the affirmance of a judgment merely for money lent. But interest is allowed upon the affirmance of a judgment for the balance of an account for money lent & for interest upon the advances, where *ptfs.*, as bankers, have been in the habit of charging it.—*GWYN v. GODBY* (1812), 4 Taunt. 346; 128 E. R. 363, Ex. Ch.

*Annotation*:—*Reid. Ibbotson v. Ibbotson* (1897), 13 T. L. R. 589.

**464. Balance of account.**—Interest allowed on the affirmance of a judgment obtained for the balance of a merchant's account, & for interest on that balance.—*HAMMEL v. ABEL* (1812), 4 Taunt. 298; 128 E. R. 343; *sub nom. HAMEL v. ABEL*, 8 Price, 516, Ex. Ch.

**465. Foreign judgment.**—In an action of debt on a foreign judgment, for an entire sum recovered on counts for the balance of a merchant's account, for goods sold, moneys advanced & paid, moneys due on bills of exchange, & for interest; this ct. will not give interest on affirmance of the judgment of the ct. below. Where interest is given, the debt must appear on the record to be one which carries interest.—*DORAN v. O'REILLY* (1816), 3 Price, 250; 146 E. R. 252, Ex. Ch.; *affd.* (1817), 5 Dow, 133, H. L.

*Annotation*:—*Reid. Butler v. Stoveld* (1823), 1 Bing. 368.

**466. Bankers.**—On a judgment recovered against bankers for a balance due from them of money deposited in their bank by a customer, the ct. will, on affirmance, order the interest to be added to the damages, where the custom of the bank is to allow it; but they will make the order for interest, after the same rate only at which it was the usage of the bank to allow it to their customers.—*IKIN v. BRADLEY* (1818), 5 Price, 536; 8 Taunt. 250; 2 Moore, C. P. 206; 146 E. R. 687, Ex. Ch.

**467. Goods sold & delivered.**—To have been paid for by bill.—*Bill not given.*—Interest allowed upon the affirmance of a judgment for goods sold & delivered, which were to have been paid for by a bill, the bill not having been given.—*MIDDLETON v. GILL* (1812), 4 Taunt. 298; 128 E. R. 344, Ex. Ch.

**468. Promise to give mortgage.**—Interest given on affirmance of a judgment on a promise to give a mtge.—*ANON.* (1813), 4 Taunt. 876; 128 E. R. 577, Ex. Ch.

**469. Recognisance of bail.**—No interest on affirmance in error of a judgment on a bail recognisance in the K. B.—*ANON.* (1813), 4 Taunt. 722; 128 E. R. 514, Ex. Ch.

**470.**—The Ct. of Error will not allow interest on affirmance of a judgment in an action on recognisance of bail, on the ground that the original action was on a promissory note, the bail being only liable for the sum sworn to & costs.—*ANON.* (1819), 6 Price, 338; 146 E. R. 827, Ex. Ch.

**471. Promise of payment.—Admitted balance.**—Interest allowed on affirmance of judgment on a letter promising payment of an admitted balance by a bill at two months.—*SUTTON v. MORGAN* (1814), 5 Taunt. 758; 128 E. R. 890, Ex. Ch.

**472. Conversion of bills.—Delivered for discount.**—Interest allowed on affirming a judgment for not discounting bills delivered for that purpose, but converting them to debt's use.—*WATTS v. TOUSSAINT* (1814), 5 Taunt. 758; 128 E. R. 890, Ex. Ch.

*d.* ————] — *McKINNON v. LEWTHWAITE* (1914), 28 W. L. R. 885; 17 W. R. 25; 20 D. L. R. 220; 20 B. C. R. 55.—*CAN.*



**473. Attorney's undertaking—To pay debt & taxed costs.]—**Interest given on affirmance of a judgment in an action on an attorney's undertaking to pay debt & taxed costs on or before a day certain. On the execution of a writ of enquiry, a sheriff's jury ought to give interest in such cases where the cts. at Westminster would allow it. — *v. EDMUNDS* (1815), 6 Taunt. 346; 128 E. R. 1068, Ex. Ch.

**474. Stock fraudulently sold—By one holding power of attorney to sell.]—**The ct. gave interest on affirmance in error of a judgment for the proceeds of stock fraudulently sold out by one holding a power of attorney to sell.—*MITCHELL v. MINIKEN* (1815), 6 Taunt. 117; 128 E. R. 977, Ex. Ch.

**475. Breach of covenant—Charterparty—Claim partly liquidated partly unliquidated.]—**In covenant on a charterparty, pltf. assigns two breaches; one for a specific sum, the other for unliquidated damages; on judgment by default, damages are assessed generally. Upon affirmance in the Exch. Chamber, the ct. refused to allow interest.—*MARTIN v. EMMOTE* (1816), 6 Taunt. 530; 2 Marsh. 230; 128 E. R. 1141, Ex. Ch.

**476. —Non-payment of purchase-money.]—**Interest allowed on the affirmance of a judgment, in an action for breach of covenant for non-payment of purchase-money, on the whole sum recovered below, & from the date of the judgment below, notwithstanding an express agreement between the parties that part only of the sum recovered should bear interest.—*JAMES v. EMERY* (1818), 8 Taunt. 245; 5 Price, 529; 2 Moore, C. P. 195; 129 E. R. 377, Ex. Ch.

*Annotations:—***Mentd.** Withers v. Brehm (1824), 5 Dow. & Ry. K. B. 106; Doe d. Bedford v. White (1827), 12 Moore, C. P. 526; Foley v. Addenbrooke (1843), 4 Q. B. 197; Sorsbie v. Park (1843), 12 M. & W. 146; Mills v. Ladbroke (1844), 7 Man. & G. 218; Bradburne v. Botfield (1815), 14 M. & W. 559; Hopkinson v. Lee (1845), 11 Q. B. 964; Keightley v. Watson (1819), 3 Exch. 716.

**477. Allowance discretionary.]—**The allowing of interest upon affirmance in error is discretionary. Refused, in a case wherein the original debt did not carry interest, & the writ of error was not vexatious.—*BUCKERIDGE v. FLIGHT* (1826), 5 L. J. O. S. K. B. 70.

**478. On appeal to House of Lords.]—**On a judgment affirmed on writ of error the House of Lords gives interest from the day of its affirmance by the Exch. Chamber, pursuant to Civil Procedure Act, 1833 (c. 42), s. 30.—*GARLAND v. CARLISLE* (1838), 5 Cl. & Fin. 354; 7 E. R. 438, H. L.

**479. —.]—***SIMPSON v. HOWDEN* (LORD) (1842), 9 Cl. & Fin. 61; 3 Ry. & Can. Cas. 294; 8 E. R. 338, H. L.; *affg. S. C. sub nom. HOWDEN* (LORD) *v. SIMPSON* (1839), 10 Ad. & El. 793, Ex. Ch.

*Annotations:—***Mentd.** Desborough v. Curlew (1835), 3 Y. & C. Ex. 175; Fenn v. Craig (1838), 3 Y. & C. Ex. 216; Dent v. Bonett (1839), 4 My. & Cr. 269; Jones v. Lane (1839), 3 Y. & C. Ex. 281; Williams v. Flight (1842), 5 Beav. 41; Smyth v. Griffin (1843), 13 Sm. 245; Moleworth v. Howard (1845), 9 Jur. 837; Stockton & Hartlepool Ry. v. Leeds & Thirsk & Clarence Rys. (1848), 5 Ry. & Can. Cas. 691; Shrewsbury & Birmingham Ry. v. L. & N. W. Ry. (1851), 17 Q. B. 652; Gage v. Newmarket Ry. (1852), 18 Q. B. 457; Hall v. Dyson (1852), 17 Q. B. 785; Hioras v. Holton, Fortnum v. Holton (1852), 20 L. T. O. S. 188; Lindsey v. G. N. Ry. (1853), 10 Hare, 664; Eastern Counties Ry. v. Hawkes (1855), 5 H. L. Cas. 331; Bowes v. Toronto City (1858), 11 Moo. P. C. 463; Cooper v. Joel (1859), 1 L. T. 351; Burgess v. Richardson (1861), 4 L. T. 316; Maunsell v. Mid. G. W. (Ireland) Ry. (1863), 1 Hem. & M. 130; Proctor v. Robinson (1866), 35 Beav. 329; Taylor v. Chichester &

Midhurst Ry. (1867), L. R. 2 Exch. 356; Elliott v. Richardson (1870), L. R. 5 C. P. 744; Hoare v. Bromridge (1872), 8 Ch. App. 22; Ayerst v. Jenkins (1873), L. R. 16 Eq. 275; Neate v. Denman (1874), 30 L. T. 290; Yorkshire Ry. Wagon Co. v. MacLure (1881), 30 W. R. 288; Brooking v. Maudslay, Son & Field (1883), 38 Ch. D. 636; Savill v. Langman (1898), 79 L. T. 44.

**480. —By which court order made.]—***Qu.*: whether where a judgment of the ct. below is affirmed on error, & interest is asked for under Civil Procedure Act, 1833 (c. 42), this House need make the order for interest, or may leave the party to apply for it in the ct. below.—*HOOPER v. LANE* (1857), 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 30 L. T. O. S. 33; 3 Jur. N. S. 1026; 6 W. R. 146; 10 E. R. 1368, H. L.

*Annotations:—***Reld.** Tyne Improvement Comrs. v. General Steam Navigation Co. (1860), 8 B. & E. 66. **Mentd.** Bateman v. Preston (1861), 3 E. & E. 578; *Re* Preston, *Ex p.* Preston (1861), 3 De G. F. & J. 612; Ockford v. Preston, Chapman v. Preston (1861), 6 H. & N. 466; *Re* London Celluloid Co. (1888), 39 Ch. D. 190.

**481. Execution delayed—by appeal.]—**Where judgment is given in a ct. of error for deft. in error, the ct. is bound, under Civil Procedure Act, 1833 (c. 42), s. 30, to allow interest for the time that execution has been delayed by the writ of error. Such interest will be calculated at 4 per cent.—*LEVY v. LANGRIDGE* (1838), 4 M. & W. 337; 1 Horn & H. 325; 7 L. J. Ex. 387; 150 E. R. 1458, Ex. Ch.

*Annotations:—***Mentd.** Palmoro v. Hood (1838), 5 Bing. N. C. 97; Brown v. Edgington (1841), 2 Scott, N. R. 496; Winterbottom v. Wright (1842), 10 M. & W. 109; Howard v. Shepherd (1850), 9 C. B. 297; Collett v. L. & N. W. Ry. (1851), 16 Q. B. 984; Keates v. Cadogan (1851), 10 C. B. 591; Longmead v. Holliday (1851), 6 Exch. 761; Gerhard v. Bates (1853), 2 E. & B. 476; Hadley v. Baxendale (1854), 18 Jur. 358; Blakemore v. Bristol & Exeter Ry. (1858), 8 E. & B. 1035; Eastwood v. Bain (1858), 3 H. & N. 738; Collins v. Cave (1859), 4 H. & N. 225; Rogers v. Rajendro Dutt (1860), 13 Moo. P. C. C. 209; Barry v. Cuskey (1861), 2 John. & H. 1; Dutton v. Powles (1861), 7 Jur. N. S. 725; Farrant v. Barnes (1862), 11 C. B. N. S. 553; The Norway (1864), Brown. & Lush. 226; Alton v. Mid. Ry. (1865), 19 C. B. N. S. 213; Mullett v. Mason (1866), Har. & Ruth. 779; Playford v. United Kingdom Electric Telegraph Co. (1867), 17 L. T. 243; Collis v. Seldon (1868), L. R. 3 C. P. 495; Thompson v. Lucas (1868), 17 W. R. 520; George v. Skivington (1869), L. R. 5 Exch. 1; Francis v. Cockrell (1870), 10 B. & S. 950; Peek v. Gurney (1873), L. R. 10 H. L. 377; Swift v. Winterbottom (1873), L. R. 8 Q. B. 244; Cattle v. Stockton Waterworks (1875), L. R. 10 Q. B. 453; Smith v. Green (1875), 24 W. R. 142; Homegood v. Bull & Kingdon (1876), 36 L. T. 617; Heaven v. Pender (1883), 11 Q. B. D. 503; West London Commercial Bank v. Kitson (1884), 50 L. T. 656; Wilkinson v. Downton, [1897] 2 Q. B. 57; Tallerman v. Dowling Radiant Heat Co., [1900] 1 Ch. 1; Earl v. Lubbock (1904), 74 L. J. K. B. 121; Cavalier v. Pope, [1906] A. C. 428; Jackson v. Watson (1906), 74 L. J. K. B. 587; Bamfield v. Goble & Sheffield Transport Co., [1910] 2 K. B. 94; Blacker v. Lake & Elliot (1912), 106 L. T. 533; Janvier v. Sweeney, [1919] 2 K. B. 316.

**482. —.]—**At the trial of a cause pltf's. had a verdict with leave to defts. to move to enter a verdict. A rule in pursuance of leave reserved was subsequently obtained & discharged, whereupon defts. appealed under C. L. P. Act, 1854 (c. 125), s. 34, pltf's. delayed to sign judgment until after the decision of the ct. below had been affirmed by the Ct. of Exch. Chamber. A judge's order was then obtained by pltf. to the master to compute interest under rule 26 of Reg. Gen. Trin. Term 1853, pursuant to C. L. P. Act, 1852 (c. 125). A rule was obtained by defts. to rescind the order, on the ground that rule 26 had no application to proceedings upon appeal under C. L. P. Act, 1854, upon which ground the ct. below discharged the rule.

But the Ct. of Appeal, by the joint effect of Civil Procedure Act, 1833 (c. 42), s. 30, rule 20 of

## PART XVI. SECT. 4, SUB-SECT. 1.

**481 i. Execution delayed—By appeal.]—**Where an appeal is brought against

a judgment in any personal action which is affirmed on appeal, interest on the judgment is allowed for such

time as execution has been stayed by the appeal.—*McEwan v. McEwan* (1884), 10 A. R. 96.—*CAN.*



**Sect. 4.—Appeals: Sub-sects. 1 & 2. Sect. 5. Part XVII. Sect. 1.]**

Reg. Gen. Trin. Term 1853, & C. L. P. Act, 1854 (c. 125), s. 42, are empowered under the circumstances to make an order for the allowance of interest for such time as execution was delayed by the proceedings upon appeal.—**TYNE IMPROVEMENT COMRS. v. GENERAL STEAM NAVIGATION CO.** (1867), 16 L. T. 452; 15 W. R. 875, Ex. Ch.

**483.** ———.—An arbitrator had found that pltf. was entitled to "damages occasioned to pltf. by reason of loss of customers":—**Held:** his finding was right.

Interest upon the judgment was declared to arise on account of the delay in execution occasioned by the proceedings in error.—**LANCASHIRE & YORKSHIRE RY. CO. v. GIDLOW** (1875), L. R. 7 H. L. 517; 45 L. J. Q. B. 625; 32 L. T. 573, H. L.

**Annotations:—Mentd.** Dunkirk Colliery Co. v. M. S. & L. Ity. (1876), 2 Ity. & Can. Tr. Cas. 402; Chatterley Iron Co. v. North Staffordshire Ity. (1878), 3 Ity. & Can. Tr. Cas. 238; L. & N. W. Ity. v. Evershed (1878), 3 App. Cas. 1029; Isle of Wight (Newport Junction) Ity. v. Isle of Wight Ity. (1882), 4 Ity. & Can. Tr. Cas. 128; Murray v. G. & S. W. Ity. (1883), 4 Ity. & Can. Tr. Cas. 456; Berry v. L. C. & D. Ity. (1884), 4 Ity. & Can. Tr. Cas. 310; Hall v. L. B. & S. C. Ity. (1886), 5 Ity. & Can. Tr. Cas. 28; Crossfield v. Manchester Ship Canal Co. (1903), 19 T. L. R. 398; Maskell v. Horner, [1915] 3 K. B. 106; Foster v. G. E. Ity. (1920), 37 T. L. R. 268.

**SUB-SECT. 2.—WHEN JUDGMENT REVERSED.**

**484. Where amount paid & repayment ordered.]**—Where a decree or order under which money has been paid is reversed on appeal the money is in general ordered to be repaid without interest.—**PARKER v. MORRELL** (1848), 2 Ph. 453; 17 L. J. Ch. 226; 12 L. T. O. S. 1; 12 Jur. 253; 41 E. R. 1018, L. C.

**Annotations:—Mentd.** Hopworth v. Heslop (1849), 6 Haro. 622; Drake v. Drake (No. 1) (1858), 25 Beav. 611.

**485.** ———.—Persons who by the order of an inferior ct. have been improperly compelled to pay money to their opponents in the suit, are, upon the reversal of such order by a ct. of appeal, entitled to have the amount repaid with interest at 4 per cent. from the time of payment.—**MERCHANT BANKING CO. v. MAUD** (1874), L. R. 18 Eq. 659; 43 L. J. Ch. 801; 22 W. R. 874.

**486. Action dismissed at trial—Ascertainment of damages.]**—Pltf. sued defts. to recover unliquidated damages for breach of contract. At the trial judgment was given for defts.; but the Ct. of Appeal ordered judgment to be entered for

pltf. for a sum to be ascertained. When the amount had been ascertained pltf. asked that judgment should be entered for him for that amount with interest from the date of the trial:—**Held:** pltf. was entitled to interest only from the date when the judgment of the Ct. of Appeal was pronounced, & the ct. ought not to order its judgment to be antedated in the absence of good ground for so doing.—**BORTHWICK v. ELDERSLIE S.S. CO.** (No. 2), [1905] 2 K. B. 516; 74 L. J. K. B. 772; 93 L. T. 387; 53 W. R. 643; 21 T. L. R. 630; 49 Sol. Jo. 618; 10 Asp. M. L. C. 121, C. A.

**Annotations:—Distd.** Ashover Fluorspar Mines v. Jackson, [1911] 2 Ch. 355. **Consd.** Nitrate Producers S.S. Co. v. Short (1922), 91 L. J. K. B. 871. **Refd.** Belgian Grain & Produce Co. v. Cox (France), [1919] W. N. 317.

**487. — Remitted by House of Lords.]**—In an action upon a policy of marine insurance on ship claiming for a total loss, the House of Lords, reversing the judgment of the Ct. of Appeal & of the judge at the trial, held that the value of the wreck ought to be taken into account in ascertaining whether the ship was a constructive total loss & that upon that basis there was a constructive total loss of the ship, & remitted the cause to the High Ct. to do what was just & consistent with their judgment. The House of Lords said nothing about interest:—**Held:** the assured ought to have interest on the sum due from the date of the judgment at the trial.—**MACBETH & CO., LTD. v. MARITIME INSURANCE CO., LTD.** (1908), 24 T. L. R. 559.

**Annotations:—Apld.** Stickney v. Keeble (1915), 112 L. T. 1107. **Refd.** Deeley v. Lloyds Bank (No. 2) (1912), 57 Sol. Jo. 158; Nitrate Producers S.S. Co. v. Short (1922), 91 L. J. K. B. 871.

**488. Decision in favour of plaintiff—Reversed by Court of Appeal—Restored by House of Lords.]**—A decision in favour of pltf. was reversed by the Ct. of Appeal & restored by the House of Lords. No order was made as to pltf.'s costs of the appeal to the Ct. of Appeal prior to the judgment in the House of Lords:—**Held:** pltf. was entitled to interest at the rate of 4 per cent. *per annum* on his costs of the appeal to the Ct. of Appeal as from the date of the judgment of that ct.—**STICKNEY v. KEEBLE** (No. 2) (1915), 84 L. J. Ch. 927; 112 L. T. 1107; 31 T. L. R. 221.

**Whether judgment antedated.]—See PRACTICE. Appeal to Judicial Committee of Privy Council.]—See COURTS, Vol. XVI., pp. 165, 166, Nos. 684, 689.**

**SECT. 5.—FOREIGN JUDGMENTS.**

**See CONFLICT OF LAWS, Vol. XI., p. 472.**

## Part XVII.—Judicial Decisions as Authorities.

**SECT. 1.—IN GENERAL.**

**489. What are decisions—Court equally divided—House of Lords—Decision appealed from affirmed.]**—As I have reason to believe that two of the four Peers who heard the case argued at your Lordships' bar are of a contrary opinion, the result will be an affirmation of the decree appealed against, the question to be put according

to the Standing Order of the House being "That the decree be reversed (LORD WESTBURY, C.).—**BAKER v. LEE** (1860), 8 H. L. Cas. 495; 30 L. J. Ch. 625; 11 E. R. 522; *sub nom.* **Re ILMINSTER SCHOOL, BAKER v. LEE**, 2 L. T. 701; 7 Jur. N. S. 1, H. L.

**Annotations:—Refd.** A-G. v. St. John's Hospital, Bath (1876), 2 Ch. D. 551. **Mentd.** **Re Hodgson's School** (1878), 3 App. Cas. 857.

**PART XVII. SECT. 1.**

**e. General rule.]**—An order once pronounced will be given effect to & followed by every judge & ct. of inferior or co-ordinate jurisdiction, & no order will be made inconsistent

therewith.—**GABRIEL v. MESHER** (1894), 3 B. C. R. 159.—**CAN.**

**f. —.]**—It is the duty of the cts. of the province to follow the decision of the highest ct. in Canada, being the latest decision on the subject,

without questioning whether or not it is in accordance with previous cases.—**SLATER v. LABERGE** (1905), 5 O. W. R. 420, 539; 6 O. W. R. 628; 10 O. L. R. 648.—**CAN.**

**g. What are decisions—Memoranda**

**490.** ————.]—In cases of appeal to the House of Lords there are always two motions before the House, one, that the judgment under appeal be reversed, the other, that the judgment under appeal be affirmed, & the appeal dismissed with costs. When the votes are equal upon the first motion, the motion is lost. The second motion is not put, as it is assumed that it would be lost also. The judgment appealed from is therefore affirmed, but no costs are given.—*PRYCE v. MONMOUTHSHIRE CANAL & RAILWAY COS.* (1879), 4 App. Cas. 197; 49 L. J. Q. B. 130; 40 L. T. 630; 43 J. P. 524; 27 W. R. 666, H. L.

*Annotations.*—*Reld.* *G. W. Ry. v. Railway Comrs. & Brown* (1881), 45 L. T. 65. *Mentd.* *Tennant v. Swansea Harbour Trustees* (1886), 3 T. L. R. 128; *R. v. Railway Comrs. & Distington Iron Co.* (1889), 22 Q. B. D. 642; *McDonnell & Bonthron v. London & India Docks Co.*, [1908] 2 K. B. 175.

*See, also*, Nos. 518, 575–577, 592, *post*.

*Divisional Court.*]—*See* Nos. 645–648,

*post*.

—.]—*Compare* No. 679, *post*.

**491. Part of system of English law.**]—Where the law is known & clear though it be inequitable & inconvenient the judges must determine as the law is without regarding the inequity or inconvenience. . . . But where the law is doubtful & not clear the judges ought to interpret the law to be as is most consonant to equity & least inconvenient.—*DIXON v. HARRISON* (1669), Vaugh. 36; 124 E. R. 958.

*Annotations.*—*Reld.* Precedence, etc., of the Judges (circa 1725), Fortes. Rep. 382. *Mentd.* *Herring v. Brown* (1688), Comb. 11; *Shortridge v. Lamplugh* (1702), 2 Ld. Raym. 798; *Armstrong d. Neve v. Woolsey* (1755), Barnes, 467; *Hill v. Saunders* (1825), 4 B. & C. 529.

**492. — Embodiment of legal principles.**]—The case is in some sense new, as many others which constantly occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all & because it has not yet been decided to decide it for ourselves, according to our judgment of what is just & expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles & judicial precedents & for the sake of attaining uniformity, consistency & certainty, we must apply those rules where they are not unreasonable & inconvenient to all cases which arise; & we are not at liberty to reject them & to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not so convenient & reasonable as we ourselves could have devised (*PARKE, J.*).—*MIREHOUSE v. RENNELL* (1833), 1 Cl. & Fin. 527; 7 Bli. N. S. 241; 8 Bing. 490; 1 Moo. & S. 683; 6 E. R. 1015, H. L.; *affg.* S. C. *sub nom.* *RENNELL v. LINCOLN (Bp.)* (1827), 7 B. & C. 113.

*Annotations.*—*Mentd.* *Alston v. Atlay* (1837), 7 Ad. & El. 289; *Edwards v. Exeter (Bp.)* (1839), 7 Scott. 652; *Bradburne v. Botfield* (1845), 14 M. & W. 559; *Howley v. Knight* (1849), 19 L. J. Q. B. 3; *Ford v. Harrington* (1869), L. R. 5 C. P. 282; *Walsh v. Lincoln (Bp.)* (1875), L. R. 10 C. P. 518.

*of opinions—Resignation or death of judge before judgment.*]—Written opinions sent to the registrar by judges who had retired or died before the judgment in the case was pronounced in open ct. are not judgments, but merely memoranda of the opinions & arguments of such judges.—*MAROMED AKIL v. ASADUNISSA BEKRE, MUTTULLALL SEN v. DESKHAR ROY* (1867), B. L. R. Sup. Vol. 774; 9 W. R. 1.—*IND.*

*h. Authority of decisions in English courts.*]—After the decision of a case by the ct., a motion to re-open the

same, based on a conflicting judgment of the Ct. of Q. B. & the House of Lords, will not be entertained, but *secus*, if the judgment be that of the Privy Council.—*WILLIAMSON v. NEW SOUTH WALES MARINE ASSURANCE CO.* (1) (1856), 2 Legge, 975.—*AUS.*

*k.* —.]—If there be a series of decisions in this country leading one way, they should be followed in preference to a single decision of an English ct., especially where in it there was a difference of opinion.—*SCOTT v. REIKIE* (1865), 15 C. P. 200.—*CAN.*

**493.** —.]—It is no sufficient reason for deciding against any known principle or any current of consistent authority, that we may thereby be enabled to establish a more exact harmony between different ct.s. or systems of jurisprudence; but, where matters hang evenly balanced, & still more where both sound principle & the better practice authorises our determination, we cannot avoid feeling that it is highly desirable to place the law as administered by the different tribunals respecting the same subject-matter in a state of uniformity & consistency (*per* CUR.).—*BARNES v. VINCENT* (1846), 5 Moo. P. C. C. 201; 4 Notes of Cases Supp. xxi; 7 L. T. O. S. 445; 10 Jur. 233; 13 E. R. 468, P. C.

*Annotations.*—*Mentd.* *Este v. Este* (1851), 2 Rob. Eccl. 351; *Brenchley v. Lynn* (1852), 2 Rob. Eccl. 441; *De Chatelain v. De Pontigny* (1859), 1 Sw. & Tr. 411; *In the Goods of Wollaston* (1863), 32 L. J. P. M. & A. 171; *In the Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *Hawksley v. Barrow* (1866), L. R. 1 P. & D. 147; *Paglar v. Tongue* (1866), L. R. 1 P. D. 158; *In the Goods of De Pradel* (1867), L. R. 1 P. & D. 454; *Noble v. Phelps* (1871), L. R. 2 P. & D. 276; *Re Graham* (1872), L. R. 2 P. & D. 385; *Parkinson v. Townsend & Townsend* (1875), 44 L. J. P. & M. 32; *In the Goods of Tharp, Tharp v. Macdonald* (1878), 3 P. D. 76; *Phillips v. Jenkins* (1880), 44 L. T. 281; *Re Parker's Trusts*, [1894] 1 Ch. 707; *In the Goods of Huber*, [1896] P. 209.

**494. What part of decision binding—Only ratio decidendi.**]—The only use of authorities or decided cases is the establishment of some principle which the judge can follow out in deciding the case before him . . . where a case has decided a principle, although I myself do not concur in it & although it has only been the decision of a ct. of co-ordinate jurisdiction I have felt bound to follow it (*JESSEL, M.R.*).—*Re HALLETT'S ESTATE, KNATCHBULL v. HALLETT* (1880), 13 Ch. D. 606; *sub nom.* *Re HALLETT'S ESTATE, KNATCHBULL v. HALLETT, COTTERELL v. HALLETT*, 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732, C. A.

*Annotations.*—*Apprvd.* *Kreglinger v. New Patagonia Meat & Cold Storage Co.*, [1914] A. C. 25. *Reld.* *Wimbledon (Vicar, etc.) v. Eden, Re St. Mark's, Wimbledon*, [1908] P. 167. *Mentd.* *Kirkham v. Peel* (1880), 43 L. T. 171; *Harris v. Truman* (1881), 7 Q. B. D. 340; *Re Mawson, Ex p. Hardeastle* (1881), 44 L. T. 523; *New Zealand & Australian Land Co. v. Watson* (1881), 7 Q. B. D. 374; *Collins v. Stimson* (1883), 11 Q. B. D. 142; *Marten v. Docke, Eyton* (1885), 53 L. T. 946; *Lyell v. Kennedy* (1887), 18 Q. B. D. 796; *Re Murray, Dickson v. Murray* (1887), 57 L. T. 223; *Hancock v. Smith* (1889), 41 Ch. D. 456; *Ellis v. Goulton*, [1893] 1 Q. B. 350; *Re Miller, Ex p. Official Receiver*, [1893] 1 Q. B. 327; *Re Hallett, Ex p. Blane*, [1894] 2 Q. B. 237; *Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433; *Cory v. Turkish S.S. Moecca (Owners)*, *The Moecca*, [1897] A. C. 286; *Re Wreford, Carmichael v. Rudkin* (1897), 13 T. L. R. 153; *Moss v. Hancock*, [1899] 2 Q. B. 111; *Mutton v. Peat*, [1899] 2 Ch. 556; *Re Outway, Hertlet v. Outway*, [1903] 2 Ch. 356; *Grinnell v. Welch*, [1905] 2 K. B. 650; *Davis v. Petrie*, [1906] 2 K. B. 786; *Wilson & Furness-Leyland Line v. British & Continental Shipping Co.* (1907), 23 T. L. R. 397; *Burdett v. Horne* (1911), 27 T. L. R. 402; *Guliba v. Pintus* (1913), 104 L. T. 574; *Sinclair v. Brougham*, [1914] A. C. 398; *Re Dacre, Whitaker v. Dacre*, [1915] 2 Ch. 480; *Roscoe (Bolton) v. Winder*, [1915] 1 Ch. 62; *Re Hodgson's Trusts, Public Trustee v. Milno*, [1919] 2 Ch. 189; *Banque Belge v. Hambrouck*, [1921] 1 K. B. 321.

**495.** ————.]—The only thing in a judge's decision binding as an authority is the principle

*l.* ————.]—Colonial ct.s. cannot disregard the adjudication in *part materia* of the superior ct. of common law in England. It is of the utmost importance that in all parts of the empire where the English law prevails, the interpretation of that law by the ct.s. shall be as nearly as possible the same.—*BAIRD v. GRIEVE* (1882), 6 Nfld. L. R. 452.—*NFLD.*

*m.* ————.]—When a decision of the Ct. of Appeal in England is at variance with one of the Ct. of Appeal in Ontario, the latter should be followed here, as the former ct. is not the

**Sect. 2.—Dicta. Sect. 3.]**

but that responsibility is lightened by the fact that the judgment given in [that case] will in no way be affected. What we are dealing with is *obiter dicta*, not necessary for the purpose of that decision (LORD JAMES).—LEWIN v. END, [1906] A. C. 299; 75 L. J. K. B. 473; 94 L. T. 649; 70 J. P. 268; 54 W. R. 606; 22 T. L. R. 504; 4 L. G. R. 618, H. L.; *reversing* S. C. *sub nom.* LEWIN v. END, LEWIN v. CIVIL SERVICE SUPPLY ASSOCN., [1905] 1 K. B. 669, C. A.

*Annotations*.—**Mentd.** Morgan v. Kenyon (1913), 78 J. P. 60; B. Aerodrome v. Dell, [1917] 2 K. B. 380.

**512.** ———. —[If a decision is binding there is an end of it. But if you have only to do with dicta, though such dicta may well serve to help you to form your own opinion, I cannot see that they ought to overrule it. It is a different question when a practice follows on dicta. A practice it might not be right to disturb, but then it is the practice & not the dicta that forms the binding authority (LORD DUNEDIN).—LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. SLACK, [1924] A. C. 851; 93 L. J. Ch. 436; 131 L. T. 710; 40 T. L. R. 745; 68 Sol. Jo. 715, H. L.; *reversing* S. C. *sub nom.* SLACK v. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD., [1923] 1 Ch. 431, C. A.

**513.** ———. **Dicta of judge of superior court.**—*Semble*: the ct. is bound to follow dicta when pronounced by a judge of a superior ct.—ASSICURAZIONI GENERALI DE TRIESTE v. EMPRES ASSURANCE CORPN., LTD., [1907] 2 K. B. 814; 76 L. J. K. B. 980; 97 L. T. 785; 23 T. L. R. 700; 51 Sol. Jo. 703; 10 Asp. M. L. C. 577; 13 Com. Cas. 37.

— **Dicta in House of Lords.**—*See* Nos. 518–522, *post*.

**514.** ———. **Rights of property resting on dictum.**—It would be impossible to upset rights of property merely because, when historically traced through the reports, they rested upon a dictum (HAMILTON, J.).—A.-G. v. REYNOLDS, [1911] 2 K. B. 888; 80 L. J. K. B. 1073; 104 L. T. 852.

**515.** ———. —[Dicta by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding (LORD HALDANE).—CORNELIUS v. PHILLIPS, [1918] A. C. 199; 87 L. J. K. B. 246; 118 L. T. 228; 34 T. L. R. 116; 62 Sol. Jo. 140, H. L.

*Annotation*.—**Mentd.** Bowen v. Samuels (1918), 34 T. L. R. 487.

**516.** ———. —[Dicta are of different kinds & of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case & is not really present to the judge's mind. Such dicta, though entitled to the respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised & argued in a way to bring it under much fuller consideration. Some dicta, however, are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought & argued before the ct. It is open no doubt to other judges to give decisions contrary to such dicta, but much greater weight attaches to them than to the former class (LORD STERNDALE, M.R.).—SLACK v. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD., [1923] 1 Ch. 431;

92 L. J. Ch. 470; 129 L. T. 264; 67 Sol. Jo. 497, C. A.; *on appeal, sub nom.* LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. SLACK, [1924] A. C. 851, H. L.

**517.** ———. —[Dicta expressed unanimously by the three judges of a Div. Ct. ought to be adopted by the judges of another Div. Ct.—MILLS v. LONDON COUNTY COUNCIL, [1925] 1 K. B. 213; 94 L. J. K. B. 216; 132 L. T. 386; 89 J. P. 6; 41 T. L. R. 122; 69 Sol. Jo. 254; 23 L. G. R. 43; 27 Cox, C. C. 720, D. C.

*Annotation*.—**Mentd.** Short v. Poole Corpn., [1925] 42 T. L. R. 107.

**518. In House of Lords—How far binding.**—By the constitution of this United Kingdom, the House of Lords is the ct. of appeal in the last resort, & its decisions are authoritative & conclusive declarations of the existing state of the law, & are binding upon itself when sitting judicially, as much as upon all inferior tribunals. The observations made by Members of the House, whether law Members or lay Members beyond the *ratio decidendi* which is propounded & acted upon in giving judgment, although they may be entitled to respect, are only to be followed in as far as they may be considered agreeable to sound reason & to prior authorities. But the doctrine on which the judgment of the House is founded must be universally taken for law, & can only be altered by Act of Parliament. So it is, even when the House gives judgment in conformity to its rule of procedure, that where there is an equality of votes, *semper presumitur pro negante* (LORD CAMPBELL, C.).—A.-G. v. WINDSOR (DEAN & CANONS) (1860), 8 H. L. Cas. 369; 30 L. J. Ch. 529; 2 L. T. 578; 24 J. P. 467; 6 Jur. N. S. 833; 8 W. R. 477; 11 E. R. 472, H. L.

*Annotations*.—**Refd.** Usher's Wiltshire Brewery v. Bruce, [1915] A. C. 433; Consett Industrial & Provident Soc. v. Consett Iron Co., [1922] 2 Ch. 135. **Mentd.** A.-G. v. Marchant (1866), L. R. 3 Eq. 424; A.-G. v. Wax Chandlors' Co. (1873), L. R. 6 H. L. 1; Re Camden Charities (1881), 18 Ch. D. 310; I. R. Comrs. v. Walker, [1915] A. C. 509.

**519.** ———. —[KREGLINGER (G. & C.) v. NEW PATAGONIA MEAT & COLD STORAGE CO., LTD., No. 498, *ante*.

**520.** ———. —[Dicta of noble Lords in this House, while always of great weight, are not of binding authority & to be accepted against one's own individual opinion, unless they can be shown to express a legal proposition which is a necessary step to the judgment which the House pronounces in the case (LORD DUNEDIN).—DAVIDSON (CHARLES R.) & Co. v. M'ROBB or OFFICER, [1918] A. C. 304; 87 L. J. P. C. 58; 118 L. T. 451; 34 T. L. R. 213; 62 Sol. Jo. 347; 10 B. W. C. C. 673, H. L.

*Annotations*.—**Mentd.** Heffernan v. Secretary of State for War (1918), 11 B. W. C. C. 424; Phillbin v. Hayes (1918), 87 L. J. K. B. 779; Stevens v. L. & S. W. Ry. (1918), 87 L. J. K. B. 756; Wilson v. L. & N. W. Ry. (1918), 11 B. W. C. C. 19; Bell v. Armstrong, Whitworth (1919), 88 L. J. K. B. 844; Matthews v. Pomeroy (1919), 12 B. W. C. C. 134; Wild v. Brown, [1919] 1 K. B. 134; Armstrong, Whitworth v. Redford, [1920] A. C. 757; Clark v. Lord Advocate (1922), 15 B. W. C. C. 320; St. Helens Colliery Co. v. Hewitson, [1924] A. C. 59; Upton v. G. C. Ry., [1924] A. C. 302.

**521.** ———. **Practice discouraged.**—The practice of giving decisions, which only amounted to dicta, on issues not necessary to decide on appeal is not to be recommended, & will not be adopted by the House of Lords.—PARKINSON v. SIMON (1895), 12 R. P. C. 403, H. L.

*Annotation*.—**Mentd.** Horrocks v. Stubbs (1896), 74 L. T. 58.

**522.** ———. —[If a point does not arise for decision, particularly in the House of Lords, it is not only not useful, but it is mischievous to express an opinion upon it. To decide a point

which does not arise, in my view is only mischievous (LORD WRENBURY).—*HARRIES v. CRAWFORD*, [1919] A. C. 717; 88 L. J. Ch. 477; 121 L. T. 398; 83 J. P. 197; 35 T. L. R. 543; 63 Sol. Jo. 589; 17 L. G. R. 509, H. L.

*Annotations*.—*Mentd.* *Martin v. Eccles Corp.*, [1919] 1 Ch. 387; *Hanson v. Radcliffe U. D. C.*, [1922] 2 Ch. 490.

### SECT. 3.—DECISIONS FOLLOWED FOR LONG PERIOD OF TIME.

**523. General rule—Scottish decision.**—*HARVEY v. FARQUHAR*, No. 708, *post*.

**524.** —.]—The principle laid down [in the decision cited] has been so firmly established now by authority in our technical system, that I feel more mischief would be done by dissenting from it, than by acquiescing in it (LORD HALSBURY, C.).—*PLEDGE v. WHITE*, [1896] A. C. 187; 65 L. J. Ch. 449; 74 L. T. 323; 44 W. R. 589, H. L.; *affg. S. C. sub nom. PLEDGE v. CARR*, [1895] 1 Ch. 51, C. A.

*Annotations*.—*Mentd.* *Riley v. Hall* (1898), 79 L. T. 241; *Sharp v. Rickards*, [1909] 1 Ch. 109.

**525.** —.]—*THE CAYO BONITO*, No. 606, *post*.

**526. Productive of injustice & inconvenience.**—After a decision of the Ct. of K. B., which was much considered before it was pronounced, has remained unimpeached for more than forty years, & has been confirmed, we ought not to overturn it, unless it establishes a rule productive of injustice & inconvenience. Whatever conveyancers might have thought of the case when it was first decided, they have since considered it as having settled the law, & it would be productive of much confusion to unsettle it again (BEST, C.J.).—*MOODY v. KING* (1825), 2 Bing. 447; 10 Moore, C. P. 233; 130 E. R. 378.

*Annotations*.—*Mentd.* *Barker v. Barker* (1828), 2 Sim. 249; *Smith v. Spencer* (1856), 27 L. T. O. S. 325.

**527.** —.]—From the authorities I collect the following principles as applicable to the question of overruling decisions of long standing, viz. (a) the construction of a statute of doubtful meaning once laid down & accepted for a long period of time ought not to be altered unless the ct. can say positively that it was wrong & productive of inconvenience; (b) decisions upon which title to property depends, or which by establishing principles of construction or otherwise form the basis of contract ought to receive the same protection; (c) decisions that affect the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected ought in the same way to continue. These principles do not compel acceptance as accurate of a doctrine plainly outside a statute & outside the common law, where no title & no contract will be shaken, no person can complain, & no general course of dealing be altered by the remedy of a mistake (LORD BUCKMASTER).—*BOURNE v. KEANE*, [1919] A. C. 815; 89 L. J. Ch. 17; 121 L. T. 426; 35 T. L. R. 560; 63 Sol. Jo. 606, H. L.; *reversg. S. C. sub nom. Re EGAN, KEANE v. HOARE*, [1918] 2 Ch. 350, C. A.

**528. Affecting general conduct of affairs.**—*BOURNE v. KEANE*, No. 527, *ante*.

**529. Construction—Of statute.**—It would be against reason to hold, that where we entertain doubt on principle, even a current of prior de-

cisions, if clearly contrary to law, may not be overruled. In the present case I yield to the arguments & authorities which have been urged to the ct. in support of this bill. In doing so, I feel that no such injustice as has been apprehended will be worked by our decision; because we have the satisfaction of knowing, that if we should be wrong in holding ourselves bound by previous determinations on the same question, recourse may be had to a higher tribunal, by whose authority we may be brought back to the principle which, it seems to be thought, would have determined our opinion in a different way, if the question in the cause had been now raised before us for the first time, & we were unshackled by the authority of the decided cases (GARROW, B.).—*EVANS v. GEORGE* (1825), 12 Price, 76; 147 E. R. 660; *sub nom. EVANS v. ROWE*, M'Cle. & Yo. 577, Ex. Ch.

*Annotation*.—*Mentd.* *Lozon v. Pryse* (1810), 4 My. & Cr. 600.

**530.** —.]—After a course of decisions for fifty years it is too late to alter the rule [of construction of a statute] (TINDAL, C.J.).—*COOK v. ROGERS* (1831), 7 Bing. 438; 5 Moo. & P. 353; 9 L. J. O. S. C. P. 155; 131 E. R. 169.

*Annotations*.—*Mentd.* *Morgan v. Brundrett* (1833), 5 B. & Ad. 289; *Belcher v. Prittie* (1831), 10 Bing. 408; *Strachan v. Barton* (1856), 11 Exch. 647; *Hills v. Smith* (1865), 6 B. & S. 311.

**531.** —.]—Considering that the statute has already received a judicial interpretation sixteen years ago, which interpretation has been acted on ever since, & that thousands of contracts & settlements of accounts have taken place on the faith of that interpretation, that if these settlements are disturbed an infinite multitude of actions will be brought, & many lines become payable by persons who have trusted the authorised expounders of the statute, I think this is a case in which the maxim "*Stare decisis*" ought to apply (BYLES, J.).—*ARCHER v. JAMES* (1862), 2 B. & S. 61; 31 L. J. Q. B. 153; 6 L. T. 167; 8 Jur. N. S. 166; 10 W. R. 489; 121 E. R. 996, Ex. Ch.

*Annotations*.—*Mentd.* *Moorhouse v. Leo* (1861), 4 F. & F. 34; *Cutts v. Ward* (1867), L. R. 2 Q. B. 357; *Redgrave v. Kelly* (1889), 37 W. R. 513; *Hewlett v. Allen*, [1892] 2 Q. B. 662; *Hughes v. Bonella* (1894), 10 T. L. R. 197; *Abram Coal Co. v. Southern* (1903), 19 T. L. R. 579; *Williams v. Norths Navigation Collieries* (1889), Ltd., [1906] A. C. 136.

**532.** —.]—**Decision acted on by many persons.**—If the matter came before us now for the first time I should entertain no doubt that the combined operation of Wills Act, 1837 (c. 26), ss. 24, 27, was that which has been attributed to them by the Ct. of Appeal. . . . If the matter were even doubtful, I should hesitate very long before I laid down a different rule of construction in relation to sects. of the Wills Act which have had for many years a particular construction given to them, because it is impossible to say how many persons may have acted upon the faith that that construction was correct (LORD HERSCHELL).—*AIREY v. BOWER* (1887), 12 App. Cas. 263; 56 L. J. Ch. 742; 56 L. T. 409; 35 W. R. 657, H. L.; *previous proceedings. sub nom. Re BOWER, AIREY v. BOWER* (1886), 2 T. L. R. 291, C. A.

*Annotations*.—*Reid. Re Marsh, Mason v. Thorne* (1888), 38 Ch. D. 630. *Mentd.* *Re Wells' Trusts, Hardisty v. Wells* (1889), 42 Ch. D. 646; *Re Hayes, Turnbull v. Hayes*, [1900] 2 Ch. 332; *Re Moses, Beddington v. Beddington*, [1902] 1 Ch. 100.

### PART XVII. SECT. 3.

**524 i. General rule.**—A judge is bound to follow the decisions of his predecessors in office.—*CHANCEY v. BROOKING* (1823), 1 Nfld. L. R. 314.—*NFLD.*

**Sect. 3.—Decisions followed for long period of time.]****533. ——— Correction by House of Lords.]—**

I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for so long. But if it is founded upon an erroneous construction of a statute, there is no principle which precludes the House of Lords from correcting the error (LORD MACNAGHTEN).—*HAMILTON v. BAKER, THE SARA* (1889), 14 App. Cas. 209; 58 L. J. P. 57; 61 L. T. 26; 38 W. R. 129; 5 T. L. R. 507; 6 Asp. M. L. C. 413, H. L.

*Annotations:—Consd. Morgan v. Castlegate S.S. Co., The Castlegate, [1893] A. C. 38. Rejd. The Orienta, [1894] P. 271; The Mecca, [1895] P. 95; The Tagus, [1903] P. 44; Winstanley v. North Manchester Overseers [1910] A. C. 7; West Kent Main Sewerage Board v. Dartford Assessment Committee, [1911] A. C. 171; The British Trade, [1924] P. 104. Mentd. The Orchib (1890), 59 L. J. P. 31; The Ripon City, [1897] P. 226; The Veritas (1901), 70 L. J. P. 75.*

**534. ———.]—LEWIN v. END, No. 511, ante.**

**535. ——— Decision of Privy Council.]—THE (CAYO BONITO, No. 606, post.**

**536. ———.]—The ct. will not readily overrule the decision of a ct. of inferior jurisdiction which has been acted on for a great number of years.**

It [the decision followed] has never yet been dissented from, but, on the contrary, it has been followed continuously up to the present time (ROMER, L.J.).—*LEWIN v. END, LEWIN v. CIVIL SERVICE SUPPLY ASSOC'N., [1905] 1 K. B. 669; 74 L. J. K. B. 406; 92 L. T. 486; 69 J. P. 128; 53 W. R. 406; 21 T. L. R. 287; 49 Sol. Jo. 313; 3 L. G. R. 449, C. A.; on appeal, sub nom. LEWIN v. END, [1906] A. C. 299, H. L.*

*Annotations:—Mentd. Morgan v. Kenyon (1913), 78 J. P. 66; B. Aerodrome v. Doll, [1917] 2 K. B. 380.*

**537. ———.]—LEWIN v. END, No. 511, ante.**

**538. ———.]—Where the construction of a statute has been acted upon for over forty years, the ct. will not interfere even though the natural construction of the statute appears to be different from the construction acted on (LORD ALVERSTONE, C.J.).—R. v. MARTIN, [1911] 2 K. B. 450; sub nom. R. v. MARTIN, Ex p. SMYTHE, 80 L. J. K. B. 876; 105 L. T. 220; 75 J. P. 425; 27 T. L. R. 460; 22 Cox, C. C. 560, D. C.**

**539. ——— Decision wrong & productive of inconvenience.]—BOURNE v. KEANE, No. 527, ante.**

———.]—*See, generally. STATUTES.*

**540. ——— Of will.]—T., by his will, gave & devised unto his grandson C., all that his estate, etc., called, etc., for his own use during his natural life, with remainder to the first son of the body of the said C. lawfully begotten, severally & successively in tail male of the name of C. " & for want of such lawful issue of that name, either by my said grandson C., or my son J., then I give & devise the said estate, etc., amongst my daughters & their children, share & share alike, to hold unto them, his, her or their heirs for ever, as tenants in common, & not as joint tenants." C. the grandson never had a child; he suffered a recovery & sold part of the estate so devised to him, as freehold. The purchaser objected to this title on the ground that he had only an estate for life. LORD ELDON sent a case for the opinion of the Ct. of K. B., which ct. was of opinion C. took an estate tail, & that was afterwards confirmed by the Ct. of Ch. Another purchaser, who also objected on the same ground, had a decree of specific performance against him, & the Ct. of Exch. certified that C. took such an estate as enabled him to make a good title in fee. Upon an**

ejectment thirty years after those three decisions, by a person claiming under a daughter of testator on the ground that C. the grandson took an estate for life only, & the intermediate remainders were vested:—*Held: this ct. would not now express any opinion contrary to those three decisions upon the will already pronounced, & if pltf. insisted upon the construction he put upon the will to be the true construction, he must, considering those decisions so long since given by cts. of law & equity upon this will to the contrary, appeal to the House of Lords to reverse them.*—*BARROW v. TOTAL* (1862), 7 H. & N. 962; 6 L. T. 472; 8 Jur. N. S. 991; 10 W. R. 357; 158 E. R. 761, Ex. Ch.; on appeal, sub nom. *PARKER v. TOOTAL* (1865), 11 H. L. Cas. 143, H. L.

*Annotations:—Mentd. Parker v. Tootal (1865), L. R. 1 Exch. 41; Allgood v. Blake, Roach v. Blake, Clennell v. Blake, Reed v. Blake, Allgood v. Blake (1873), 29 L. T. 331; Dias v. De Livera (1879), 5 App. Cas. 123; Re Hillman, Ade v. Hillman (1910), 103 L. T. 183.*

———.]—*See, generally, WILLS.*

**541. ——— Of mercantile document.]—Where documents are in daily use in mercantile affairs, it is material that the construction given them years ago & which has been accepted in the cts. of law should not be altered, because all subsequent contracts have been made on the faith of the decisions (LORD ESHER, M.R.).—*PANDORF v. HAMILTON* (1886), 17 Q. B. D. 670; 55 L. J. Q. B. 546; 55 L. T. 499; 35 W. R. 70; 2 T. L. R. 891; 6 Asp. M. L. C. 44, C. A.; *reusd.* on other grounds, sub nom. *HAMILTON, FRASER & Co. v. PANDORF & Co.* (1887), 12 App. Cas. 518, H. L.**

*Annotations:—Mentd. Thames & Mersey Marine Insce. v. Hamilton, Fraser (1887), 12 App. Cas. 484; The Bedouin, [1894] P. 1; Ballantyne v. Mackinnon, [1896] 2 Q. B. 455; Trinder, Anderson v. Thames & Mersey Marine Insce., Trinder, Anderson v. North Queensland Insce., Trinder, Anderson v. Weston, Crocker, [1898] 2 Q. B. 114; Henscy v. White, Lloyd v. Sugg, Walker v. Lilleshall Coal Co., [1900] 1 Q. B. 481; Blackburn v. Liverpool, Brazil & River Plate Steam Navigation Co., [1902] 1 K. B. 290; Fenton v. Thorley, [1903] A. C. 443; The Torbryan, [1903] P. 35; Steel v. Cammell, Laird, [1905] 2 K. B. 232; The Northumbria (1906), 95 L. T. 618; Ingram & Royle v. Services Maritimes du Tréport (1913), 109 L. T. 733; Stott (Baltic) Steamers v. Marten, [1914] 3 K. B. 1262; Morrison v. Shaw, Savill & Albion Co., [1916] 1 K. B. 747; Becker, Gray v. London Assce. Corp'n., [1918] A. C. 101; British & Foreign S.S. Co. v. IL, [1918] 2 K. B. 879; Leyland Shipping Co. v. Norwich Union Fire Insce. Soc., [1918] A. C. 350; Denholm v. Shipping Controller (1920), 124 L. T. 378; Samuel v. Motor Union Insce. (1922), 28 Com. Cas. 134; Samuel v. Dumas, Graham Joint Stock Shipping Co. v. Merchants Marine Insce. (No. 2), [1923] 1 K. B. 592.*

**542. ———.]—It is a wholesome rule that has often been laid down, that when a well-known document has been in constant use for a number of years, the ct., in construing it, should not break away from previous decisions, even if in the first instance they would have taken a different view, because all the documents made after the meaning of one has been judicially determined are taken to have been made on the faith of the rule so laid down (LORD ESHER, M.R.).—*DUNLOP & SONS v. BALFOUR, WILLIAMSON & Co., [1892] 1 Q. B. 507; 61 L. J. Q. B. 354; 66 L. T. 455; 40 W. R. 371; 8 T. L. R. 378; 7 Asp. M. L. C. 181, C. A.***

*Annotation:—Mentd. Castlegate S.S. Co. v. Dempsey, [1892] 1 Q. B. 854.*

**543. Where decision has made law.]—A decision, although questionable in itself, which has been acquiesced in by the co-ordinate cts. & has been acted on as law for any considerable period of time, may be better left for correction to some superior & more authoritative tribunal than departed from by the same ct. in subsequent cases; but if these circumstances do not exist, & we should be satisfied on reconsideration that our earlier decision was erroneous, there is nothing**



which should prevent us from so declaring, when the same circumstances again present a case for our decision (*LORD DENMAN, C.J.*).—*DEPTFORD (CHURCHWARDENS) v. SKETCHLEY* (1847), 8 Q. B. 394; 2 New Mag. Cas. 336; 17 L. J. M. C. 17; 10 L. T. O. S. 285; 11 J. P. 887; 12 Jur. 38; 115 E. R. 925.

*Annotation*:—*Mentd.* Westminster Corpn. v. St. Martin-in-the-Fields (1906), 90 L. T. 491.

**544.** —[If a case has been always supposed to be of one particular aspect & purport & if that case being uniformly supposed in subsequent cases to be such, has, as such, ruled those subsequent cases, it will not do to go back to some critical difference which may be raised respecting the authority of that case, because the law may have been settled (*LORD BROUGHAM*).—*BAKER v. TUCKER* (1850), 3 H. L. Cas. 106; 14 Jur. 771; 10 F. R. 41, H. L.

*Annotations*:—*Reid.* Barrow v. Tootal (1862), 10 W. R. 357. *Mentd.* Foster v. Hayes (1855), 4 E. & B. 717; Towns v. Wentworth (1858), 11 Moo. P. C. C. 526; Sykes v. Sykes (1871), L. R. 13 Eq. 56.

**545.** —[Where an old case is contrary to the principle of the general law the Ct. of Appeal ought not to shrink from overruling it even after a considerable lapse of time. But when an old decided case has made the law on a particular subject, the Ct. of Appeal ought not to interfere with it, because people have acted upon it (*JESSEL, M.R.*).—*SMITH v. KEAL* (1882), 9 Q. B. D. 340; 47 L. T. 142; 31 W. R. 76, C. A.

*Annotations*:—*Reid.* Morris v. Salberg (1889), 22 Q. B. D. 614. *Mentd.* Thomas v. Rowlands (1886), 3 T. L. R. 148; Lee v. Rumilly (1891), 55 J. P. 519; Hewitt v. Spiers & Pond (1896), 13 T. L. R. 64; Serjeant v. Nash, Field (1903), 72 L. J. K. B. 630; Montague v. Davies, Benachl, [1911] 2 K. B. 595.

**546.** —*Never sanctioned by Court of Appeal.*—Although for eight years a decision may not appear to have been questioned by any judge, & may have been followed by other judges in cts. of first instance, yet if it be then doubted & have never received the sanction of the Ct. of Appeal, the Ct. of Appeal ought not to treat it as binding (*COTTON, L.J.*).—*PEARSON v. PEARSON* (1884), 27 Ch. D. 145; 54 L. J. Ch. 32; 51 L. T. 311; 32 W. R. 1006, C. A.

*Annotations*:—*Consd.* Vernon v. Hallam (1886), 34 Ch. D. 748; Trego v. Hunt, [1896] A. C. 7. *Reid.* Jennings v. Jennings, [1898] 1 Ch. 378. *Mentd.* Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs (1890), 44 Ch. D. 616; Robb v. Green (1895), 64 L. J. Q. B. 693; *Re David & Matthews*, [1899] 1 Ch. 378; Gillingham v. Biddow, [1900] 2 Ch. 242.

**547. Decisions affecting settlement & devolution of property.**—The ct. of ultimate appeal will not easily overturn a series of decisions which have long regulated the settlement & devolution of property.

There is another duty incumbent on all cts., & pre-eminently upon a ct. of ultimate appeal, & which has been invariably observed, namely, that as regards those rules which regulate the settlement & devolution of property, those cts. which have to interpret instruments & acts of parties must take care to be very guarded against letting any supposed notion as to the inaccuracy of any rule which has in fact been acted upon, induce them to alter it so as to endanger the security of property & of titles (*LORD CRANWORTH*).—*YOUNG v. ROBERTSON* (1862), 4 Macq. 337, H. L.

**548. Affecting rights of property.**—A Ct. of Appeal should be careful in overruling decisions which, not being manifestly erroneous have stood

unchallenged for a long period, & which from their nature & the effect which they may reasonably be supposed to have had in matters affecting rights of property, may be held to have become part of the recognised established law of the land.—*PUGH v. GOLDEN VALLEY RY. CO.* (1880), 15 Ch. D. 330; 49 L. J. Ch. 721; 42 L. T. 863; 28 W. R. 803, C. A.

*Annotations*:—*Consd.* Pearson v. Pearson (1884), 27 Ch. D. 145. *Mentd.* Wilkinson v. Hull, etc. Ry. & Dock Co. (1882), 20 Ch. D. 323; Glasgow Corpn. v. Farie (1888), 13 App. Cas. 657; C. & S. L. Ry. v. L. C. C. (1891), 7 T. L. R. 643; Morris v. Tottenham & Forest Gate Ry. (1892), 36 Sol. Jo. 232; A.-G. v. Met. Rly., [1894] 1 Q. B. 384; Emsley v. N. E. Ry., [1896] 1 Ch. 418; L. & N. W. Ry. v. Ogwen District Council (1899), 80 L. T. 401.

**549.** —*Decision relied on by conveyancers.*—Reliance was placed on *Doc v. Biggs* (1809), 2 Taunt. 109. Now *Doc v. Biggs* is one of those cases which may be classed as anomalies, & it is so known to & understood by conveyancers & real property lawyers, who take care to draw instruments accordingly. I do not think it is a sensible decision. I do not think that case could possibly be so decided now if the question arose for the first time; & I am not disposed to extend it. On the other hand, I do not wish to shake titles, & I shall do precisely what our predecessors have always done—leave the case where it is (*LINDLEY, L.J.*).

*Doc v. Biggs* (1809), 2 Taunt. 109, is a case of some antiquity, & the last thing this ct. does is to disturb cases upon which conveyancers may have relied (*BOWEN, L.J.*).—*Re LASHMAR, MOODY v. PENFOLD*, [1891] 1 Ch. 258; 60 L. J. Ch. 143; 64 L. T. 333, C. A.

**550.** —[—*BOURNE v. KEANE*, No. 527, *ante*.

**551. Affecting commercial matters.**—Your Lordships are free to overrule [decisions of inferior cts.] if you think fit, in spite of all that has been said about the importance of following well-established rules in commercial matters (*LORD SUMNER*).—*UNITED STATES SHIPPING BOARD v. STRICK (F.) & Co.* (1926), 95 L. J. K. B. 776; 135 L. T. 185; 42 T. L. R. 550, H. L.

**552. Affecting contracts — Sale by auction.**—(1) This ct., according to what has been a universal practice, even of a ct. of error, would decide now in the same way, even though it would not have come originally to the same decision. All the sales by auction which have occurred since those decisions must have taken place on the law which had been so published, & it would be very wrong now to overrule those decisions (*BRETT, M.R.*).

(2) A ct. of law is not justified, according to the comity of our cts., in overruling the decision of another ct. of co-ordinate jurisdiction (*BRETT, M.R.*).—*PALMER v. JOHNSON* (1884), 13 Q. B. D. 351; 53 L. J. Q. B. 348; 51 L. T. 211; 33 W. R. 36, C. A.

*Annotations*:—*Generally, Mentd.* *Re Orange & Wrights' Contract* (1885), 52 L. T. 606; Clayton v. Loech (1889), 41 Ch. D. 103; A.-G. & Hare v. Met. Rly. (1893), 69 L. T. 811; Mason v. Schuppesser (1899), 81 L. T. 147; Grosvalde-Williams v. Barnley (1900), 49 W. R. 203; *De Lassalle v. Gulliford* [1901] 2 K. B. 215; Saunders v. Cockrill (1902), 87 L. T. 30.

**553.** —[—I admit that, although there has been no judicial decision, yet if I could find that this had been an accepted dictum of law, & that it was likely to have affected divers contracts between man & man, & that by not following it I should be disturbing anything done in former times on the faith of the dictum, I should feel myself bound by it (*PEARSON, J.*).—*Re ROSEH,*

**548 i. Affecting rights of property.**—This ct. should follow its own previous decisions where rights of property or

matters determining the payment of money are involved. In a case upon a point of criminal procedure, different

considerations apply.—*MURDOCH v. MINNEAPOLIS THRESHING MACHINE CO.*, [1921] 2 W. W. R. 640.—*CAN.*



**Sect. 3.—Decisions followed for long period of time.**  
**Sect. 4: Sub-sect. 1, A.]**

**ROSHER v. ROSHER** (1884), 26 Ch. D. 801; 53 L. J. Ch. 722; 51 L. T. 785; 32 W. R. 821.  
*Annotation:—Mentd. Re Dugdale, Dugdale v. Dugdale* (1888), 38 Ch. D. 176.

**554. — Separation deed.]**—Even although the ct. may think that cases were wrong at the time they were decided, the ct. cannot afterwards overrule them for the purpose of getting rid of a separation deed drawn up on the faith of them.—**FEARON v. AYLESFORD (EARL)** (1884), 14 Q. B. D. 792; 54 L. J. Q. B. 33; 52 L. T. 954; 49 J. P. 596; 33 W. R. 331; 1 T. L. R. 68, C. A.  
*Annotations:—Mentd. Sweet v. Sweet, [1895] 1 Q. B. 12; Hunt v. Hunt, [1897] 2 Q. B. 547; Kennedy v. Kennedy, [1907] P. 49.*

**555. — Mercantile documents.]**—**PANDORF v. HAMILTON**, No. 541, *ante*.

**556. —]**—If I had had to decide the point in an appeal in **Coode v. Johns** (1886), 17 Q. B. D. 714, I could not have agreed with the decision of the Div. Ct. That being so, is there anything to prevent me now deciding in accordance with this view. If this were a contract in daily use, & if the decision had been acted on throughout the country for a long time, it might be that we should feel bound to follow it; . . . but that is not the case here, & there is nothing to prevent our adopting what we think is the right interpretation of the statute (**LORD ESHER, M.R.**).—**PHILLIPS v. REES** (1889), 24 Q. B. D. 17; 59 L. J. Q. B. 1; 61 L. T. 713; 54 J. P. 293; 38 W. R. 53; 6 T. L. R. 14, C. A.

**557. —]**—When a decision has stood for so many years, this ct. always considers that subsequent contracts have been entered into subject to it, & even if the ct. would not have come to the same conclusion, it will not overrule the decision (**LORD ESHER, M.R.**).—*Re WALLIS, Ex p. LICKORISH* (1890), 25 Q. B. D. 176; 59 L. J. Q. B. 500; 62 L. T. 674; 38 W. R. 482; 6 T. L. R. 291; 7 Morr. 148, C. A.  
*Annotations:—Mentd. Stone v. Lickorish, [1891] 2 Ch. 363; Re Doody, Fisher v. Doody, Hilbert v. Lloyd, [1893] 1 Ch. 129; Kyre v. Wyvill-Mackenzie, [1894] 1 Ch. 218.*

**558. —]**—I think the doctrine having been laid down so long ago, whether it rests upon any sound basis or not, it would be must improper to depart from it now, because one would be really altering the contract between the parties; for they entered into it upon the basis of that which for nearly a century has been understood to be the law (**LORD HERSHELL**).—**TANCRED, ARROL & Co. v. STEEL CO. OF SCOTLAND** (1890), 15 App. Cas. 125; 62 L. T. 738, H. L.

*Annotations:—Consd. Bourne v. Keane, [1919] A. C. 815. Mentd. Caledonian Insce. v. Gilmour, [1893] A. C. 85; Kensington Electric Lighting Co. v. Notting Hill Electric Lighting Co. (1918), 82 J. P. 197.*

**559. —]**—**BOURNE v. KEANE**, No. 527, *ante*.

**560. As to jurisdiction of court.]**—I do not think the rule is applicable which often governs us in not overruling decisions of many years' standing on which persons may often have acted in making contracts or otherwise. Where the decision is really one as to the jurisdiction of another ct. there seems to be no reason why, at any distance of time, a superior ct. may not overrule it (**BRETT, M.R.**).—**R. v. EDWARDS** (1884), 13 Q. B. D. 586; 53 L. J. M. C. 149; 51 L. T. 586; 49 J. P. 117, C. A.  
*Annotations:—Mentd. East London Waterworks Co. v. Charles, [1894] 2 Q. B. 730; R. v. Part (1906), 70 J. P. 398.*

**561. On procedure.]**—We have, it is true, the power of reviewing that decision, but where there

is a decision on procedure made more than twelve years ago & frequently acted on, this Ct. of Appeal would not be disposed to overrule it (**BRETT, M.R.**).—**FRASER v. EHRENSPERGER** (1883), 12 Q. B. D. 310; 53 L. J. Q. B. 73; 49 L. T. 646; 32 W. R. 240, C. A.

*Annotation:—Mentd. Re Mitchell & Izard & Governor of Ceylon* (1888), 21 Q. B. D. 408.

**562. —]**—A convenient practice for many years will not be willingly upset, even although founded on cases tried at assizes & not binding on the ct. (**LORD ALVERSTONE, C.J.**).—**R. v. STAFFORD PRISON (GOVERNOR), Ex p. EMERY**, [1909] 2 K. B. 81; 78 L. J. K. B. 629; 100 L. T. 993; 73 J. P. 284; 25 T. L. R. 440; 22 Cox, C. C. 143, D. C.

*Annotation:—Mentd. R. v. Lee Kun, [1916] 1 K. B. 337.*

**SECT. 4.—DECISIONS OF PARTICULAR COURTS — HOW FAR BINDING.**

**SUB-SECT. 1.—HOUSE OF LORDS.**

**A. On House Itself.**

**563. General rule — Decision binding.]**—A judgment of the House of Lord is conclusive, & cannot be reversed or corrected, except by Act of Parliament.—**TOMMEY v. WHITE** (1850), 3 H. L. Cas. 48; 10 E. R. 19, H. L.

*Annotation:—Follid. Wilson v. Wilson* (1854), 5 H. L. Cas. 40.

**564. —]**—**EVERARD v. WATSON**, No. 584, *post*.

**565. —]**—The House will not reconsider a question which it has once decided.—**THELLUSSON v. RENDLESHAM, THELLUSSON v. THELLUSSON, HARE v. ROBERTS** (1859), 7 H. L. Cas. 429; 28 L. J. Ch. 948; 11 E. R. 172; *sub nom. THELLUSSON v. ROBERTS, HARE v. ROBERTS, RENDLESHAM v. ROBERTS*, 33 L. T. O. S. 379; 5 Jur. N. S. 1031, H. L.

*Annotations:—Mentd. Richards v. Davies* (1862), 13 C. B. N. S. 69; *Di Sora v. Philipps* (1863), 2 New Rep. 553; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192; *Re Northern's Estate, Salt v. Pym* (1884), 25 Ch. D. 153; *R. v. Sunderland JJ.* (1901), 85 L. T. 183.

**566. —]**—**A.-G. v. WINDSOR (DEAN & CANONS)**, No. 518, *ante*.

**567. —]**—The case . . . being a decision of the House of Lords, the ultimate Ct. of Appeal, overrules all earlier authorities inconsistent with that decision, & so far as the judgment goes, fixes the law in this country. We are not bound by all that is said in the course of a judgment of the House of Lords, but that which appears to be the rule established by the decision of that tribunal is binding, not only on all inferior tribunals in this country, but even on that House itself when sitting judicially (**BLACKBURN, J.**).

We are not bound by every reason given by the learned lords in delivering their opinions; of course we are bound by the *ratio decidendi* in that case (**CHANNELL, B.**).—**BULLEN v. SHARP** (1865), L. R. 1 C. P. 86; Har. & Ruth. 117; 35 L. J. C. P. 105; 14 L. T. 72; 12 Jur. N. S. 247; 14 W. R. 338, Ex. Ch.

*Annotations:—Mentd. Redpath v. Wigg* (1866), L. R. 1 Exch. 335; *Easterbrook v. Barker* (1870), L. R. 6 C. P. 1; *Holme v. Hammond* (1872), L. R. 7 Exch. 218; *Mollwo, March v. Court of Wards* (1872), 9 Moo. P. C. C. N. S. 214; *Noakes v. Barlow* (1872), 26 L. T. 136; *Ross v. Parkyn* (1875), L. R. 20 Eq. 331; *Re Howard, Ex p. Tennant* (1877), 6 Ch. D. 308; *Steel v. Lester & Lilee* (1877), 47 L. J. Q. B. 43; *Badeley v. Consolidated Bank* (1888), 38 Ch. D. 238; *Re Young, Ex p. Jones* (1896), 65 L. J. Q. B. 681.

**568. —]**—A decision of the House of Lords is binding upon every ct. in the kingdom, including the House itself in its judicial character.—**TOPHAM v. PORTLAND (DUKE)** (1869), as reported in

38 L. J. Ch. 513; 17 W. R. 911; *on appeal*, 5 Ch. App. 40, C. A.

*Annotations*.—**Mentd.** *Mackechnie v. Marjoribanks* (1870), 39 L. J. Ch. 604; *Roach v. Trood* (1876), 34 L. T. 105; *Henderson v. Astwood*, *Astwood v. Cobbold*, *Cobbold v. Astwood*, [1894] A. C. 150; *Cloutte v. Storey*, [1911] 1 Ch. 18.

569. ———.]—I should be sorry to lay it down as a rule that this Ct. cannot depart from a previous decision, especially where it can be shown that there has been an omission to cite an earlier authority, or a clear mistake in its application; & I do not concede that we are absolutely bound to adhere to our decisions in the same manner as the House of Lords considers itself bound. There is no parallel between the two cases. The decisions of the House of Lords as the supreme Ct. & Ct. of ultimate appeal, are decisions upon the law not pronounced simply by lawyers, but by the whole House of Peers; for it is only in modern times that they are pronounced by a select number of the members of the House. The law seems, from the cases referred to, to be clearly settled that decisions of the Lords are final & binding on the House itself in future cases. That principle, however, has never been applied to the superior Cts. of Westminster in cases where they have a peculiar jurisdiction; for instance, in the Q. B. on appeals from quarter sessions, in the Exchequer in matters of revenue, and in this Ct. on appeals under the Registration Acts, & in matters arising under the Railway & Canal Traffic Act. Wherever a new jurisdiction is given to the Cts., some time must necessarily elapse before the law can be settled; & great inconvenience & mischief would result in such cases, where there is no appeal, if the Cts. were absolutely bound by their decisions, though manifestly erroneous. I, therefore, hold that we are fully at liberty to reconsider any decision which may have been come to upon these Acts of Parliament (*BOVILL, (C.J.)*).—**WEBSTER v. ASHTON-UNDER-LYNE OVERSEERS** *HADFIELD'S CASE* (1873), 1 L. R. 8 C. P. 306; 2 Hop. & Colt. 89; 42 L. J. C. P. 146; 28 L. T. 901; 37 J. P. 486; 21 W. R. 637.

*Annotations*.—**Refd.** *Boon v. Howard* (1874), 2 Hop. & Colt. 208; *Leonard v. Alloways* (1878), 2 Hop. & Colt. 411. **Mentd.** *Winyard v. Tookgood*, *Hance v. Fortnum* (1882), 10 Q. B. D. 218; *Lowcock v. Broughton Overseers* (1883), 51 L. T. 399; *Bonnard v. Perryman*, [1891] 2 Ch. 269.

570. **Erroneous decision—Erroneous principle of law.**—The House of Lords is bound by its own decisions as much as any Ct. would be bound so that it could not reverse its own decision in a particular case, yet it is not bound by any rule of law which it may lay down, if, upon a subsequent occasion it should find reason to differ from that rule; the House of Lords like every other Ct. of justice possesses an inherent power to correct an error into which it may have fallen (*LORD ST. LEONARDS, C.*).

A decision of this High Ct. upon a point of law is conclusive upon the House itself, as well as upon all inferior tribunals, for it is the constitutional mode in which the law is declared; & after such a judgment has been pronounced it can only be altered by an Act of the legislature. This House cannot decide one thing as law to-day, & decide the same thing differently as law to-morrow; because that would leave the inferior tribunals & the rights of the Queen's subjects in a state of uncertainty; & after there has been a solemn judgment of this House, laying down any position as law, that is binding upon the rights & liberties of the Queen's subjects, until it is altered by an Act of the Commons, the Lords,

& the Sovereign (*LORD CAMPBELL*).—**BRIGHT v. HUTTON, HUTTON v. BRIGHT** (1852), 3 H. L. Cas. 341; 7 Ry. & Can. Cas. 325; 19 L. T. O. S. 249; 16 Jur. 695; 10 E. R. 133, H. L.

*Annotations*.—**Consd.** *London Tram Co. v. L. C. C.* (1898), 78 L. T. 361. **Refd.** *Paul v. Joel* (1857), 3 H. & N. 455; 1 L. Comrs. v. *Harrison* (1874), L. R. 7 H. L. 1; *The Vera Cruz* (No. 2) (1884), 9 P. D. 96. **Mentd.** *Re Rugby, Warwick & Worcester Ry.*, *Preeco & Evans's Case* (1852), 2 De G. M. & E. 374; *Re Wolverhampton, Chester, & Holyhead Ry.*, *Robert's Case* (1852), 20 L. T. O. S. 9; *Re Midland Union, Burton-upon-Trent, Ashby de la Zouch & Leicester Ry.*, *Lucy's Case* (1853), 4 De G. M. & E. 356; *Quartermaine v. Bittleston* (1853), 13 C. B. 133; *Re Direct Birmingham, Oxford, Reading & Brighton Ry.*, *Spottlawode's Case*, *Amsnick's Case* (1855), 6 De G. M. & E. 345; *Burbridge v. Morris* (1865), 3 H. & C. 664; *Hobbert v. Pearch* (1871), L. R. 3 P. C. 661.

571. ———.]—A suit for nullity of marriage had been instituted by the wife against her husband; an arrangement for a deed of separation was proposed, in order to stop it. An agreement was entered into by which the property of the parties was regulated, & by which their conduct in relation to each other was to be guided. One of the arts. of this agreement stipulated that the husband should "permit the wife to live separate & apart from him, as if she were unmarried, without any molestation, interference or annoyance whatsoever, by, or on the part of," the husband. By another art., it was declared that if he performed the covenants, etc., "he, his heirs, exors., etc., & their estates & effects, shall be indemnified from all the present debts & liabilities of the said John" (the husband), "by the joint & several covenant of" the trustees for the wife. A deed was to be drawn up in conformity with these arts., & on mutual execution of the deed the suit for nullity was to be withdrawn. On a bill by the wife to compel the husband specifically to perform this agreement, the judge made an order referring it to the master to approve of a proper deed to carry its provisions into effect. This order was confirmed on appeal to this House. Pending the appeal, the master approved of a deed containing a covenant by the husband not to institute any suit in the Ecclesiastical Ct. for restitution of conjugal rights, & another in which the trustees of the wife agreed to indemnify the husband, "against the present & future debts of Mary" (the wife). Exceptions to this deed taken by the husband were overruled by the judge, whose decision was affirmed by the Lord Chancellor:—**Held**: after a previous judgment of this House affirming the order which referred the agreement to the master as the basis for a deed of separation between these parties, the subsequent order approving of the deed as drawn by the master must be supported.

A decision of this House when once pronounced in a particular case is conclusive in that case, & cannot be reversed except by Act of Parliament; but if the House should afterwards be of opinion that an erroneous principle had been adopted in the first case, the House would not be bound in any other to adhere to such principle.—**WILSON v. WILSON** (1854), 5 H. L. Cas. 10; 23 L. J. Ch. 697; 23 L. T. O. S. 134; 10 E. R. 811, H. L.

*Annotations*.—**Consd.** *London Tram Co. v. L. C. C.* (1898), 78 L. T. 361. **Mentd.** *Hope v. Hope* (1857), 8 De G. M. & E. 731; *Hunt v. Hunt* (1862), 4 De G. F. & J. 221; *Burchell v. Tark* (1876), 2 C. P. D. 88; *Bralley v. Bralley*, [1922] P. 15.

572. ———.]—A decision of the House of Lords upon a question of law is conclusive & binds the House in subsequent cases. An erroneous decision can be set right only by an Act of Parliament.—**LONDON TRAMWAYS CO. v. LONDON COUNTY COUNCIL**, [1898] A. C. 375; 67 L. J. Q. B. 559;

**Sect. 4.—Decisions of particular courts—How far binding: Sub-sect. 1, A. & B.]**

78 L. T. 361; 62 J. P. 675; 46 W. R. 609; 14 T. L. R. 360, H. L.  
**Annotation:—***Reid*. Davidson v. M'Robb or Officer, [1918] A. C. 304.

**573. Decision on question of law—Construction of statutes.]—**Decisions of the House of Lords upon questions of law, as the construction of statutes, & especially of fiscal Acts, are binding upon the House in subsequent cases.—**INLAND REVENUE COMRS. v. HARRISON** (1874), L. R. 7 H. L. 1; 43 L. J. Ex. 138; 30 L. T. 274; 22 W. R. 559, H. L.

**Annotations:—***Reid*. Bourne v. Keane, [1919] A. C. 815. *Mentd.* Le Marchant v. I. R. Comrs. (1876), 1 Ex. D. 185; Cowley v. I. R. Comrs., [1899] A. C. 198.

**574. House not unanimous—House equally divided.]—**A.-G. v. WINDSOR (DEAN & CANONS), No. 518, *ante*.

**575. ———.]—**If it were competent to me, I would now ask your Lordships to reconsider the doctrine laid down, particularly as the judges who were then consulted, complained of being hurried into giving an opinion without due time for deliberation, & the Members of this House who heard the argument were equally divided; so that the judgment was only pronounced on the technical rule of your Lordships' House, that where, upon a division, the numbers are equal, *semper præsumitur pro negante*.

But it is my duty to say that your Lordships are bound by this decision as much as if it had been pronounced *nemine dissentiente*, & that the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially, as the last & supreme Ct. of Appeal for this empire, must be taken for law till altered by an Act of Parliament, agreed to by the Commons & the Crown, as well as by your Lordships. The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, & on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, & legislating by its own separate authority (LORD CAMPBELL, C.).—**BEAMISH v. BEAMISH** (1861), 9 H. L. Cas. 274; 5 L. T. 97; 8 Jur. N. S. 770; 11 E. R. 735, H. L.

**Annotations:—***Consd.* London Tram Co. v. L. C. C., [1898] A. C. 375. *Reid*. I. R. Comrs. v. Walker, [1915] A. C. 509; Usher's Wiltshire Brewery v. Bruce, [1915] A. C. 433. *Mentd.* *Re* Bethell, Bethell v. Hildyard (1888), 58 L. T. 674; Lightbody v. West (1902), 87 L. T. 138.

**576. ———.]—**I regard it as unfortunate that the case fell to be determined on the principle that where your Lordships are equally divided in opinion the decision of the ct. below must be affirmed. It is, however, well settled that a case decided on the principle to which I have referred is as binding on this House as a decision pronounced *nemine contradicente* (LORD PARKER).—**INLAND REVENUE COMRS. v. WALKER**, [1915] A. C. 509; 84 L. J. P. C. 115; 112 L. T. 611, H. L.

**577. ———.]—**This point was practically decided by *Smith v. Lion Brewery Co.*, [1911] A. C. 150. Your Lordships' House was equally divided, but it is none the less binding, & our duty is loyally to carry it into effect (LORD LOREBURN).—**USHER'S WILTSHIRE BREWERY, LTD. v. BRUCE**, [1915] A. C. 433; 84 L. J. K. B. 417; 112 L. T. 651; 31 T. L. R. 104; 59 Sol. Jo. 144; 6 Tax Cas. 399, H. L.; *revers.*, [1914] 2 K. B. 891, C. A.  
**Annotations:—***Mentd.* *Smith v. Incorporated Council of*

*Law Reporting for England & Wales*, [1914] 3 K. B. 674; *Stevens v. Boustead*, [1916] 2 K. B. 560; *Hancock v. General Reversionary & Investment Co.*, [1919] 1 K. B. 25; *Re Sawyer & Withall*, [1919] 2 Ch. 333; *Weller v. I. R. Comrs.*, [1919] 2 K. B. 407; *Currie v. I. R. Comrs.*, [1921] 2 K. B. 332; *Union Cold Storage Co. v. Jones* (1923), 129 L. T. 512; *Atherton v. British Insulated & Helsby Cables*, [1925] 1 K. B. 421; *Rowntree v. Curtis* [1925] 1 K. B. 328.

**578. ———.]—**KREGLINGER (G. & C.) v. NEW PATAGONIA MEAT & COLD STORAGE CO., LTD., No. 498, *ante*.

———.]—*Compare* Nos. 489, 490, *ante*, No. 592, *post*.

**579. Where conflicting decisions.]—**If two cases in this House are not to be reconciled, the authority which is at once the more recent & the more consistent with general principles ought to prevail (LORD SELBORNE, C.).—**CAMPBELL v. CAMPBELL** (1880), 5 App. Cas. 787, H. L.

**580. ———.]—**It is the duty of this House to maintain as far as possible the authority of all former decisions of this House; & although later decisions may have interpreted & limited the application of earlier, they ought not (without some unavoidable necessity) to be treated as conflicting (LORD SELBORNE, C.).—**CALEDONIAN RY. CO. v. WALKER'S TRUSTEES** (1882), 7 App. Cas. 259; 46 L. T. 826; 46 J. P. 676; 30 W. R. 569, H. L.

**Annotations:—***Reid*. Davidson v. M'Robb or Officer, [1918] A. C. 304. *Mentd.* *Furness Ry. v. Cumberland Co-operative Bldg. Soc.* (1884), 52 L. T. 144; *Ford v. Met. & Met. Dist. Rys.* (1886), 17 Q. B. D. 12; *Re Holliday & Wakefield Corpn.* (1888), 20 Q. B. D. 699; *Cowper Essex v. Acton L. B.* (1889), 14 App. Cas. 153; A.-G. v. *Met. Ry.*, [1894] 1 Q. B. 384.

**B. On Inferior Courts.**

**581. General rule — Decision binding.]—**There can be no doubt it is entirely binding, being a decision of the House of Lords (LORD CRANWORTH, V.-C.).—*Re* DIRECT BIRMINGHAM, READING & BRIGHTON RY. CO., *Ex p.* SICHELL (1851), 1 Sim. N. S. 187; 20 L. J. Ch. 129; 15 Jur. 53; 61 E. R. 73; *sub nom.* *Re* DIRECT BIRMINGHAM, OXFORD, READING & BRIGHTON RY. CO., SEACHELL'S CASE, 16 L. T. O. S. 340.

**Annotations:—***Mentd.* *Re* Direct Birmingham, Oxford, Reading & Brighton Ry., *Ex p.* Best (1851), 20 L. J. Ch. 125.

**582. ———.]—**Where the circumstances of the case are strictly analogous to those decided by the House of Lords, that decision must be followed by the ct.—*Re* DIRECT SHREWSBURY & LEICESTER RY. CO., *Ex p.* BRITAIN (1851), 1 Sim. N. S. 281; 20 L. J. Ch. 479; 16 L. T. O. S. 482; 61 E. R. 109.

**583. ———.]—**BRIGHT v. HUTTON, HUTTON v. BRIGHT, No. 570, *ante*.

**584. ———.]—**[That decision of the House of Lords] is a decision which we cannot reverse; indeed I fear the House of Lords could not do so. But I do wish that it were reversed by Act of Parliament (LORD CAMPBELL, C.J.).—**EVERARD v. WATSON** (1853), 1 E. & B. 801; 1 C. L. R. 424; 22 L. J. Q. B. 222; 21 L. T. O. S. 74; 17 Jur. 762; 118 E. R. 636.

**Annotation:—***Mentd.* *Paul v. Joel* (1858), 3 H. & N. 455.

**585. ———.]—**The decisions of the House of Lords are binding upon us, but the reasons they give for them may not be so (POLLOCK, C. B.).—**PAUL v. JOEL** (1858), as reported in 3 H. & N. 455; 31 L. T. O. S. 185; 4 Jur. N. S. 1086; 157 E. R. 549; *on appeal* (1859), 4 H. & N. 355, Ex. Ch.

**Annotation:—***Mentd.* *Maxwell v. Brain* (1864), 4 New Rep. 26.

**PART XVII. SECT. 4, SUB-SECT. 1.—**

**B. Question of Scottish law or**

*jurisdiction.]—*VIRTUE v. ALLOA COMRS. OF POLICE (1873), 1 R. (Ct. of Sess.) 285; 11 Sc. L. R. 140.—**SCOT.**

**C. ———.]—**BAKER v. GLASGOW CORPN., [1916] S. C. 199.—**SCOT.**

586. ———.]—*A-G. v. WINDSOR (DEAN & CANONS)*, No. 518, *ante*.

587. ———.]—*BULLEN v. SHARP*, No. 567, *ante*.

588. ———.]—*TOPHAM v. PORTLAND (DUKE)*, No. 568, *ante*.

589. Reasons for judgment—How far binding.]—By that decision [of the Ct. of Exchequer Chamber & the House of Lords] we are bound, though I am not prepared to say that I am bound by all the reasoning language of the learned judges in giving their opinion (*PARKE, B.*)—*HEDGER v. STEAVENSON* (1837), 2 M. & W. 799; 5 Dowl. 771; Murr. & H. 178; 6 L. J. Ex. 189; 1 Jur. 987; 150 E. R. 980.

*Annotations* :—*Consd.* *Strange v. Price* (1839), 2 Per. & Dav. 278; *Lewis v. Gompertz* (1840), 6 M. & W. 399. *Refd.* *Messenger v. Southey* (1840), 8 Dowl. 594. *Mentd.* *Houlditch v. Cauty* (1838), 4 Bing. N. C. 411; *Furze v. Sharwood* (1841), 2 Q. B. 388; *Robson v. Curlewis* (1842), 2 Q. B. 421; *Armstrong v. Christiani* (1848), 5 C. B. 687; *Paul v. Joel* (1859), 4 H. & N. 355.

590. ———.]—*PAUL v. JOEL*, No. 585, *ante*.

591. ———.]—*BULLEN v. SHARP*, No. 567, *ante*.

592. ———.]—*House not unanimous.*]—Where you have five Lords giving independent reasons, it is very difficult to ascertain with accuracy the ground upon which the House of Lords decided, but I think that in all such cases you must only look at the judgments of the majority who decided the case, for the reasons to be found in their judgments must be either wholly or to some extent the reasons which guided the House of Lords in coming to their conclusion (*JESSEL, M.R.*)—*REDGRAVE v. HURD* (1881), 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251, C. A.

*Annotations* :—*Mentd.* *Mathias v. Yetts* (1882), 46 L. T. 497; *Mullens v. Miller* (1882), 31 W. R. 559; *Roots v. Snelling* (1883), 48 L. T. 216; *Smith v. Chadwick* (1884), 9 App. Cas. 187; *Smith v. Land & House Property Corp.* (1884), 28 Ch. D. 7; *Hughes v. Twissden* (1886), 55 L. J. Ch. 481; *Newbigging v. Adam* (1886), 34 Ch. D. 582; *Re Librarian Government Concessions & Exploration Co.* (1892), 9 T. L. R. 136; *Re Metropolitan Coal Consumers' Assoc., Karberg's Case*, [1892] 3 Ch. 1; *Aaron's Reefs v. Twiss*, [1896] A. C. 273; *Davis v. Ohlry* (1898), 14 T. L. R. 260; *Whittington v. Seale-Hayne* (1900), 82 L. T. 49; *Re Law, Law v. Law* (1904), 74 L. J. Ch. 169; *Merino v. Mutual Reserve Life Insce.* (1904), 21 T. L. R. 167; *Nash v. Calthorpe*, [1905] 2 Ch. 237; *Mair v. Ido Grande Rubber Estates*, [1913] A. C. 853; *Wells v. Smith*, [1914] 3 K. B. 722; *Armstrong v. Jackson*, [1917] 2 K. B. 822; *Goldrel, Foucard v. Sinclair & Itusian Chamber of Commerce in London*, [1918] 1 K. B. 180; *Compagnie Chemin De Fer Paris-Orleans v. Leeston Shipping Co.* (1919), 36 T. L. R. 68; *Dawsons v. Bonnin*, [1922] 2 A. C. 413.

593. Appeal affecting part only of decree of inferior court.]—J. was an annuitant on an estate which had been sold to B., subject to the annuity & other incumbrances. J. had also a charge on the purchase-money. B. gave notice to put an end to the annuity, & then filed a bill to have it declared that it was at an end, & to have an account taken. The Vice-Chancellor directed the master to inquire what were the incumbrances, & declared the annuity at an end. The Lord Chancellor affirmed this decree. J. appealed against the last part of it to this House, & the decree was reversed; but the cause went on to further litigation on the other point, & a subsequent decree was made. In this decree, which was made on the hearing upon further directions, the Lord Chancellor introduced alterations & additions to the first decree, as to that part of it which had not been the subject of appeal :—*Held* : he was at liberty to do so; for that the part unappealed against remained as before, & was not rendered final by the decision in this House on the part which

was the subject of the appeal.—*BIRCH v. JOY* (1852), 3 H. L. Cas. 505; 10 E. R. 222.

*Annotations* :—*Mentd.* *Rhys v. Dare Valley Ry.* (1874), L. R. 19 Kq. 93; *Ballard v. Shutt* (1880), 15 Ch. D. 122; *Leppington v. Freeman* (1891), 65 L. T. 145; *Fletcher v. L. & Y. Ry.*, [1902] 1 Ch. 901; *Bennett v. Stone*, [1903] 1 Ch. 509; *Re Richard & G. W. Ry.*, [1905] 1 K. B. 68; *Swift v. Board of Trade*, [1925] A. C. 520.

594. Effect of discovery of new evidence.]—(1) The party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must show that the matter so discovered has come to the knowledge of himself & of his agents for the first time since the period at which he could have made use of it in the suit, & that it could not with reasonable diligence have been discovered sooner; & secondly, that it is of such a character that if it had been brought forward in the suit, it might probably have altered the judgment. These rules as to bills of review apply to cases where the application is to review a master's report equally as to a review of a decree.

(2) An order of the House of Lords, affirming a decree in Chancery, is final & conclusive, but it does not preclude a bill of review.—*HOSKING v. TERRY* (1862), 15 Moo. P. C. C. 493; 7 L. T. 52; 8 Jur. N. S. 975; 10 W. R. 884; 15 E. R. 581, P. C.

*Annotation* :—*Mentd.* *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596.

595. Question of Scottish law or jurisdiction.]—A decision of this House, in an English case, ought to be held conclusive in Scotland, as well as England, as to the questions of English law & English jurisdiction which it determined. It cannot, of course, conclude any question of Scottish law, or as to the jurisdiction of any Scottish Ct. in Scotland. So far as it may proceed upon principles of general jurisprudence, it ought to have weight in Scotland; as a similar judgment of this House on a Scottish appeal ought to have weight in England. If, however, it can be shown that by any positive law of Scotland, or according to authorities having the force of law in that country, a different view of the proper interpretation, extent or application of those principles prevails there, the opinions on those subjects, expressed by noble & learned Lords when giving judgment on an English appeal ought not to be held conclusive in Scotland. When a Scottish decision, in apparent conflict with them, is brought to the bar of this House, the first duty of your Lordships must, I conceive, be, to ascertain, whether there is any settled rule of Scottish law, requiring or justifying that decision. If not, it may still be open to the House to reconsider the points raised, in any new light which may be presented by the view of them taken in the Scottish Ct. (*LORD SELBORNE*).—*EWING v. ORR EWING* (1885), 10 App. Cas. 453; 53 L. T. 820; 1 T. L. R. 645, H. L.

*Annotations* :—*Mentd.* *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Re De Penny, De Penny v. Christie*, [1891] 2 Ch. 63; *Mac Ivor v. Burns*, [1895] 2 Ch. 631, n.; *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. 141; *Exbert v. Short*, [1907] 2 Ch. 205; *Re Bonnefol, Surrey v. Porrin*, [1912] P. 233.

596. What is judgment of House—House not unanimous.]—*REDGRAVE v. HURD*, No. 592, *ante*. Compare Nos. 489, 490, 574–577, *ante*.

597. ———.]—*Elaborate judgment by one lord—None dissenting.*]—The practice in the case of reserved judgments in the House of Lords is well known. Each lord considers the matter separately & then they interchange their judgments, so that before judgment is delivered each lord has had the opportunity of reading the judgments of all the others. If, therefore, there is anything in the judgment of any one lord with which the

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other lords do not agree they say so when they deliver judgment, & if they do not say so they must be taken to agree.

LORD WATSON delivered the most elaborate judgment, but there is no doubt that his judgment had been read by all the other lords, & if they had disagreed with it they would have said so when they delivered their judgments. LORD FITZGERALD expressly says that he does agree with it, & the LORD CHANCELLOR must, I think, be taken to do so. Nor does LORD MACNAGHTEN express the slightest difference from the judgment of LORD WATSON. In my opinion he adopts & agrees with it, & then he adds another reason of his own for the view he takes of the section. But giving an additional reason is not disagreement with LORD WATSON'S judgment. Therefore, I think the judgment of LORD WATSON must be taken to be the judgment of the House of Lords (LORD ESHER, M.R.).—WEST DERBY UNION GUARDIANS v. ATCHAM UNION GUARDIANS (1889), 24 Q. B. D. 117; 59 L. J. M. C. 17; 54 J. P. 485; 38 W. R. 361; 6 T. L. R. 5, C. A.

*Annotations:—*Fold. Manchester Overseers v. Ormskirk Union Grdms. (1890), 24 Q. B. D. 678. *Mentd.* Lenden & Winstree Union v. Windsor Union, [1921] 2 K. B. 143.

**598. ————.]—**Where in the House of Lords one of the learned lords gives an elaborate explanation of the meaning of a statute, & some of the other learned lords present concur in the explanation, & none express their dissent from it, it must be taken that all of them agreed in it (LORD COLERIDGE, C.J.).—MANCHESTER OVERSEERS v. ORMSKIRK UNION GUARDIANS (1890), 24 Q. B. D. 678; 62 L. T. 661; 54 J. P. 487; 38 W. R. 778, D. C.

*Annotations:—*Mentd. West Ham Union v. Holbeach Union, [1903] 2 K. B. 627; Woolwich Union v. Fulham Union, [1906] 2 K. B. 240.

**599. Duty of inferior court.]—**When the House of Lords overrules a decision of the Ct. of Appeal, it is the duty of that ct. to obey their judgment & not to pick out infinitely small points of difference between it & any case that may come before the ct. (LORD ESHER, M.R.).

The duty of a tribunal in respect of a decision given by some superior ct. is to find out what has been decided by that superior ct., & then to follow that decision without extending it except in proper cases (RIGBY, L.J.).—BARRACLOUGH v. BROWN (1890), 65 L. J. Q. B. 333; 74 L. T. 86; 12 T. L. R. 250; 8 Asp. M. L. C. 134; 1 Com. Cas. 329, C. A.; *on appeal*, [1897] A. C. 615, H. L.

*Annotations:—*Mentd. Smith v. Wilson, [1896] A. C. 579; A.-G. v. Morthor Tydfil Union, [1900] 1 Ch. 516; The Veritas, [1901] P. 304; Devonport Corp. v. Tozer, [1902] 2 Ch. 182; R. v. Philbrick (County Court Judge) *Ex p.* Edwards (1905), 53 W. R. 527; The Wallend, [1907] P. 302; De Gasquet James v. Mecklenburg-Schwerin, [1914] P. 63; Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536; Barwick v. S. E. & C. Ry., [1921] 1 K. B. 187; Simmonds v. Newport Abercrom Black Vein Steam Coal Co., [1921] 1 K. B. 616; Boston Corp. v. Fenwick (1923), 129 L. T. 766; Everett v. Griffiths, [1924] ; Whitney v. I. R. Comrs. (1925), 42 T. L. R. 58.

**SUB-SECT. 2.—JUDICIAL COMMITTEE OF PRIVY COUNCIL.**

**600. On Itself—Appeal from Court of Arches.]—**

Although the judgment of the Judicial Committee on appeal from the Arches Ct. is final *inter partes*, yet the proceedings being penal in their consequences, their Lordships will in some circumstances

entertain an appeal *inter alios* involving questions already decided.—RIDSDALE v. CLIFTON (1877), 2 P. D. 276; 46 L. J. P. C. 27; 36 L. T. 865; 42 J. P. 148, P. C.; *varying* S. C. *sub nom.* CLIFTON v. RIDSDALE (1876), 1 P. D. 316.

*Annotations:—*Apld. Tooth v. Power, [1891] A. C. 284. *Fold.* Road v. Lincoln (Bp.), [1892] A. C. 644. *Reid.* Coombe v. Edwards (1877), 2 P. D. 354; The Vera Cruz (No. 2) (1884), 9 P. D. 96; Gore-Booth v. Manchester (Bp.), [1920] 2 K. B. 412. *Mentd.* Howard v. Bodington (Bp.), [1920] 2 P. D. 203; Hudson v. Tooth (1877), 2 P. D. 125; Hughes v. Edwards (1877), 2 P. D. 361; Serjeant v. Dale (1879), 43 J. P. 220; *Re* St. Lawrence, Pittington (1880), 5 P. D. 131; Combe v. St. La Bere (1881), 6 P. D. 157; Heywood v. Manchester (Bp.) (1884), 12 Q. B. D. 404; R. v. London (Bp.) (1889), 23 Q. B. D. 414; Allcroft v. London (Bp.) & St. Paul's (Dean & Chapter), Lighton v. London (Bp.) & St. Paul's (Dean & Chapter) (1891), 61 L. J. Q. B. 62; St. John, Pendlebury (Vicar, etc.), Parishioners of same, [1895] P. 178; St. John the Baptist, Timberhill (Vicar, etc.), Rectors, etc., of same, [1895] P. 71; Barsham, Suffolk (Rector & Churchwardens) v. Barsham, Suffolk Churchwardens, [1896] P. 256; Great Barfield (Vicar & Churchwardens) v. All Having Interest, [1897] P. 185; Richmond (Vicar) & St. Matthias, Richmond (Chapelwardens) v. All Having Interest, [1897] P. 70; *Re* Robinson, Wright v. Tud., St. Mark's (Vicar) v. St. Mark's, Marylebone, [1898] P. 114; Davey v. Hinde, [1901] P. 85; *Re* St. Anselm, Pinn., [1901] P. 202; Davey v. Hinde, [1903] P. 221; Paignton (Vicar & Churchwardens) v. All Having Interest, [1905] P. 111; *Re* Christ Church, Faling, [1906] P. 289; Markham v. Shirebrook Overseers, [1906] P. 239; St. John the Evangelist, Clevedon (Vicar & Churchwardens) v. All Having Interest, [1909] P. 6; St. Paul, Bow Common (Vicar & Churchwardens) v. Inhabitants of Same, [1909] P. 215; Fowke v. Berlington, [1914] 2 Ch. 308; *Re* St. Paul's, Carlisle, [1919] P. 134; *Re* Tenbury Parish (1919), 36 T. L. R. 188; *Re* St. Luke's, Southport (1920), 36 T. L. R. 733; Vincent v. St. Magnus the Martyr, etc., [1925] P. 1.

**601. — Ex parte decision.]—**A decision of the Judicial Committee given *ex p.* does not preclude their Lordships in a subsequent case, from examining the reasons upon which it was arrived at, & if they should find themselves forced to dissent from those reasons, from deciding upon their own view of the law.—TOOTH v. POWER, [1891] A. C. 284; 60 L. J. P. C. 39; 64 L. T. 698; 7 T. L. R. 495, P. C.

**602. ———.]—**Although great weight will be attached to previous decisions of the Privy Council, their Lordships are bound to examine the reasons upon which such decisions rest, & to give effect to their own view of the law.—READ v. LINCOLN (Bp.), [1892] A. C. 644; 62 L. J. P. C. 1; 67 L. T. 128; 56 J. P. 725; 8 T. L. R. 763, P. C.

*Annotations:—*Mentd. *Re* St. Paul, Camden Square (1897), 14 T. L. R. 156; Assheton-Smith v. Owen (1905), 94 L. T. 42; Wimbledon (Vicar, etc.) v. Eden, *Re* St. Mark's, Wimbledon, [1908] P. 167; Hendon Parish Church (1912), 28 T. L. R. 438; Fowke v. Berlington, [1914] 2 Ch. 308; Gore-Booth v. Manchester (Bp.), [1920] 2 K. B. 412; Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service, [1923] A. C. 191.

**Power to rehear appeal.]—**See COURTS, Vol. XVI., pp. 166, 167.

**603. On other courts—General rule.]—**A decision of the Judicial Committee of the Privy Council is not binding on any English ct. although commanding the most respectful consideration (LORD FINLEY, C.).—LONDON JOINT STOCK BANK v. MACMILLAN & ARTHUR, [1918] A. C. 777; 88 L. J. K. B. 55; 119 L. T. 387; 34 T. L. R. 509; 62 Sol. Jo. 650, H. L.; *revg.* S. C. *sub nom.* MACMILLAN v. LONDON JOINT STOCK BANK, LTD., [1917] 2 K. B. 439, C. A.

*Annotations:—*Mentd. Joachimson v. Swiss Bank Corp., [1921] 3 K. B. 110; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560.

**Inferior courts.]—**See COURTS, Vol. XVI., pp. 164, 165, Nos. 682, 683.

**PART XVII. SECT. 4, SUB-SECT. 2.**

**603 I. On other courts—General rule.]—**The cts. of British Columbia are

bound by the decisions of the Supreme Ct. of Canada to the exclusion of those of all other tribunals except the Judicial Committee of the Privy Council.—

CHILLIWACK EVAPORATING & PACKING CO., LTD. v. CHUNG, [1918] 1 W. W. R. 870; 23 B. C. R. 90.—CAN.



**604. — Court of Appeal.]**—We are not bound by a decision of the Judicial Committee of the Privy Council, but we should treat any decision of that tribunal with respect & rejoice if we could agree with it (*BRAMWELL, L.J.*).—*LEASK v. SCOTT* (1877), 2 Q. B. D. 376; 46 L. J. Q. B. 576; 36 L. T. 784; 25 W. R. 654; 3 Asp. M. L. C. 469, C. A.

**605. — —.]**—It is true that the decisions of the Privy Council are not theoretically binding in this ct.; but in case of mercantile or admty. law where the same principles are professedly followed in the colonies & in this country, it is, to say the least, highly undesirable that there should be any conflict between the decisions of the Judicial Committee & those of the High Ct. or Cts. of Appeal in this country (*LINDLEY, L.J.*).—*THE CITY OF CHESTER* (1884), 9 P. D. 182; 53 L. J. P. 90; 51 L. T. 485; 33 W. R. 104; 5 Asp. M. L. C. 311, C. A.

*Annotation:—Mentd.* *The Melanle* (1924), 40 T. L. R. 236.

**606. — —.]**—*Semble*: a decision of the Privy Council at a time when it was the final ct. of appeal in Admty. matters is formally & technically binding on the Ct. of Appeal in the same sense as a decision of the House of Lords. But even if this is not so, a decision of the Privy Council on the construction of an Act relating to shipping ought not to be departed from when the law has been declared more than forty years ago & has been acted upon since.—*THE CAYO BONITO*, [1903] P. 203; 72 L. J. P. 70; 89 L. T. 260; 52 W. R. 133; 19 T. L. R. 609; 47 Sol. Jo. 671; 9 Asp. M. L. C. 445, C. A.

**607. — —.]**—Decisions of the Judicial Committee of the Privy Council are technically not binding on the Ct. of Appeal, although deserving of the greatest attention & respect (*POLLOCK, M.R.*).—*STEPHENSON v. THOMPSON*, [1924] 2 K. B. 240; 93 L. J. K. B. 771; 131 L. T. 279; 88 J. P. 142; 40 T. L. R. 513; 68 Sol. Jo. 536; 22 L. G. R. 359; [1924] B. & C. R. 170, C. A.

**608. — High Court.]**—The High Ct. of this country, though it yields the fullest regard to the opinions of the Privy Council, is not bound by its decisions (*McCARDIE, J.*).—*VENN v. TODESCO*, [1926] 2 K. B. 227; 135 L. T. 108; 70 Sol. Jo. 709.

**— Admiralty courts.]**—*See ADMIRALTY*, Vol. I., p. 102, Nos. 34–36.

**609. — Common law courts.]**—A judgment of the Privy Council ought to be treated by this ct. as entitled to very great weight indeed; but it is not binding on us (*KENNEDY, J.*).—*DULIEU v. WHITE & SONS*, [1901] 2 K. B. 669; 70 L. J. K. B. 837; 85 L. T. 126; 50 W. R. 76; 17 T. L. R. 555; 45 Sol. Jo. 578, D. C.

*Annotations:—Consd.* *Diamond Alkali Export Corp'n. v. Bourgeois*, [1921] 3 K. B. 443. *Held.* *Coyle or Brown v. Watson*, [1915] A. C. 1. *Mentd.* *Willoughby v. G. W. Iry*, (1904), 6 W. C. C. 28; *Yates v. South Kirkby, Featherstone & Hensworth Collieries* (1910), 103 L. T. 170; *The Rigel*, [1912] P. 99; *Janvier v. Sweeney*, (1919) 2 K. B. 316; *Marriott v. Maltby Main Colliery Co.* (1920), 90 L. J. K. B. 349; *Hambrook v. Stokes*, [1925] 1 K. B. 141.

**610. — — Suit of quare impedit.]**—Apart from the question whether in a suit of *quare impedit* this ct. is irrevocably bound by those decisions, which, although, of course great weight should be attached to them, I am not prepared to concede, the fact that the Judicial Committee does not think itself bound by its own decisions is an argument to show that neither am I bound by them, although, as I have said, great weight must attach to its authority (*LORD COLERIDGE, J.*).—*GORE-BOOTH v. MANCHESTER* (Bp.), [1920] J.—VOL. XXX.

2 K. B. 412; 89 L. J. K. B. 1123; 123 L. T. 301; 36 T. L. R. 464, C. A.

**611. — —.]**—A Privy Council advice is not binding on the K. B. Div. even as to the *res decisa* (*McCARDIE, J.*).—*DIAMOND ALKALI EXPORT CORPN. v. BOURGEOIS*, [1921] 3 K. B. 443; 91 L. J. K. B. 147; 126 L. T. 379; 15 Asp. M. L. C. 455; 26 Com. Cas. 310.

*Annotations:—Mentd.* *Aron v. Comptoir Wegmont*, [1921] 3 K. B. 435; *Scott v. Barclays Bank*, [1923] 2 K. B. 1; *Harper v. Mackeechnie*, [1925] 2 K. B. 423.

**612. — Chancery courts.]**—*Semble*: a decision on a question of equity by the Judicial Committee of the Privy Council will be followed by the Ct. of Ch.—*Re COMMERCIAL BANK OF INDIA & THE EAST* (1869), L. R. 8 Eq. 241; 38 L. J. Ch. 525; 20 L. T. 839; 17 W. R. 840.

*Annotation:—Mentd.* *Nicholl v. Eberhardt Co.* (1888), 58 L. J. Ch. 399.

**613. — —.]**—*CHITTY, J.*, held that although the decision of the Privy Council was not binding on him, yet having regard to the constitution of the particular committee, & seeing that they had fully considered the former authorities, their decision was one of the greatest weight & he should follow it.—*RANELAGH v. RANELAGH* (1893), 41 W. R. 549; 3 R. 315.

**614. — Ecclesiastical courts — Court of Arches.]**—The incumbent of a parish church was charged with wearing, when officiating in the Communion Service, certain vestments called respectively a chasuble, alb, amice, maniple & stole. At the hearing of the suit the charge was proved; but it was submitted on behalf of deft. that as the promoter had not proved the “advertisements of Queen Elizabeth,” he had failed to establish that the vestments were illegal: *Held*: the ct. was bound to follow the ruling of a Judicial Committee of the Privy Council in *Ridsdale v. Clifton*, No. 600, ante, & it was unnecessary for the promoter to prove the advertisements.—*COMBE v. EDWARDS* (1877), 2 P. D. 354; 42 J. P. 100.

*Annotation:—Mentd.* *R. v. London (Bp.)* (1888), 23 Q. B. D.

**— Prize courts.]**—*See PRIZE LAW.*

#### SUB-SECT. 3.—COURTS OF APPEAL.

**615. On itself—Decision of Court of Appeal in Chancery.]**—(1) The Ct. of Appeal is generally bound by the previous decisions of the Ct. of Appeal, including those of the old Ct. of Appeal in Chancery, but there may be exceptional circumstances under which the ct. would not necessarily be so bound, *e.g.*, where the circumstances were not very fully considered, or where doubts are entertained by one or more of the judges who took part in the decision, or where there is a concurrence of opinion, outside the members of the ct. so constituted, to the effect that the decision was one which cannot be supported.

(2) A ct. should follow the decision of a ct. of co-ordinate jurisdiction, leaving it to a higher ct. to set it right if it is wrong.—*Re SOUTH DURHAM IRON CO., SMITH'S CASE* (1879), 11 Ch. D. 579; 48 L. J. Ch. 480; 40 L. T. 572; 27 W. R. 845, C. A.

*Annotations:—Generally.* *Mentd.* *Re Underbank Mills Cotton Spinning & Manufacturing Co.* (1885), 31 Ch. D. 226; *Wright v. Horton* (1887), 12 App. Cas. 371; *Re Kingston Cotton Mill Co., Ex p. Pickering & Peasegood* (1895), 73 L. T. 482; *Freeman v. Lasing*, [1899] 2 Ch. 355; *Dublin City Distillery v. Doherty*, [1914] A. C. 823.

**616. — —.]**—Although the decision of a Lord Chancellor given before the Judicature Act may be overruled by this ct., yet such a course



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ought only to be taken exceptionally & in a very strong case. So rarely is that done that practically the decisions of a Lord Chancellor & the old Lords Justices are considered as binding us (COTTON, L.J.).—*Re WATTS, CORNFORD v. ELLIOTT* (1885), 29 Ch. D. 947; 55 L. J. Ch. 332; 53 L. T. 426; 33 W. R. 885, C. A.

**Annotations:—***Mentd.* *Re Hollon, Forbes v. Hardcastle* (1893), 69 L. T. 425; *Miller v. Collins*, [1896] 1 Ch. 573; *Re Richard's Settlement, Playne v. Twissden* (1903), 88 L. T. 197; *Re Dawson, Pattison v. Bathurst*, [1915] 1 Ch. 626; *Re Lyne's Settlement, Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

**617.** ———.]—The decision of the Lord Justices is the decision of a ct. of co-ordinate jurisdiction with the present Ct. of Appeal & cannot be overruled by that Ct.—*PLEDGE v. CARR*, [1895] 1 Ch. 51; 64 L. J. Ch. 51; 71 L. T. 598; 43 W. R. 50, C. A.; *on appeal, sub nom. PLEDGE v. WHITE*, [1896] A. C. 187, H. L.

**Annotations:—***Mentd.* *Riley v. Hall* (1898), 79 L. T. 244; *Sharp v. Rickards*, [1909] 1 Ch. 109.

**618.** ———.]—**Approving decision of Court of Exchequer.**—Where a decision of the Ct. of Exchequer has been treated by the old Ct. of Appeal in Chancery as good law, by virtue of that recognition the decision has become equivalent to a decision of the Ct. of Appeal & is binding on the Ct. of Appeal.—*HANAU v. EHRLICH*, [1911] 2 K. B. 1056; 81 L. J. K. B. 162; 105 L. T. 320, C. A.; *on appeal*, [1912] A. C. 39, H. L.

**619.** ———.]—**Construction—Of Instrument.**—On a question of mere construction even the decision of the Appeal Ct. on similar grounds is not binding on another Ct., & much less on a Ct. of equal jurisdiction. As regards the construction of the instrument, even if there are the identical words, although we follow them, they are not strictly binding; but on similar words they are not binding.

When the House of Lords affirm a decision on different grounds from those of the Ct. below, it is evidence, in fact proof, to those who know the practice of the House of Lords, that they do not agree with those grounds. Therefore a judgment so affirmed, so far from leaving the judgment of the Ct. of Appeal intact, shows the contrary, & that you are no longer bound by it. The mere affirmation of the decision is quite a different thing. You are bound by the decision but not by the reasons given for it (JESSEL, M.R.).—*HACK v. LONDON PROVIDENT BUILDING SOCIETY* (1883), 23 Ch. D. 103; 52 L. J. Ch. 541; 48 L. T. 247; 31 W. R. 392, C. A.

**Annotations:—***Consd.* *Re Whiting, Ormond v. De Launay*, [1913] 2 Ch. 1. *Reid.* *Municipal Bldg. Soc. v. Kent* (1884), 9 App. Cas. 280. *Mentd.* *French v. Municipal Permanent Bldg. Soc.* (1884), 53 L. J. Ch. 743; *Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin* (1886), 17 Q. B. D. 66; *Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777; *Re Knight & Tabernacle Permanent Bldg. Soc.*, [1891] 2 Q. B. 63; *Norton v. Counties Conservative Permanent Benefit Bldg. Soc.*, [1895] 1 Q. B. 246.

**620.** ———.]—**Decision affirmed by House of Lords on different grounds.**—*HACK v. LONDON PROVIDENT BUILDING SOCIETY*, No. 619, *ante*.

**621.** ———.]—(1) The Ct. of Appeal is as much bound by decisions of the Ct. of Appeal as a ct. of first instance.

(2) A decision should not be reviewed by a ct. of co-ordinate jurisdiction (BUCKLEY, L.J.).—*EVANS v. RIVAL GRANITE QUARRIES, LTD.*, [1910] 2 K. B. 979; 79 L. J. K. B. 970; 18 Mans. 64, C. A.

**Annotations:—***Generally.* *Mentd.* *De Beers Consolidated Mines v. British South Africa Co.*, [1912] A. C. 52; *Sinnot v. Bowden*, [1912] 2 Ch. 414; *Heaton & Dugard v. Cutting*, [1925] 1 K. B. 655.

**622.** ———.]—*HUGHES v. OXENHAM*, [1913] 1 Ch. 254, at p. 256; 82 L. J. Ch. 155; 108 L. T. 316, C. A.

**623.** ———.]—*BIRCHALL v. BIRCH, CRISP & Co.*, [1913] 2 Ch. 375, at p. 379; 82 L. J. Ch. 442; 109 L. T. 275, C. A.

**624.** ———.]—**Question of principle.**—When there has been a decision of this ct. upon a question of principle it is not right for this ct., whatever its own views may be, to depart from that decision (COZENS-HARDY, M.R.).—*VELAZQUEZ, LTD. v. INLAND REVENUE COMRS.*, [1914] 3 K. B. 458; 83 L. J. K. B. 1108; 111 L. T. 417; 30 T. L. R. 539; 58 Sol. Jo. 554, C. A.

**625.** ———.]—**Reasoning disapproved by House of Lords—Decision not overruled.**—By an inclosure Act, the moors & commons of the manor of Lanchester, Durham, were divided & allotted. The Act provided that the lord of the manor & his assigns should have, hold & enjoy all mines & minerals within & under the allotments, with full & free liberty of searching for, draining, winning & working the mines & minerals by any ways or means then in use or thereafter to be invented as fully & freely as he might or could have had, held, used & enjoyed the same in case that Act had not been made without paying any damages or making any satisfaction for so doing; & also that the annual rental of a certain allotment to the justices should be applied in or towards the compensation of those allottees whose allotments were damaged by the exercise of the lord's mining rights, & that any deficiency should be made up by means of a rate levied upon all the allottees.—*Held*: the case was governed by the decision of the Ct. of Appeal in *Consett Waterworks Co. v. Ritson* (1889), 22 Q. B. D. 702, which was a decision on the identical question arising on the construction of the same Act & in the same circumstances, & although the reasoning upon which that decision was founded had been disapproved of by the House of Lords in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, the decision itself had not been overruled & was therefore binding upon the ct.

In order that a case may be treated as overruled one must find either a decision of a superior ct. inconsistent with that arrived at in the case in question, or an expression of opinion on the part of that ct. as a whole that the case was wrongly decided on its own facts, & not merely that it ought to be treated as an authority in a case arising out of different facts (WARRINGTON, L.J.).—*CONSETT INDUSTRIAL & PROVIDENT SOCIETY v. CONSETT IRON CO.*, [1922] 2 Ch. 135; 91 L. J. Ch. 630; 127 L. T. 383; 38 T. L. R. 584; 66 Sol. Jo. 452, C. A.

**Court equally divided.**—When the Ct. of Appeal is equally divided so that the decision appealed against stands unreversed, the result

affirming the validity of a patent & follow the Ct. of Appeal in refusing to disturb a decision in the Exchequer Ct.—*TORONTO AUER LIGHT CO. v. COLLING* (1898), 31 O. R. 18.—CAN.

**626 I.** ———.]—**Court equally divided.**—*CLARKSON v. A.-G. OF CANADA* (1889), 16 A. R. 202.—CAN.

**PART XVII. SECT. 4, SUB-SECT. 3.**

**624 I.** *On itself—Question of principle.*—The Supreme Ct. *en banc*, being the final Ct. of Appeal in such a case, should decline to follow its own earlier, but recent decision, if of opinion that that decision was wrong.—*Re RILEY*

*HOTEL CO.* (1910), 15 W. L. R. 229.—CAN.

**624 II.** ———.]—*REID v. MCFARLANE* (1893), Q. R. 2 Q. B. 130.—CAN.

**624 III.** ———.]—Although the High Ct. may be a final ct. of appeal, it will defer to previous cases decided

of the case in the Ct of Appeal affects the actual parties to the litigation only, & the Ct., when a similar case is brought before it, is not bound by the result of the previous case.—*THE VERA CRUZ* (No. 2) (1884), 9 P. D. 96; 53 L. J. P. 33; 61 L. T. 104; 32 W. R. 783; 5 Asp. M. L. C. 270, C. A.; *on appeal, sub nom. SEWARD v. THE VERA CRUZ*, 10 App. Cas. 59, H. L.

*Annotations*.—*Fold*. *Hobson v. Leng*, [1914] 3 K. B. 1245. *Mentd.* *The Englishman & The Australia*, [1894] P. 239; *The Theta*, [1894] P. 280; *The Tynwald*, [1895] P. 142; *Adam v. British & Foreign S.S. Co.*, [1898] 2 Q. B. 430; *Davidsson v. Hill*, [1901] 2 K. B. 606; *The Swift*, [1901] P. 168; *Whitechapel Board of Works v. Crow* (1901), 84 L. T. 595; *Cavendish v. Strutt*, [1904] 1 Ch. 524; *Headland v. Coster*, [1905] 1 K. B. 219; *Williams v. Mersey Docks & Harbour Board*, [1905] 1 K. B. 804; *Bristol Corp. v. Canning* (Clerk to Sewers Comrs. for Lower Level of County of Gloucester) (1906), 95 L. T. 183; *The Circe*, [1906] P. 1; *Clark v. London General Omnibus Co.*, [1906] 2 K. B. 648; *R. v. L. G. Board, Ex p. South Stoneham Union*, [1908] 2 K. B. 368; *Jackson v. Watson*, [1909] 2 K. B. 193; *British Assn. of Glass Bottle Manufacturers v. Nettlefold* (1911), 27 T. L. R. 527; *British Columbia Electric Ry. v. Gentle*, [1914] A. C. 1034; *Date v. Gas Coal Collieries*, [1915] 2 K. B. 454; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38; *Flannagan v. Shaw*, [1920] 3 K. B. 86; *Starr Estate Co. v. Blackpool Corp.* (1920), 19 L. G. R. 9; *Nicoll v. Nicoll*, [1921] 1 A. C. 284; *Harper v. Hedges*, [1923] 2 K. B. 314; *McColl v. Canadian Pacific Ry.*, [1923] A. C. 126; *Nunan v. Southern Ry.*, [1924] 1 K. B. 223; *The Mollière*, [1925] P. 27; *Perry v. Harding*, [1925] 1 K. B. 111.

627. ———.]—The two judges in the Ct. of Appeal differed in opinion, with the result that the decision stood unreversed. In this state of facts this ct. is not bound by the decision (*BUCKLEY, L.J.*).—*HOBBSON v. LENG* (SIR W. C.) & CO., [1914] 3 K. B. 1245; 83 L. J. K. B. 1625; 111 L. T. 954; 30 T. L. R. 682; 59 Sol. Jo. 28, C. A.

628. ———.]—Decision not of full court.]—This ct. [Ct. of Appeal] is composed of six members & if at any time a decision of a lesser number is called in question & a difficulty arises about the accuracy of it, I think this ct. is entitled, sitting as a full ct., to decide whether we will follow the decision arrived at by the smaller number (*ESHER, M.R.*).—*KELLY & Co. v. KELLOND* (1888) 20 Q. B. D. 569; 57 L. J. Q. B. 330; 58 L. T. 263; 36 W. R. 363; 4 T. L. R. 290, C. A.; *on appeal, sub nom. THOMAS v. KELLY*, 13 App. Cas. 506, H. L.

*Annotations*.—*Mentd.* *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Hadden, Best v. Oppenheim* (1889), 60 L. T. 962; *Parsons v. Brand, Coulson v. Dickson* (1890), 25 Q. B. D. 110; *Bird v. Davey*, [1891] 1 Q. B. 29; *Re Heselbine, Woodward v. Heselbine*, [1891] 1 Ch. 464; *Heselbine v. Simmons*, [1892] 2 Q. B. 547; *Re Tweedale, Ex p. Tweedale*, [1892] 2 Q. B. 216; *Seod v. Bradley*, [1894] 1 Q. B. 319; *Peace v. Brookes*, [1895] 2 Q. B. 451; *Sims v. Trollope* (1896), 75 L. T. 351; *De Braam v. Ford*, [1900] 1 Ch. 142; *Lysons v. Knowles, Stuart v. Nixon & Bruce*, [1901] A. C. 79; *Saunders v. White*, [1902] 1 K. B. 472; *Coates v. Moore*, [1903] 2 K. B. 140; *Mourmand v. Le Clair* (1903), 51 W. R. 589; *Bell v. Hunt*, [1912] A. C. 496; *Ryan v. Oceanic Steam Navigation Co.*, *O'Connell v. Same*, *Seaton v. Same*, *O'Brien v. Same*, [1914] 3 K. B. 731; *Brandon Hill v. Lane*, [1915] 1 K. B. 250; *Burchell v. Thompson*, [1920] 2 K. B. 80; *Commercial Credit Co. of Canada v. Fulton*, [1923] A. C. 798.

629. On other courts.—Divisional court.]—If there have been decisions on the construction of a statute, whether by a Ct. of Appeal or by a ct. of

co-ordinate jurisdiction, the Div. Ct. has no right to disregard them, but must construe the Act according to the interpretation which the judges have put on it.—*READ v. JOANNON* (1890), 25 Q. B. D. 300; 59 L. J. Q. B. 544; 63 L. T. 387; 38 W. R. 734; 2 Meg. 275; *sub nom. REID v. JOANNON*, 6 T. L. R. 407, D. C.

*Annotations*.—*Reid*. *Clark v. Balm, Hill*, [1908] 1 K. B. 667. *Mentd.* *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; *G. N. Ry. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187; *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K. B. 772.

630. ———.]—Chancery courts.]—My ignorance is corrected, as it must be, by a statement [of law] of the Ct. of Appeal about a matter which I think was pertinent, & indeed essential, to the decision of the case before them (*NEVILLE, J.*).—*CARNELL v. HARRISON*, [1910] 1 Ch. 328; 85 L. J. Ch. 155; 114 L. T. 478; *sub nom. CORNELL v. HARRISON*, 60 Sol. Jo. 121; *on appeal*, [1910] 1 Ch. 335, C. A.

631. ———.]—Colonial courts.]—Where the provisions of a colonial statute are identical with those of an imperial statute, the colonial cts. should follow the decisions of Cts. of Appeal on the imperial statute.—*TRIMBLE v. HILL* (1879), 5 App. Cas. 342; 49 L. J. P. C. 49; 42 L. T. 103; 28 W. R. 479, P. C.

*Annotations*.—*Consd.* *Hunt v. Fripp*, [1898] 1 Ch. 675. *Mentd.* *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697; *Re Cromire, Ex p. Waud*, [1898] 2 Q. B. 383; *Shoolbroed v. Roberts*, [1899] 2 Q. B. 560; *Burge v. Ashley & Smith*, [1900] 1 Q. B. 714.

Whether bound by decision of Lord Chancellor sitting alone.]—See Sub-sect. 4, *post*.

Whether bound by decision of Court of Exchequer Chamber—Court equally divided.]—See No. 679, *post*.

#### SUB-SECT. 4.—LORD CHANCELLOR SITTING ALONE.

632. Whether binding on Court of Appeal.]—We ought not to lay down as an absolute rule that decisions of Lord Chancellors, at all events sitting alone, are to be taken as decisions of the Ct. of Appeal, & absolutely binding on this ct. so as to prevent us from even looking into the grounds of or considering the case which was before the particular Lord Chancellor. But no doubt the greatest weight ought to be given to such decisions, & unless they are shown to be manifestly wrong or manifestly contrary to the general current of authority on the point decided, it appears to me that we ought not to take upon ourselves to overrule them (*THESIGER, L.J.*).—*WHEELDON v. BURROWS* (1879), 12 Ch. D. 31; 48 L. J. Ch. 853; 41 L. T. 327; 28 W. R. 190, C. A.

*Annotations*.—*Reid*. *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Mentd.* *Allen v. Taylor* (1880), 16 Ch. D. 355; *Brett v. Clowser* (1880), 5 C. L. D. 376; *Shubbrook v. Tufnell* (1882), 46 L. T. 886; *Russell v. Watts* (1885), 10 App. Cas. 590; *Ford v. Met. & Met. Dist. Rys.*, [1886] 1 Q. B. D. 12; *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Birmingham, Dudley & District Banking Co. v. Ross* (1888), 38 Ch. D. 295; *Taws v. Knowles*, [1891]

*Intrinsic wisdom*.—*PINKEN v. MEEHAN* (1876), 40 U. C. R. 146.—CAN.

*g. Competence to overrule*.—*Where decision erroneous*.—The Supreme Ct. is competent to overrule a judgment of the ct. differently constituted, if it clearly appears to be erroneous.—*DUVAL v. MAXWELL* (1901) 31 S. C. R. 459.—CAN.

*h. ———.*]—The Ct. of Appeal is not bound to perpetuate error & may therefore set aside a former decision.—*NOBLE FIVE CONSOLIDATED MINING & MILLING CO., LTD. v. LAKE CHANUC MINING CO., LTD.* (1903), 9 B. C. R. 518.—CAN.

626 ii. ———.]—When the Supreme Ct. of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed, the result of the case in the Supreme Ct. affects the actual parties to the litigation only, & the ct., when a similar case is brought before it, is not bound by the result of the previous case.—*RE STANSTED ELECTION CASE, RIDER v. SNOW* (1891), 20 S. C. R. 12.—CAN.

631 i. On other courts.—Colonial courts.]—*CANADIAN PACIFIC RY. CO. v. ROBINSON* (1887), 16 S. C. R. 105.—CAN.

631 ii. ———.]—*JEANOTTE v. COUILLARD* (1894), Q. R. 3 Q. B. 461.—CAN.

*d. ———.* *Quebec courts*.]—*SALVAR v. VASSAL* (1897), 27 S. C. R. 68.—CAN.

*e. ———.* *Different principles applying*.]—*HALPARIN v. BULLING* (1914), 50 S. C. R. 471; *affu*, 24 Man. L. R. 235.—CAN.

*f. ———.*]—It is not for a subordinate ct. to disregard the decisions of a Ct. of Appeal; but, on the contrary, it is the duty of the subordinate ct. to give full effect to such decisions, whatever its views may be as to their

**Sect. 4.—Decisions of particular courts—How far binding: Sub-sects. 4, 5, 6 & 7, A.]**

2 Q. B. 564; *Bunting v. Hicks* (1894), 70 L. T. 455; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; *Broomfield v. Williams*, [1897] 1 Ch. 602; *Gordon v. Ogilvie* (1899), 15 T. L. R. 239; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557; *Itay v. Hazeldine*, [1904] 2 Ch. 17; *Strick v. City Offices Co.* (1906), 22 T. L. R. 667; *Mallam v. Rose*, [1915] 2 Ch. 222; *Schwann v. Cotton*, [1916] 2 Ch. 459; *Derry v. [1919] 1 K. B. 223*; *Hansford v. Jago*, [1921] 1 Ch. 322; *Cory v. Davies*, [1923] 2 Ch. 95; *Simpson v. Weber* (1925), 133 L. T. 46.

**633. —**—[I do not consider the decision of a Lord Chancellor is absolutely binding upon us, because every Lord Chancellor's decision was liable to be reheard not only by himself but by his successor. When I was sitting with LORD JUSTICE MELLISH we did rehear decisions of the LORD CHANCELLOR SELBORNE. There is always this to be considered, that it is the decision, no doubt, of a superior Ct. of Appeal; but it is always qualified by this, that according to the old practice of the Ct. of Ch. it was liable to be reheard.—*ASHWORTH v. MUNN* (1880), as reported in 15 Ch. D. 363; 43 L. T. 553, C. A.]

**Annotations:—Mentd.** *Re Hill's Trusts* (1880), 16 Ch. D. 173; *Re Watts, Cornford v. Elliott* (1885), 29 Ch. D. 947; *Re Hollon, Forbes v. Hardcastle* (1893), 68 L. T. 160; *Re Pickard, Blimley v. Mitchell*, [1894] 3 Ch. 704; *Re Hume, Forbes v. Hume*, [1895] 1 Ch. 422; *Re Dawson, Patteson v. Bathurst*, [1915] 1 Ch. 626; *Re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192.

**634. —**—**Conflicting decisions.**—Where we have conflicting decisions of two Lord Chancellors, the decision of the subsequent Lord Chancellor is entitled to greater weight, because the subsequent Lord Chancellor could overrule the decision of the prior Lord Chancellor, & sometimes did. It has not been the practice of modern cts. to exercise the jurisdiction quite so freely as the old Chancellors did, but they overruled one another & sometimes they overruled their own decisions without the slightest doubt or hesitation. There are remarkable cases even in modern times in which a Lord Chancellor has overruled the decision of his predecessor (*JESSEL, M.R.*).—*HENTY v. WREY* (1882), 21 Ch. D. 332; 53 L. J. Ch. 667; 47 L. T. 231; 30 W. R. 850, C. A.]

**Annotation:—Mentd.** *Re De Hoghton, De Hoghton v. De Hoghton*, [1896] 2 Ch. 385.

**635. —**—[The decision of a Lord Chancellor is a decision by which we are bound (*BAGGALLAY, L.J.*).—*GARD v. LONDON (CITY) SEWERS COMRS.* (1885), 28 Ch. D. 486; 54 L. J. Ch. 698; 52 L. T. 827; 1 T. L. R. 208, C. A.]

**Annotations:—Mentd.** *Toullere v. St. Mary Abbots, Kensington, Vestry* (1885), 30 Ch. D. 642; *Lynch v. London City Sewers Comrs.* (1886), 32 Ch. D. 72; *Gordon v. St. Mary Abbots, Kensington, Vestry*, [1894] 2 Q. B. 742; *A.-G. v. London Parochial Charities Trustees*, [1896] 1 Ch. 541; *Aldis v. London City Corp.* (1899), 47 W. R. 514; *Fernley v. Limehouse Board of Works* (1899), 68 L. J. Ch. 344; *Deuman v. Westminster Corp.*, *Cording v. Westminster Corp.*, [1906] 1 Ch. 464; *Davies v. London City Corp.*, [1913] 1 Ch. 415; *Clanciarde v. Ireland Congested Districts Board* (1914), 79 J. P. 481; *Conron v. L. C. C.*, [1922] 2 Ch. 283.

**636. —**—[*Re WATTS, CORNFORD v. ELLIOTT*, No. 616, *ante*.]

**637. —**—[Whether the decision of a Lord Chancellor sitting alone in the Ct. of Appeal is binding on that ct., discussed.—*Re LLOYD, LLOYD v. LLOYD*, [1903] 1 Ch. 385; 72 L. J. Ch. 78; 87 L. T. 541; 51 W. R. 177; 19 T. L. R. 101; 47 Sol. Jo. 128, C. A.]

**Annotations:—Mentd.** *Re Hazeldine's Trusts*, [1908] 1 Ch. 34; *Re Thomson's Mortgage Trusts*, *Thomson v. Bruty*, [1920] 1 Ch. 508.

**638. Whether binding on inferior courts—Decision opposed to all other decisions.**—[A decision of a Lord Chancellor is in general binding upon the cts. below, but where it is directly

opposed to all the other decisions of equal authority it will not be followed, & the inference will be that there has been some error in the matter.—*GIBSON v. FISHER* (1867), L. R. 5 Eq. 51; 37 L. J. Ch. 67; 16 W. R. 115.]

**Annotations:—Refd.** *Robinson v. Shepherd* (1863), 4 De G. J. & Sm. 129; *Stead v. Mellor* (1877), 5 Ch. D. 225; *Re Dering, Neall v. Beale* (1911), 105 L. T. 404. **Mentd.** *Hughes v. Pritchard* (1877), 6 Ch. D. 24; *Re Wilson, Parker v. Winder* (1883), 24 Ch. D. 664; *Re Alexander, Alexander v. Alexander*, [1919] 1 Ch. 371.

**639. —**—[A Vice-Chancellor, in deciding a case, is bound by a previous decision of a Lord Chancellor applicable to the case, whether he assents to it or not.—*FREEMAN v. POPE* (1869), L. R. 9 Eq. 206; 39 L. J. Ch. 148; 21 L. T. 816; 18 W. R. 399; *on appeal* (1870), 5 Ch. App. 538, L. C. & L. J.]

**Annotations:—Consd.** *Sedgwick v. Place* (1871), 25 L. T. 307. **Refd.** *Re Johnson, Golden v. Gillam* (1881), 20 Ch. D. 389. **Mentd.** *Kent v. Riley* (1872), 41 L. J. Ch. 569; *Mackay v. Douglas* (1872), L. R. 14 Eq. 106; *Taylor v. Coenen* (1876), 1 Ch. D. 636; *Re Ridler, Ridler v. Ridler* (1882), 22 Ch. D. 74; *Re Maddever, Three Towns Banking Co. v. Maddever* (1884), 27 Ch. D. 523; *Re Wise, Ex p. Mercer* (1886), 17 Q. B. D. 290; *Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111; *Re Lane-Fox, Ex p. Glimblett*, [1900] 2 Q. B. 508; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360; *Edmunds v. Edmunds*, [1904] P. 362; *Caruthers v. Peake* (1911), 55 Sol. Jo. 291; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334; *Re Halsted, Ex p. Richardson* (1917), 116 L. T. 386.

**640. —**—[The Lord Chancellor, wherever he is sitting & whatever cases he is trying, is still Lord Chancellor, & his decision is binding on me (*FRY, J.*).—*Ex p. ST. MARY, WIGTON (VICAR)* (1881), 18 Ch. D. 646; 45 L. T. 134; 29 W. R. 883.]

**SUB-SECT. 5.—DIVISIONAL COURT.**

**641. On another Divisional Court.**—[Although I do not go so far as to say that in every case & under all circumstances the ct. is absolutely bound by a decision of another Div. Ct., still the decision is one by which we should abide. It is urged that we need not follow that decision because it was a case in which there was no right of appeal. That is a contention which cannot prevail (*POLLOCK, B.*).—*VERNON v. WATSON*, [1891] 1 Q. B. 400; 60 L. J. Q. B. 205; 64 L. T. 460; 55 J. P. 454; 7 T. L. R. 184; *on appeal*, [1891] 2 Q. B. 288, C. A.]

**Annotation:—Mentd.** *Fishwick v. Gyant*, [1925] 1 K. B. 617.

**642. —**—**Composed of Lords Justices—Sitting as additional judges of King's Bench Division.**—[Where a Div. Ct. is composed of two Lords Justices sitting as additional judges of the K. B. Div. the Lords Justices will follow the decision of a previous Div. Ct., although doubting its authority, reserving their liberty as Lords Justices if the question then comes before them.—*HARRISON v. RIDGWAY* (1925), 133 L. T. 238; 23 L. G. R. 434, D. C.]

**Annotation:—Mentd.** *Lowther v. Clifford* (1926), 135 L. T. 200.

**Dicta.**—[See No. 517, *ante*.]

**643. On specially constituted Divisional Court.**—[*Semble*: in cases where there is no appeal from the Div. Cts., a specially constituted Div. Ct. appointed by the Chief Justice of England has power to review, & if it thinks fit to differ from, previous decisions of Div. Cts. on the same subject.—*KRUSE v. JOHNSON*, [1898] 2 Q. B. 91; 67 L. J. Q. B. 782; 78 L. T. 647; 62 J. P. 469; 46 W. R. 630; 14 T. L. R. 416; 42 Sol. Jo. 509; 19 Cox, C. C. 103, D. C.]

**Annotations:—Mentd.** *Kilston v. Ashe*, [1899] 1 Q. B. 425; *White v. Morley*, [1899] 2 Q. B. 34; *Thomas v. Sutters*, [1900] 1 Ch. 10; *Nash v. Finlay* (1901), 85 L. T. 682;

*Gentel v. Rapps*, [1902] 1 K. B. 160; *Metropolitan Industrial Dwellings Co. v. Long* (1903), 68 J. P. 113; *Pomeroy v. Malvern U. D. C.* (1903), 67 J. P. 375; *Clayton v. Peirce*, [1904] 1 K. B. 424; *Scott v. Pilliner* (1904) 91 L. T. 658; *Stiles v. Galinski*, *Nokes v. Islington Corp.* (No. 2), [1904] 1 K. B. 615; *Leyton U. C. v. Chew* (1907) 76 L. J. K. B. 781; *Williams v. Weston-super-Mare U. D. C.* (1907), 98 L. T. 537; *Moorman v. Tordoff* (1908), 98 L. T. 416; *Williams v. Weston-super-Mare U. D. C.* (No. 2) (1910), 103 L. T. 9; *L. C. v. Bermondsey Blooscope Co.*, [1911] 1 K. B. 445; *Mitcham Common Conservators v. Cox*, *Same v. Cole*, [1911] 2 K. B. 854; *Russon v. Dutton* (1911), 104 L. T. 601; *Slee v. Meadows* (1911), 105 L. T. 127; *Dunning v. Maher* (1912), 105 L. T. 846; *Friend v. Brehout* (1914), 111 L. T. 832; *R. v. Broad*, [1915] A. C. 1110; *Repton School Governors v. Repton R. C.*, [1918] 2 K. B. 133; *Sutton Harbour Improvement Co. v. Foster* (1920), 89 L. J. K. B. 829; *A.-G. v. Hodgson*, [1922] 2 Ch. 429; *Doid v. Venne* (1922), 127 L. T. 746; *Owner v. King* (1922), 128 L. T. 307; *Roberts v. Williams* (1922), 127 L. T. 303; *A.-G. v. Denby*, [1925] 1 Ch. 596; *Mills v. L. C. C.*, [1925] 1 K. B. 213; *Roberts v. Hopwood*, [1925] A. C. 578; *Short v. Poole Corp.* (1925), 42 T. L. R. 107.

**644. On judge in chambers.**—A decision of a Div. Ct. is binding on a judge sitting in chambers.—*VILLAGE MAIN REEF GOLD MINING CO., LTD v. STEARNS* (1900), 5 Com. Cas. 246.

*Annotations*:—*Reid. Harding v. Russell* (1905), 74 L. J. K. B. 500; *Tannenbaum v. Heath*, [1908] 1 K. B. 1032.

**645. Court equally divided—Duty of junior judge to withdraw judgment.**—It is the proper result wherever there is an appeal to two judges who differ that the judgment appealed from should stand & not that the junior judge should withdraw his judgment (*CHANNELL, J.*).—*METROPOLITAN WATER BOARD v. JOHNSON & CO.*, [1913] 3 K. B. 900; 82 L. J. K. B. 1164; 107 L. T. 711; 77 J. P. 85; 29 T. L. R. 105; 11 L. G. R. 113 D. C.; *on appeal*, [1913] 3 K. B. 910, C. A.

*Annotation*:—*Consd. Poulton v. Moore* (1913), 109 L. T. 976.

**646. ———.**—Where on an appeal to the Div. Ct. from a county ct., the judges differ in opinion, it is within the discretion of the junior judge, in accordance with the old common law practice, to withdraw his judgment.

When a junior judge withdraws his judgment, the judgment of the senior judge becomes the judgment of the ct. (*BRAY, J.*).—*POULTON v. MOORE* (1913), 83 L. J. K. B. 875; 109 L. T. 976; 30 T. L. R. 155; 58 Sol. Jo. 156; 77 J. P. Jo. 591, D. C.; *on appeal*, [1915] 1 K. B. 400, C. A.

*Annotation*:—*Dbtd. Poulton v. Moore*, [1915] 1 K. B. 400.

**647. ———.**—It is common practice in a Div. Ct. consisting of two judges for the junior judge to withdraw his judgment if the two differ in opinion (*RIDLEY, J.*).—*R. v. THOMAS, Ex p. O'HARE*, [1914] 1 K. B. 32; 83 L. J. K. B. 351; 109 L. T. 929; 23 Cox, C. C. 687, D. C.

**648. ———.**—Where on an appeal to two judges the judges differ in opinion:—*Seemle*: the junior judge should not withdraw his judgment.—*POULTON v. MOORE*, [1915] 1 K. B. 400; 84 L. J. K. B. 462; 112 L. T. 202; 31 T. L. R. 43, C. A.

**649. — Necessity for concurrence of both judges—To overrule county court judgment.**—An appeal from a county ct. ought to be decided by two judges & not by one judge only (*SCRUTTON, L.J.*).

It was not the intention of the Legislature that the judgment of a county ct. judge should be overruled by one judge in the High Ct. (*DUKE, L.J.*).—*FLANNAGAN v. SHAW*, [1920] 3 K. B. 96; 89 L. J. K. B. 168; 122 L. T. 177; 84 J. P. 45; 36 T. L. R. 34; 64 Sol. Jo. 51; 18 L. G. R. 29, C. A.

*Annotations*:—*Mentd. Hunt v. Bliss* (1919), 89 L. J. K. B. 174; *Davies v. Bristow*, *Penrhos College v. Butler*, [1920] 3 K. B. 428; *Barton v. Fincham*, [1921] 2 K. B. 291; *The Danube II*, [1921] P. 183; *Northcott v. Roche* (1921), 37 T. L. R. 364; *Wallwork v. Fielding*, [1922] 2 K. B. 66.

## SUB-SECT. 6.—COURTS OF FIRST INSTANCE.

**On court itself.**—See Nos. 696, 697, *post*.

**On courts of co-ordinate jurisdiction.**—See Sub-sect. 6, *post*.

**650. On inferior courts.**—*VELEY & JOSLIN v. BURDER*, No. 659, *post*.

**651. — Court of Common Bench—Binding on committees of House of Commons.**—As our decisions [Ct. of Common Bench] are binding upon the committees of the House of Commons, we should not reverse the decision without argument (*JERVIS, C.J.*).—*POWELL v. HOOD* (1851), 11 C. B. 1; 2 Lut. Reg. Cas. 170; 21 L. J. C. P. 12; 18 J. L. T. O. S. 94; 15 J. P. 819; 16 Jur. 618; 138 E. R. 369.

*Annotation*:—*Mentd. Pownall v. Dawson* (1851), 21 L. J. C. P. 14.

**652. — Construction—Of instrument.**—The construction put upon an instrument by a ct. of law or equity is not binding on another ct. of law or equity, even of inferior jurisdiction, as regards the construction of an instrument couched in somewhat similar language (*JESSEL, M.R.*).—*Re NEW CALLAO* (1882), 22 Ch. D. 484; 52 L. J. Ch. 283; 48 L. T. 251; 31 W. R. 185, C. A.

*Annotation*:—*Mentd. Re Manchester Economic Bldg. Soc.* (1883), 24 Ch. D. 468.

## SUB-SECT. 7.—COURTS OF CO-ORDINATE JURISDICTION.

### A. Single Decision.

**653. General rule.**—Observations as to the necessity of preserving an uniformity of decision in the different cts.

I have repeatedly stated that in my opinion uniformity of decision was so important to be obtained that whenever I found a decision pronounced by one of the Vice-Chancellors I should consider myself to be bound by the decision, where it related either to a new matter or was not opposed by contradictory decisions (*ROMILLY, M.R.*).—*PARKIN v. THOROLD* (1852), 16 Beav. 59; 22 L. J. Ch. 170; 16 Jur. 959; 51 E. R. 698.

*Annotations*:—*Mentd. Roberts v. Berry* (1853), 3 De G. M. & G. 284; *Nott v. Riccard* (1856), 22 Beav. 307; *Wells v. Maxwell* (1863), 32 Beav. 408; *McMurray v. Spicer* (1868), L. R. 5 Eq. 527; *Burclay v. Messenger* (1874), 43 L. J. Ch. 419; *Patrick v. Milner* (1877), 2 C. P. D. 342.

**654. ———.**—It is not becoming to say of a case, decided by a ct. of co-ordinate jurisdiction, that it is wrongly decided. (*CHESTERFIELD, & CO. COLLIERY CO. v. HAWKINS* (1865), 3 H. & C. 677; L. J. Ex. 121; 12 L. T. 427; 11 Jur. N. S. 468; 13 W. R. 841; 159 E. R. 698.

*Annotations*:—*Mentd. Gurrin v. Kopeka* (1865), 3 H. & C. 694; *Scott v. Berry* (1865), 3 H. & C. 966; *Itt Cobb, Ex p. Fairfax & Bryson* (1866), 14 W. R. 289; *Kitchin v. Hawkins* (1866), L. R. 2 C. P. 22; *Reeves v. Watts* (1866), 35 L. J. Q. B. 171; *Isaacs v. Green* (1867), L. R. 2 Exch. 352; *McLaren v. Baxter* (1867), L. R. 2 C. P. 559; *Re Trust-Deed, Ex p. Sulphate Colliery Co.* (1867), 15 L. T. 545; *Cairncross v. Hill* (1869), 20 L. T. 529.

**655. ———.**—The Vice-Chancellors did not consider themselves bound by each other's decisions. I have differed frequently from cts. of co-ordinate jurisdiction (*JESSEL, M.R.*).—*GATHERCOLE v. SMITH* (1881), 44 L. T. 439; *on appeal*, 17 Ch. D. C. A.

*Annotations*:—*Mentd. McBean v. Deane* (1885), 30 Ch. D. 520; *Lucas v. Harris* (1886), 18 Q. B. D. 127; *Re ———, Ex p. Shunders*, [1895] 2 Q. B. 117; *Re Fitz-Surman v. Fitzgerald*, [1904] 1 Ch. 573.

**656. ———.**—*PALMER v. JOHNSON*, No. 552, *ante*.

*Sect. 4.—Decisions of particular courts—How far binding: Sub-sect. 7, A. & B. (a) & (b).]*

**657.** —. —.]—EVANS v. RIVAL GRANITE QUARRIES, LTD., No. 621, *ante*.

—.]—It is the prevailing practice in the cts. of the K. B. Div. to follow a previous judgment by a ct. of co-ordinate jurisdiction.—*CRAMB v. GOODWIN*, [1919] as reported in W. N. 86; *on appeal*, 35 T. L. R. 477, C. A.

**659. Decision acquiesced in for long period.]**—Where cts. have co-ordinate jurisdiction, where decisions are pronounced by judges professing the same degree of jurisdiction, a single precedent might or might not be binding, according to the peculiar circumstances of the case; it ought to be binding where it was acquiesced in for a series of years, & where it was considered as a good & valid authority by other judges, whose opinions were entitled to weight; on the other hand, a single decision if unknown & unsanctioned from the time of its being pronounced, is open to be considered upon principle by a co-ordinate ct., whether it be a right or wrong decision, not to be hastily overruled, but to be considered whether or not it is consistent with that which has been laid down by other judges. An inferior ct. cannot, of its own authority, reject the precedents repeatedly laid down by a superior ct. Obedience to a superior ct. is one of the first duties that an inferior judge has to perform, as the presumption of law is, that the judge of the superior court is not only superior in rank & station, but in judgment also, & ability.—*VELEY & JOSLIN v. BURDER* (1837), 1 Curt. 372; 163 E. R. 127; *sub nom.* *BRAINTREE (CHURCHWARDENS) v. BURDER*, 1 J. P. 371.

*Annotations:—***Reid.** *Westerton v. Liddell*, *Beal v. Liddell* (1855), 4 W. R. 167. **Mentd.** *Cordy v. Bentley* (1851), 15 Jur. 779; *R. v. Christchurch Overseers* (1857), 21 J. P. 134.

**660. Followed until reversed on appeal.]**—*Semble*: where there is an express decision of a ct. of co-ordinate jurisdiction on any point, it is binding on this ct., unless reversed in error.—*BITTLESTON v. COOPER* (1845), 14 M. & W. 399; 153 E. R. 530; *sub nom.* *BITTLESTON v. COOPER*, 5 L. T. O. S. 57.

**661.** —.]—*DEPTFORD (CHURCHWARDENS) v. SKETCHLEY*, No. 543, *ante*.

**662.** —.]—In this case, if the words of the will had been the same as the words in *Re Potter's Trust* (1869), L. R. 8 Eq. 52, I should, without expressing any opinion of my own, simply have followed the decision of VICE-CHANCELLOR SIR R. MALINS in that case; because I do not think it seems that two branches of a ct. of co-ordinate jurisdiction should be found coming to contrary decisions upon similar instruments, & encouraging as it were a race, by inducing persons who wish for one construction to go to one ct., & those who wish for another construction to go to another. I should simply have affirmed the Vice-Chancellor's decision, with the intimation of my wish that the whole matter should be brought before a Ct. of Appeal (JAMES, V.-C.).—*Re HOTCHKISS'S TRUSTS* (1869), L. R. 8 Eq. 643; 38 L. J. Ch. 631.

—**Reid.** *West v. Orr* (1878), 8 Ch. D. 60. **Mentd.** *Hall v. Woolley* (1869), 39 L. J. Ch. 106; *Adams v. Adams* (1872), L. R. 14 Eq. 246; *Re Woolrich, Harris v. Harris*, (1879) 11 Ch. D. 663; *Re Webster, Widgen v. Mello* (1883), 49 L. T. 584; *Re Chinery, Chinery v. Hill* (1888), 39 Ch. D. 614; *Re Brown, Brown v. Brown* (1889), 58 L. J. Ch. 420; *Re Musther, Groves v. Musther* (1890), 43 Ch. D. 569; *Re Wood, Tullett v. Colville*, [1894] 3 Ch. 381.

**663.** —.]—The decision of a co-ordinate branch of the ct. will be followed until reversed

on appeal, in order to avoid an unseemly conflict of decisions.—*Re TIMES LIFE ASSURANCE & GUARANTEE CO.* (1870), 5 Ch. App. 389, n.; 22 L. T. 198; *sub nom.* *Re TIMES LIFE ASSURANCE & GUARANTEE CO.*, *Ex p. NUNNELEY*, 39 L. J. Ch. 297; 18 W. R. 404; *on appeal*, 5 Ch. App. 381, L. J.

*Annotations:—***Mentd.** *Re Anchor Assoc.* (1870), 5 Ch. App. 632; *Re Manchester & London Life Assoc. & Loan Assocn.* (1870), L. R. 9 Eq. 643; *Re Medical, Invalid & General Life Assoc. Soc.*, *Griffith's Case* (1871), 6 Ch. App. 378, n.; *Re Medical, Invalid & General Life Assoc. Soc.*, *Spencer's Case* (1871), 6 Ch. App. 362; *Wilson v. Lloyd* (1873), L. R. 16 Eq. 60; *Re European Assoc. Soc. Arbitration Acts*, *Hort's Case*, *Grain's Case* (1875), 33 L. T. 766.

**664.** —.]—*Re SOUTH DURHAM IRON CO., SMITH'S CASE*, No. 615, *ante*.

**665.** —.]—A judge of the K. B. Div. should follow the decision of another judge of the division on a point of law without saying what his own view would have been on the matter, leaving it to the Ct. of Appeal to say whether or not that decision was wrong.—*PAPWORTH v. BATTERSEA CORPN.*, (1915), 84 L. J. K. B. 1881; 79 J. P. 309; *on appeal*, [1916] 1 K. B. 583, C. A.

*Annotation:—***Mentd.** *Nash v. Rochford R. D. C.*, [1917] 1 K. B. 384.

**666. Construction—Of statute.]**—When once the construction of a statute has been settled by a ct. of competent authority, . . . no doubt should be thrown upon it by a ct. of co-ordinate jurisdiction (WILLES, J.).—*Re ROUSE & CO. & MEIER & CO.* (1871), L. R. 6 C. P. 212; 40 L. J. C. P. 145.

*Annotations:—***Mentd.** *Randell v. Thompson* (1876), 1 Q. B. D. 748; *Fraser v. Ehrensperger* (1883), 12 Q. B. D. 310; *Re Mitchell & Izard & Ceylon, Governor* (1888), 21 Q. B. D. 408; *Re Smith & Service* (1890), 25 Q. B. D. 545.

**667.** —. —.]—*WEBSTER v. ASHTON-UNDER-LYNE OVERSEERS, HADFIELD'S CASE*, No. 569, *ante*.

**668.** —. —. —.]—In putting a construction on obscure enactments or instruments no single judge is entitled to say another is wrong; all he can say is that he differs from the other judge as to the meaning of the obscure enactment or instrument before him (JESSEL, M.R.).—*Re PRINTING & NUMERICAL REGISTERING CO.* (1878), 8 Ch. D. 535; 47 L. J. Ch. 580; 38 L. T. 676.

*Annotations:—***Mentd.** *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181; *Re Richards* (1879), 11 Ch. D. 676; *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335; *Re West of England Bank, Ex p. Brown* (1879), 12 Ch. D. 823. *Re Northern Counties of England Fire Insce., Macfarlane's Claim* (1880), 17 Ch. D. 337; *Re Witherssea Brickworks* (1880), 16 Ch. D. 337; *Re Land Financiers Assocn.* (1881), 16 Ch. D. 373; *Re Panther Lead Co.* (1896), 65 L. J. Ch. 499.

**669.** —. —. —.]—*READ v. JOANNON*, No. 629, *ante*.

**670.** —. —. —.]—*Of instrument.]*—*Re PRINTING & NUMERICAL REGISTERING CO.*, No. 668, *ante*.

**671.** —. —. —.]—*Re NEW CALLAO*, No. 652, *ante*.

**672.** —. —. —.]—*Of will.]*—*Re MASSON, MORTON v. MASSON*, No. 790, *post*.

**673. Decision given without reference to earlier authority.]**—*WEBSTER v. ASHTON-UNDER-LYNE OVERSEERS, HADFIELD'S CASE*, No. 569, *ante*.

**674. Decision on matter of practice.]**—In matters of practice the decisions of one ct. are not binding upon others unless the practice has become so settled that it ought not to be shaken (COCKBURN, C.J.).—*BISSICKS v. BATH COLLIERY CO.* (1877), 2 Ex. D. 459; 36 L. T. 800; *on appeal* (1878), 3 Ex. D. 174, C. A.

*Annotations:—***Mentd.** *Mortimore v. Cragg* (1878), 3 C. P. D. 216; *Smith v. Critchfield* (1885), 14 Q. B. D. 873; *Lee v. Dangar, Grant*, [1892] 1 Q. B. 231.



**675. Decision on principle of law.]—***Re HALLETT'S ESTATE, KNATCHBULL v. HALLETT*, No. 494, *ante*.

**676. Decision laying down rule of conduct—Courts of equity.]—***Re NORMAN*, No. 496, *ante*.

**677. Courts with special jurisdiction—Decisions not subject to appeal.]—***WEBSTER v. ASHTON-UNDER-LYNE OVERSEERS, HADFIELD'S CASE*, No. 569, *ante*.

**678. ———.]—**I also think that one of the most important duties of this ct. whose jurisdiction over this particular subject is exclusive, & whose decisions thereon are final, & whose personality varies from time to time, is, to follow loyally, as I once ventured to express it, all the preceding decisions, & that the action of the ct. in its exercise of this jurisdiction will be much impaired if this be not steadily kept in mind (*BRETT, J.*).—*BOON v. HOWARD* (1874), L. R. 9 C. P. 277; 2 *Hop. & Colt.* 208; 43 L. J. C. P. 115; 30 L. T. 382; 38 J. P. 678; 22 W. R. 535.

*Annotation:—Mentd. Bradley v. Baylis* (1881), 8 Q. B. D. 185.

**679. Court equally divided.]—**[The case cited] is not an authority which is binding upon us, because in the Exchequer Chamber, which was a ct. of co-ordinate jurisdiction with ourselves, the judges were equally divided, & therefore the judgment of the Q. B. stood affirmed (*BRETT, L. J.*).

—*SMITH v. LAMBETH ASSESSMENT COMMITTEE* (1882), as reported in 10 Q. B. D. 327, C. A.

*Annotations:—Mentd. Lancashire Telephone Co. v. Manchester Overseers* (1884), 14 Q. B. D. 267; *Re Holburne, Coates v. Mackillop* (1885), 53 L. T. 212; *Southport Corp'n. v. Ormskirk Union Assmt. Com.*, [1893] 2 Q. B. 468; *Jones v. I. R. Comrs., Sweetmeat Automatic Delivery Co. v. I. R. Comrs.* (1895) 1 Q. B. 484; *M. S. & L. Ry. v. Kingston-upon-Hull, Governor & Grdns.* (1896), 60 J. P. 504; *Percy v. Hall* (1903), 88 L. T. 830; *Margate Corp'n. v. Pettman* (1912), 106 L. T. 104; *Cleveland Bridge & Engineering Co. v. Darlington Union t. Com.* (1923), 21 L. G. R. 511.

**Decision of King's Bench Division—Binding on Railway & Canal Commission.]—***See* No. 698, *post*.

**Court of appeal—Whether bound by previous decisions of Court of Appeal.]—***See* Sect. 4, subsect. 3, *ante*.

#### B. Series of Decisions.

##### (a) Consistent Decisions.

**680. General rule.]—**If therefore I stood alone I might in deference to the Ct. of Exch. feel bound to give judgment for deft. though against my own opinion (*CROMPTON, J.*).—*HENDERSON v. AUSTRALIAN ROYAL MAIL STEAM NAVIGATION CO.* (1855), 5 E. & B. 409; 3 C. L. R. 1181; 24 L. J. Q. B. 322; 25 L. T. O. S. 234; 20 J. P. 132; 1 *Jur.* N. S. 830; 3 W. R. 571; 119 E. R. 533.

*Annotations:—Reid. Reuter v. Electric Telegraph Co.* (1856), 6 E. & B. 341; *South of Ireland Colliery v. Waddle* (1868), L. R. 3 C. P. 463. *Mentd. Bateman v. Mid-Wales Ry.* (1866), L. R. 1 C. & P. 499; *Nicholson v. Bradfield Union Grdns.* (1866), 7 B. & S. 774.

#### PART XVII. SECT. 4, SUB-SECT. 7.—

##### A.

**675 i. Decision on principle of law.]—**Where it appeared to the ct. that a former decision was inconsistent with the right application of a clear & well established principle of law, it reversed the former decision without intervention of a ct. of appeal.—*R. v. GERMAN-TOWN LAKE SEWERS COMRS.* (1869), 12 N. B. R. (1 *Han.*) 343.—*CAN.*

#### PART XVII. SECT. 4, SUB-SECT. 7.—

##### B. (a).

**680 i. General rule.]—**The practice of adopting & following the judgments of ct. of co-ordinate jurisdiction has prevailed to a greater extent in our ct. than it ever has in England.—*GERALDI v. PROVINCIAL INSURANCE CO.* (1878),

29 C. P. 321.

**680 ii. ———.]—***STUART v. BANK OF MONTREAL* (1909), 41 E. C. R. 516.—*CAN.*

**K. Previous decision of single judge.]—**The practice in Manitoba is that the decision of a judge is accepted & followed by any other single judge unless under very exceptional circumstances.—*Re FENTON ESTATE*, [1920] 2 W. W. R. 34; 51 D. L. R. 694.—*CAN.*

**L. Power of court to give conflicting judgment.]—***MIGNER v. ST. LAWRENCE FIRE INSURANCE CO.* (1900), Q. R. 10 K. B. 122.—*CAN.*

#### PART XVII. SECT. 4, SUB-SECT. 7.—

##### B. (b).

**General rule.]—**A decision of

**681. ———.]—**The Divisions of the High Ct. are so far to be deemed still distinct & separate, that the judges sitting in one Div. are bound, in an action in any other Div., to follow the decisions of the judge of that Div., even although against their own opinion.—*PACEY v. LONDON TRAMWAY CO.* (1876), 2 *Char. Pr. Cas.* 86; *on appeal*, 2 *Ex. D.* 440, C. A.

*Annotations:—Mentd. Friend v. L. C. & D. Ry.* (1877), 2 *Ex. D.* 437; *Feuerherd v. London General Omnibus Co.*, [1918] 2 K. B. 565.

**682. ———.]—***GATHERCOLE v. SMITH*, No. 655, *ante*.

**683. Decision already acted upon.]—***BARCLAY v. WAINWRIGHT* (1807), 14 *Ves.* 68; 33 *E. R.* 446, L. C.

*Annotations:—Reid. Norris v. Harrison* (1817), 2 *Madd.* 268. *Mentd. Hooper v. Rossiter* (1824), *McCle.* 527; *Bouch v. Sproule* (1887), 12 *App. Cas.* 385.

**684. No proof that cases decided without sufficient consideration.]—***CHICK v. RAMSDALE* (1835), 1 *Curt.* 34; 163 *E. R.* 12.

**685. Construction—Of statute.]—**The statute must not be repealed by me further than it has been hitherto repealed by my predecessors, to whose authority I submit (*LORD ELDON, C.*).—*Ex p. WHITBREAD* (1812), 19 *Ves.* 209; 34 *E. R.* 496; *sub nom. Re SHAW, Ex p. WHITBREAD*, 1 *Rosc.* 299, L. C.

**Admiralty courts—How far bound by decisions of common law courts.]—***See* *ADMIRALTY*, Vol. I., p. 102, Nos. 37–44.

#### (b) Conflicting Decisions.

**686. General rule.]—**As the authorities have been in some degree opposed, it is necessary to decide the point upon principle (*ERLE, J.*).—*ALCOCK v. SUTCLIFFE* (1847), 16 L. J. Q. B. 129; 8 L. T. O. S. 395; 11 *Jur.* 126.

**687. ———.]—**This ct. will not review a decision of a contemporary ct. of co-ordinate authority, unless there has been a conflict of decision, or such decision is at variance with a long line of authorities.—*Re BULLER'S SETTLEMENT* (1862), 8 *Jur.* N. S. 205.

**688. Whether last decision binding.]—**There is no such rule in this ct. as that referred to, which is a rule of the Ct. of K. B. It appears to me very hard that where the decisions are at variance the party is to be bound by the last (*ABINGER, C.B.*).—*KEY v. MACKYNTIRE* (1837), 5 *Dowl.* 463; 1 *Jur.* 24.

**689. ———.]—***Qu.*: where a ct. pronounces a decision opposed to a current of prior authorities, whether another ct. of co-ordinate jurisdiction is bound to follow the latest decision?—*WATTS v. REES* (1854), 9 *Exch.* 696; 2 C. L. R. 1278; 23 L. J. Ex. 238; 23 L. T. O. S. 177; 18 *Jur.* 433;

the highest ct. of Ontario, while it remains unreversed by a tribunal having appellate jurisdiction over it ought not to be set aside or ignored, simply because other ct., not possessing appellate jurisdiction over it, & themselves subject to reversal by higher ct., have subsequently expressed views that may appear to be not in harmony with the decision.—*JACOBS v. BEAVER SILVER COBALT MINING CO.* (1908), 17 O. L. R. 496; 19 O. W. R. 803.—*CAN.*

**688 ii. ———.]—**Where there are two reported decisions, each entitled *primd facie* to equal weight, a judge is not at liberty to depart from either, & is at liberty to follow that which commends itself most to him.—*HAMILTON v. HAMILTON* (1920), 47 O. L. R. 359; 14 O. W. N. 133.—*CAN.*



**Sect. 4.—Decisions of particular courts—How far binding:** *Sub-sect. 7, B. (b), C. & D.; sub-secta. 8, 9, 10 & 11.]*

2 W. R. 468; *on appeal, sub nom.* REES v. WATTS (1855), 11 Exch. 410, Ex. Ch.

**Annotations:—***Mentd.* Mardall v. Thellusson (1856), 6 E. & B. 976; Newell v. National Provincial Bank of England (1876), 1 C. P. D. 496; Hallett v. Hallett (1879), 13 Ch. D. 232; *Re* Gregson, Christison v. Bolam (1887), 36 Ch. D. 223; Watkins v. Lindsay (1898), 67 L. J. Q. B. 382; Bennett v. White, [1910] 2 K. B. 1; *Re* Peruvian Ry. Construction Co., [1915] 2 Ch. 144.

#### C. Decisions from which Appeal lies.

**690. General rule—Binding.]**—Where a cause can be taken to a ct. of error, a ct. ought to be bound by a decision on the point pronounced by a ct. of co-ordinate jurisdiction: *aliter* where the cause cannot be taken to a ct. of error.—TAYLOR v. BURGESS (1859), 5 H. & N. 1; 29 L. J. Ex. 7; 1 L. T. 12; 5 Jur. N. S. 1317; 8 W. R. 27; 157 E. R. 1076.

**Annotations:—***Mentd.* *Re* Davies & Troughton, *Ex p.* Clennell (1861), 4 L. T. 60; Ewin v. Lancaster (1865), 6 B. & S. 571.

**691. ———.]**—Where there is power to appeal, the cts. are bound by the decision of cts. of co-ordinate jurisdiction (GROVE, J.).—CASSON v. CHURCHLEY (1884), 53 L. J. Q. B. 335; 50 L. T. 568.

**Annotation:—***Mentd.* Read v. Joannon (1890), 25 Q. B. D. 300.

**692. Opinion by way of advice.]**—*Semble*: an opinion given by a superior ct. of law by way of advice & from which there is no appeal, is not as binding on co-ordinate cts. as a judgment would be.—SUNDERLAND-NEAR-THE-SEA OVERSEERS v. SUNDERLAND UNION GUARDIANS (1865), 18 C. B. N. S. 531; 34 L. J. M. C. 121; 13 L. T. 239; 11 Jur. N. S. 688; 13 W. R. 943; 144 E. R. 551.

**Annotations:—***Mentd.* Ipswich Dock Comrs. v. St. Peter, Ipswich Overseers (1866), 7 B. & S. 310; *Re* v. Battle Union (1866), L. R. 2 Q. B. 8; *Re* v. L. & N. W. Ry. (1874), L. R. 9 Q. B. 134; West Middlesex Waterworks v. Coleman, Coleman v. West Middlesex Waterworks (1885), 14 Q. B. D. 529; Bradford-on-Avon Assmt. Com. v. White, [1898] 2 Q. B. 630; Poplar Assmt. Com. v. Roberts, [1922] 2 A. C. 93.

#### D. Decisions at Nisi Prius.

**693. General rule—Not binding.]**—The Master of the Rolls considers this point bound down by the decision of LORD KENYON at *Nisi Prius*. No one will suspect me of not giving all due weight to any opinion of LORD KENYON, but I must know a great deal more than I do before that determination at *Nisi Prius* will decide my judgment (LORD ELDON, C.).—CHURCH v. BROWN (1808), 15 Ves 258; 33 E. R. 752, L. C.

**Annotations:—***Refd.* Abrahams v. MacFisheries, [1925] 1 K. B. 18. *Mentd.* Browne v. Raban (1808), 15 Ves. 528; Blakesley v. Wheldon (1841), 1 Hare, 176; Buckland v. Papillon (1866), L. R. 1 Eq. 477; Bartlett v. Greene (1874), 30 L. T. 553; Wall v. City of London Real Property Co. (1874), 30 L. T. 53; Hodgkinson v. Crowe (1875), 10 Ch. App. 622; Hampshire v. Wickens (1878), 7 Ch. D. 552; McKay v. McNally (1879), 41 L. T. 230; *Re* Lander & Bagley's Contract, [1892] 3 Ch. 41; David v. Sablin, [1893] 1 Ch. 523; West Ham Central Charity Board v. East London Waterworks Co., [1900] 1 Ch. 624; Grove v. Portal, [1902] 1 Ch. 72; Jackson v. Simons, [1923] 1 Ch. 373; Koeves v. Dean, Nunn v. Pellegrini, [1924] 1 K. B. 685; Russell v. Boecham, [1924] 1 K. B. 526.

**694. ———.]**—It is utterly impossible for any judge to decide at once rightly upon every point which comes before him at *Nisi Prius*.

#### PART XVII. SECT. 4. SUB-SECT. 7.—C.

**690 i. General rule—Binding.]**—TRANSPORT TRADING & AGENCY CO. OF W. A., LTD. v. SMITH (1906), 8

W. A. L. R. 33.—AUS.

#### PART XVII. SECT. 4. SUB-SECT. 7.—D.

**693 i. General rule—Not binding.]**—

Upon this case we are bound to differ from him (LORD MANSFIELD).—FENTUM v. POCCOCK (1813), 5 Taunt. 192; 1 Marsh. 14; 128 E. R. 660.

**Annotations:—***Refd.* Cowper v. Godmond (1833), 2 L. J. C. P. 162. *Mentd.* Bank of Ireland v. Beresford (1818), 6 Dow, 233; *Re* Renton, *Ex p.* Glendinning (1819), Buck, 517; Price v. Edmunds (1830), 10 B. & C. 578; Nichols v. Norris (1831), 3 B. & Ad. 41; Simpson v. Clarke (1835), 2 Cr. M. & R. 342; *Re* Black & Cope, *Ex p.* Frew (1853), 1 Bankr. & Ins. R. 156; Manley v. Boycot (1853), 2 E. & B. 46; Strong v. Foster (1855), 17 C. B. 201; Ewin v. Lancaster (1865), 6 B. & S. 571.

**695. ———.]**—One judge is not bound by the decision of another judge on a point of law at *Nisi Prius* (BRAY, J.).—FORSTER v. BAKER, [1910] 2 K. B. 636; 79 L. J. K. B. 664; 102 L. T. 29; *sub nom.* BOWLES v. BAKER, 26 T. L. R. 243; *on appeal, sub nom.* FORSTER v. BAKER, [1910] 2 K. B. 641, C. A.

**Annotations:—***Mentd.* *Re* Freshwater, Yarmouth & Newport Ry. (1913), 29 T. L. R. 568; Rothschild v. Fisher, [1920] 2 K. B. 243; *Re* Steel Wing Co., [1921] 1 Ch. 349.

#### SUB-SECT. 8.—RAILWAY AND CANAL COMMISSION.

**696. On itself.]**—The decisions of the Railway Commission since its commencement are binding on the ct.—DIDCOT, NEWBURY & SOUTHAMPTON RY. CO. v. GREAT WESTERN RY. CO. & LONDON & SOUTH WESTERN RY. CO. (1896), 66 L. J. Q. B. 33; 75 L. T. 401; 45 W. R. 282; 9 Ry. & Can. Tr. Cas. 210; *on appeal*, [1897] 1 Q. B. 33, C. A.

**Annotations:—***Apld.* Pickfords v. L. & N. W. Ry. (1905), 74 L. J. K. B. 634. *Mentd.* Plymouth, Devonport & South-Western Junction Ry. v. G. W. Ry. & L. & S. W. Ry. (1899), 10 Ry. & Can. Tr. Cas. 68.

**697. ———.]**—The decisions of the Railway & Canal Comrs. Ct. since its commencement are binding upon the ct., though the constitution of the ct. may now be different.—PICKFORDS, LTD. v. LONDON & NORTH WESTERN RY. CO., [1905] 1 K. B. 752; 74 L. J. K. B. 634; 92 L. T. 607; 53 W. R. 468; 21 T. L. R. 381; 12 Ry. & Can. Tr. Cas. 154, C. A.

**Annotation:—***Mentd.* Pickfords v. L. & N. W. Ry. (1907), 13 Ry. & Can. Tr. Cas. 31.

**698. Bound by decision of co-ordinate jurisdiction—Queen's Bench Division.]**—The Railway & Canal Commission is a ct. of co-ordinate jurisdiction with, & is bound by the decision of, the Q. B. Div.—SOWERBY & CO., LTD. v. GREAT NORTHERN RY. CO. (1891), 60 L. J. Q. B. 467; 65 L. T. 546; 7 T. L. R. 392; 7 Ry. & Can. Tr. Cas. 150, C. A.

**Annotations:—***Consd.* Foster v. G. E. Ry. (1920), 37 T. L. R. 268. *Mentd.* A-G v. Manchester Corp., [1906] 1 Ch. 643; Foster v. G. E. Ry., [1920] 2 K. B. 574.

#### SUB-SECT. 9.—COMMITTEE FOR PRIVILEGES.

*See* PEERAGES & DIGNITIES.

#### SUB-SECT. 10.—PARLIAMENTARY COMMITTEES.

**699. Not receivable as authorities.]**—Decisions of committees of the House of Commons may be cited so far as the reasoning goes, but not as authorised (TINDAL, C.J.).—WHITHORN v. THOMAS (1844), 7 Man. & G. 1; Bar. & Arn. 259; Cox & Atk. 29; 1 Lut. Reg. Cas. 125; Pig. & R. 109;

One judge is not bound by the decision of another judge on a point of law at *nisi prius*.—RURAL MUNICIPALITY OF BRATTS LAKE v. HUDSON'S BAY CO., [1918] 2 W. W. R. 962; 11 Sask. L. R. 357.—CAN.

8 Scott, N. R. 783; 14 L. J. C. P. 38; 4 L. T. O. S. 135, A; 9 J. P. 89; 8 Jur. 1008; 135 E. R. 1.

*Annotations*:—**Reid**, Ford v. Harington (1869), 1 Hop. & Colt. 331. **Mentd.** R. v. Stapleton (1853), 22 L. J. M. C. 102; Attenborough v. Thompson (1857), 3 Jur. N. S. 1307; Kingland v. Blackwell (1857), 6 W. R. 59; Dunston v. Paterson (1858), 5 C. B. N. S. 367; Betts v. Menzies & Wilbey (1860), 6 Jur. N. S. 1290; Curtis v. Blight (1861), 11 C. B. N. S. 95; Scott v. Durant (1865), 18 C. B. N. S. 205; R. v. Exeter Corp'n, Dipstale's Case (1868), L. R. 4 Q. B. 114; Bond v. St. George, Hanover Square, Overseers (1870), L. R. 6 C. P. 312; Beal v. Ford (1877), 26 W. R. 146; Barlow v. Smith (1892), 9 T. L. R. 57.

**700.** ———.]—**FORD v. HARINGTON** (1869), L. R. 5 C. P. 282; 1 Hop. & Colt. 331; 39 L. J. C. P. 107.

*Annotation*:—**Mentd.** Harris v. Phillips, [1891] 1 Q. B. 267.

#### SUB-SECT. 11.—SCOTTISH COURTS.

**701. General rule — Not binding — Although treated with respect.**—It was said that there was an authority, although not strictly binding on us, but yet a very high authority indeed, of the Ct. of Session, & one which if in point I should pay the greatest possible respect to, though we might not feel ourselves bound by it (FIELD, J.).—**GREAT WESTERN RY. CO. v. RAILWAY COMRS.** (1881), 7 Q. B. D. 182; 45 L. T. 65; *sub nom.* **GREAT WESTERN RY. CO. v. RAILWAY COMRS., Re BROWN**, 50 L. J. Q. B. 483; 29 W. R. 901; *sub nom.* **BROWN v. GREAT WESTERN RY. CO.**, 3 Ry. & Can. Tr. Cas. 523, D. C.; *on appeal, sub nom.* **GREAT WESTERN RY. CO. v. RAILWAY COMRS.**, 7 Q. B. D. 192, C. A.

*Annotations*:—**Reid**, Central Wales & Carmarthen Junction Ry. & Mid-Wales Ry. v. G. W. Ry., L. & N. W. Ry., Mid. Ry., & Pembroke & Tenby Ry. (1882), 4 Ry. & Can. Tr. Cas. 110. **Mentd.** Brown v. G. W. Ry. (1882), 9 Q. B. D. 744; Distington Iron Co. v. L. & N. W. Ry., Furness Ry. & Cleator & Workington Ry. (1889), 6 Ry. & Can. Tr. Cas. 108; R. v. Ry. Comrs. & Distington Iron Co. (1889), 22 Q. B. D. 642; Davis v. Taff Vale Ry., (1895) A. C. 542; West Ham (corp'n) v. G. E. Ry. (1895), 64 L. J. Q. B. 340.

**702.** ———.]—Although we ought to pay respect to the opinion on a point of law common to both England & Scotland expressed by that ct. [i.e. Ct. of Session] their decisions cannot be considered binding here (COTTON, L.J.).—**JOHNSON v. RAYLTON, DIXON & CO.** (1881), 7 Q. B. D. 438; 50 L. J. Q. B. 753; 45 L. T. 374; 30 W. R. 350, C. A.

*Annotation*:—**Mentd.** Stacey v. Chilworth Gunpowder Co. (1889), 24 Q. B. D. 90.

**703.** ———.]—The Scottish case, . . . which, though not binding as an authority, is nevertheless entitled to the greatest respect, . . . is not in point (LORD COLERIDGE, C.J.).—**IVAY v. HEDGES** (1882), 9 Q. B. D. 80, D. C.

*Annotation*:—**Mentd.** Batchelor v. Fortescue (1883), 11 Q. B. D. 474.

**704.** ———.]—Though that decision (of Ct. of Session) is not absolutely binding upon us, the Ct. of Session not being a ct. of co-ordinate jurisdiction with ourselves, far be it from me to say that the decisions of that ct. are not entitled to the greatest consideration & respect (DAY, J.).—**MORGAN v. LONDON GENERAL OMNIBUS CO.** (1883), 12 Q. B. D. 201; 50 L. T. 687; 32 W. R. 416, D. C.; *affd.* (1884), 13 Q. B. D. 832, C. A.

*Annotations*:—**Mentd.** Jackson v. Hill (1884), 13 Q. B. D. 618; Cook v. North Metropolitan Tram Co. (1887), 18 Q. B. D. 683; Hunt v. G. N. Ry., (1891) 1 Q. B. 601; Lamb v. G. N. Ry. (1891), 65 L. T. 225; Bound v. Lawrence, [1892] 1 Q. B. 226; Maynard v. Robinson (1903), 19 T. L. R. 492; Kirkdale Burial Board v. Liverpool Corp'n., [1904] 1 Ch. 829; Hoare v. Green (1907), 76 L. J. K. B. 730; Smith v. Associated Omnibus Co., [1907] 1 K. B. 916; Rushbrook v. Grimsby Palace Theatre Co. (1908), 99 L. T. 18; Whelan v. Great Northern Steam Fishing Co. (1909), 100 L. T. 913; Re Dairyman's Foremen, Re Tailors' Cutlers (1912), 28 T. L. R. 587.

**705.** ———.]—I agree with the construction of this statute adopted by the Ct. of Appeal in Scotland, although we are not bound by it. We look carefully to the decisions of such cts. for assistance (ESHER, M.R.).—**R. v. INCOME TAX COMRS.** (1888), 22 Q. B. D. 296; 58 L. J. Q. B. 196; 60 L. T. 446; 53 J. P. 198; 37 W. R. 294; 5 T. L. R. 163, C. A.; *affd. sub nom.* **INCOME TAX SPECIAL PURPOSES COMRS. v. PEMSEL**, [1891] A. C. 531, H. L.

*Annotations*:—**Reid**, Blair v. Duncan, [1902] A. C. 37; Grimond v. Grimond, [1905] A. C. 603. **Mentd.** Charterhouse School v. Lamarque (1890), 25 Q. B. D. 121; I. R. Comrs. v. Scott, Re Bootham Ward Strays, York, [1892] 2 Q. B. 152; Maughan v. Free Church of Scotland (1893), 3 Tax Cas. 207; Re Foveaux, Cross v. London Antivivisection Soc., [1895] 2 Ch. 501; Re Nottage, Jones v. Palmer, [1895] 2 Ch. 649; Southwell v. Royal Holloway College, Egham, [1895] 2 Q. B. 487; Re Buok, Bruty v. Mackey, [1896] 2 Ch. 727; Cumack v. Edwards, [1896] 2 Ch. 679; Re Macduff, Macduff v. Macduff, [1896] 2 Ch. 451; Re Perry Almshouses, Re Ross' Charity, [1899] 1 Ch. 21; L. C. C. v. South Metropolitan Gas Co., [1903] 2 Ch. 532; Re Church Patronage Trust, Laurie v. A.-G., [1904] 2 Ch. 613; Re Good, Harington v. Watts, [1905] 2 Ch. 60; Lord Advocate v. Moray, [1905] A. C. 531; Re Manser, A.-G. v. Lucas, [1905] 1 Ch. 68; Re Sidney, Hingston v. Sidney (1908), 98 L. T. 625; R. v. Income Tax Special Comrs., Ex p. University College of North Wales (1909), 78 L. J. K. B. 576; R. v. Income Tax Special Purposes Comrs., Ex p. Essex Hall (1911), 5 Tax Cas. 636; Re Wedgwood, Allen v. Wedgwood, [1915] 1 Ch. 113; Re Verrall, National Trust for Places of Historic Interest or Natural Beauty v. A.-G., [1916] 1 Ch. 100; G. W. Ry. & Mid. Ry. v. Bristol Corp'n. (1918), 87 L. J. Ch. 414; Houston v. Burns, [1918] A. C. 337; Bourne v. Keane, [1919] A. C. 815; R. v. Income Tax Special Purposes Comrs., Ex p. Dr. Barnardo's Homes (1919), 89 L. J. K. B. 194; Re Bennett, Gibson v. A.-G., [1920] 1 Ch. 305; Rotunda Hospital (Dublin) v. Coman (1920), 7 Tax Cas. 517; Barber v. Chudley (1922), 92 L. J. K. B. 711; R. v. Income Tax Special Comrs., Ex p. Rank's Trustees (1922), 127 L. T. 651; Re Hummelfenberg, Beatty v. London Spiritualist Alliance, [1923] 1 Ch. 237; Jackson v. Voss, [1923] 2 K. B. 357; Re Ludlow, Hender Jones v. A.-G. (1923), 93 L. J. Ch. 30; Re Shakespeare Memorial Trust, Lytton v. A.-G., [1923] 2 Ch. 398; Re Tetley, National Provincial & Union Bank of England v. Tetley, [1923] 1 Ch. 258; A.-G. v. National Provincial & Union Bank of England, [1924] A. C. 262; R. v. Minister of Labour, [1924] 2 K. B. 210; Vorge v. Somer, ville, [1924] A. C. 496; Brighton College v. Marriott, [1925] 1 K. B. 312; Chosterman v. Federal Taxation Comr. (1925), 42 T. L. R. 124; Re Gray, Todd v. Taylor, [1925] Ch. 362; R. v. Income Tax Special Comrs., Ex p. Headmasters' Conference, Same v. Same, Ex p. Incorporated Assoc. of Preparatory Schools (1925), 41 T. L. R. 651.

**706. Law common to England & Scotland.**—Decisions of the Scottish cts. are received as authority here, if the law on which they turn be common to England & Scotland.—**BLAKE v. MIDLAND RY. CO.** (1852), 18 Q. B. 93; 21 L. J. Q. B. 233; 18 L. T. O. S. 330; 10 Jur. 502; 118 E. R. 35.

*Annotations*:—**Mentd.** Hadley v. Baxendale (1854), 9 Exch. 341; Stanton v. Collier (1854), 3 E. & B. 274; Franklin v. S. E. Ry. (1858), 3 H. & N. 211; Lynch v. Knight (1801), 5 L. T. 291; Hebdon v. West (1863), 3 B. & S. 579; Head v. G. E. Ry. (1868), 9 B. & S. 714; The George & Richard (1871), L. R. 3 A. & E. 466; Rowley v. L. & N. W. Ry. (1873), L. R. 8 Exch. 221; Griffiths v. Dudley (1882), 47 L. T. 10; Kenrick v. Lawrence (1890), 25 Q. B. D. 99; Day v. Markham (1904), 6 W. C. C. 115; British Columbia Electric Ry. v. Gentile, [1914] A. C. 1034; Union S.S. Co. of New Zealand v. Robin, [1920] A. C. 654; Barnett v. Cohen, [1921] 2 K. B. 461.

**707. Construction — Statute applicable to England & Scotland.**—In a case arising on the construction of a statute equally applicable to England & Scotland it is the duty of an English ct. of first instance to follow a unanimous decision of the Ct. of Session.

Where the point has been decided by the Ct. of Session & where the question is one upon construction of a statute extending to Scotland as well as England, I think my duty as a judge of first instance is to follow that decision (SWINFEN EADY, J.).—**Re HARTLAND, BANKS v. HARTLAND**, [1911] 1 Ch. 459; *sub nom.* **Re DIXON HARTLAND**,



**719. American courts—Decisions useful as guide.]**—American cases are not a precedent, but only a guide to us, though decided with the greatest learning & ingenuity (ERSKINE, C.J.).—*Re TRYE, Ex p. GUILLEBERT* (1838), as reported in 3 Mont. & A. 455, Ct. of R.

**720. ———.]**—*READHEAD v. MIDLAND RY. Co.*, No. 748, *post*.

**721. ———.]**—Arbitration cases may be cited as the opinions of learned men just as the decisions of the judges of the United States are cited, but they are in no way binding on the ct. (MELLISH, L.J.).—*Re LANKESTER, Ex p. PRICE* (1875), as reported in 23 W. R. 844, L. J.J.

*Annotations:—Mentd.* Sovereign Life Assce. v. Dodd, [1892] 2 Q. B. 573; *Re Dalnrey, Ex p. Mant*, [1900] 1 Q. B. 546; *Paddy v. Clutton*, [1920] 2 Ch. 554; *Re National Benefit Assce.*, [1924] 2 Ch. 339; *Re City Life Assce.* (1925), 42 T. L. R. 45.

**722. ———.]**—*NORTH BRITISH & MERCANTILE INSURANCE CO. v. LONDON, LIVERPOOL & GLOBE INSURANCE CO.*, No. 717, *ante*.

**723. ———.]**—A judgment of a ct. in New York is not an authority in a case arising in England, but might influence the House to come to the same conclusion (LORD WATSON).—*CASTRO v. R.* (1881), 6 App. Cas. 229; 50 L. J. Q. B. 497; 44 L. T. 350; 45 J. P. 452; 29 W. R. 609; 14 Cox, C. C. 546, H. L.; *affg. S. C. sub nom. R. v. CASTRO* (1880), 5 Q. B. D. 490, C. A.

*Annotations:—Mentd.* Dixon v. Farrer (1886), 17 Q. B. D. 658; *R. v. Poole Corpn.* (1887), 19 Q. B. D. 602, 683; *R. v. Thompson*, [1914] 2 K. B. 99.

**724. ———.]**—The practice of quoting American decisions as authorities, in the same way as if they were decisions of our own cts., is wrong (LORD HALSBURY, C.).—*Re MISSOURI S.S. Co.* (1889), as reported in 42 Ch. D. 321, C. A.

*Annotations:—Mentd.* South African Breweries v. King, [1899] 2 Ch. 173; *Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333; *Royal Exchange Assce. Corpn. v. Sjöforskrings Akt. Vega* (1902), 71 L. J. K. B. 739; *Kaufman v. Gerson*, [1903] 2 K. B. 114; *Moulis v. Owen*, [1907] 1 K. B. 746; *Spiers v. Hunt*, [1908] 1 K. B. 720; *Saxby v. Fulton*, [1909] 2 K. B. 208; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; *Dynamit Act. v. Rio Tinto Co.*, [1918] A. C. 292; *Trinidad Shipping Co. v. Alston*, [1920] A. C. 888; *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K. B. 730.

**725. ———.]**—The decisions of the American cts. are not in any sense binding, but the English cts. read them with respect & they afford useful illustrations (WALTON, J.).—*APOLLINARIS Co. v. NORD DEUTSCHE INSURANCE CO.* [1904] 1 K. B. 252; 73 L. J. K. B. 62; 80 L. T. 670; 52 W. R. 174; 20 T. L. R. 79; 9 Asp. M. L. C. 526; 9 Com. Cas. 91.

*Annotation:—Mentd.* British & Foreign Marine Insce. v. Gaunt, [1921] 2 A. C. 41.

**726. ———.]**—American authorities are consulted for edification & the ct. will attend to them in the hope of getting guidance from them although they cannot be cited here as authorities.—*AMERICAN SURETY CO. OF NEW YORK v. WRIGHTSON* (1910), 103 L. T. 663; 27 T. L. R. 91; 16 Com. Cas. 37.

*Annotation:—Mentd.* The Colorado, [1923] P. 102.

**727. ———.]**—(1) When American cases are cited in English cts., as they often are, upon questions involving the decision of English law, they are treated with the utmost respect & as valuable guides, but they are not binding upon our cts., & we do not always follow them (BAILHACHE, J.).

(2) When the question is one of American law, & the opinion of experts differ & the American cases cited are in conflict, an English judge would, I presume, treat them in the same way as he does conflicting English decisions of equal authority & follow the cases which seem to him in accord-

ance with principles (BAILHACHE, J.).—*GUARANTY TRUST CO. OF NEW YORK v. HANNAY & Co.*, [1918] 1 K. B. 43; 117 L. T. 754; 33 T. L. R. 559; *on appeal*, [1918] 2 K. B. 623, C. A.

*Annotations:—Generally. Mentd.* *Re Comptoir Commercial Anversois & Power*, [1920] 1 K. B. 868; *MacLaine v. Eccott* (1924), 133 L. T. 173.

**728. ———.]**—*Decision of highest tribunal in State of New York.]*—*GUARANTY TRUST CO. OF NEW YORK v. HANNAY & Co.*, No. 718, *ante*.

**729. ———.]**—*Conflicting decisions.]*—*GUARANTY TRUST CO. OF NEW YORK v. HANNAY & Co.*, No. 727, *ante*.

**730. French courts.]**—Recent French decisions, though entitled to the highest respect & valuable as illustrations, are not of binding authority in Quebec (LORD MACNAGHTEN).—*MCARTHUR v. DOMINION CARTRIDGE CO.*, [1905] A. C. 72; 74 L. J. P. C. 30; 91 L. T. 698; 53 W. R. 305; 21 T. L. R. 47, P. C.

*Annotations:—Consd.* Quebec Ry., Light, Heat & Power Co. v. Vandry, [1920] A. C. 662. *Mentd.* *Jones v. Canadian Pacific Ry.* (1913), 83 L. J. P. C. 13.

**Recognition of foreign decisions—Generally.]**—*See CONFLICT OF LAWS*, Vol. XI., pp. 444 *et seq.*

**Grants of probate & letters of administration.]**—*See CONFLICT OF LAWS*, Vol. XI., pp. 378–380.

#### SUB-SECT. 15.—ARBITRATORS.

**731. General rule—Not binding—Useful as guide.]**—*PARLBY'S CASE* (1871), Reilly's Report of Lord Cairns' Decisions in Albert Arbitration, Part II., p. 48.

*Annotation:—Reid.* *Re Lankester, Ex p. Price* (1875), 23 W. R. 811.

**732. ———.]**—*Re LANKESTER, Ex p. PRICE*, No. 721, *ante*.

#### SECT. 5.—REPORTS OF JUDICIAL DECISIONS.

**733. Must be by barrister—Effect of barrister's name.]**—If a member of the bar produces a manuscript note of a decision, & declares that he is certain of its being a correct note of the point decided, the ct. will attend to it; but it is different when a long manuscript judgment is produced.

The reason why a long judgment may be cited as authority when in print, though it cannot be cited at all in manuscript, is that the reporter, who is an impartial person, gives the authority of his name to the matter (LORD BROUGHAM, C.).—*Re RICHARDS, Ex p. HAWLEY* (1834), 2 Mont. & A. 426, L. C.

*Annotation:—Mentd.* *Benjamin v. Belcher* (1840), 11 Ad. & El. 350.

**734. ———.]**—*Jurist Reports.]*—*Semble*: cases reported by barristers in *The Jurist* were receivable as authorities, & the ct. would be denying itself much valuable assistance in ascertaining what the law was if it were to refuse to receive the citation of cases reported by barristers in such publications.—*FRANCOME v. FRANCOME* (1865), 5 New Rep. 289; 11 L. T. 757; 11 Jur. N. S. 123; 13 W. R. 355, L. C.

**735. ———.]**—*Times Law Reports.]*—Where the ct. was referred to a case only reported in the *Times Law Reports*, WILLIS, J., said that reports of decisions republished from a newspaper were not always accurate, & declined to accept the case as an authority which precluded the ct. from considering the question in issue.—*STRAKER v. REYNOLDS* (1889), 22 Q. B. D. 262; 37 W. R. 379, D. C.

*Elder v. Carter* (1890), 6 T. L. R. Frere, [1891] 1 Ch. 323.

5.—*Reports of judicial decisions.*]

**736.** ———.]—*The Times Law Reports* being reports made by barristers with their names attached are authorities, & may be cited in ct. (LORD Esher, M.R.).—WEST DERBY UNION GUARDIANS v. ATCHAM UNION GUARDIANS (1889), as reported in 6 T. L. R. 5, C. A.

*Annotations*.—**Mentd.** Manchester Overseers v. Ormskirk Union Grdns. (1890), 24 Q. B. D. 678; Lenden & Winstree Union v. Windsor Union, [1921] 2 K. B. 143.

**737.** ———.]—*Reports in newspapers.*—Passages from cases reported only in a newspaper were read by the ct. in their judgment, the reports having been furnished to the ct. by a member of the bar, who had reported them for a newspaper, & who was able to vouch for the substantial correctness of his own reports.

The circumstance that few cases on a particular subject out of many which come before the ct. are to be found in the books must be the excuse for citing reports from a newspaper, which, however accurate & valuable they may be for their own objects, are generally reported rather with a view to the facts than to the law; & to cite which, therefore, except where there seems to be a real reason for it, would be a bad example (LORD COLERIDGE, C.J.).—R. v. LABOUCHERE (1884), 12 Q. B. D. 320; 53 L. J. Q. B. 362; 48 J. P. 165; 32 W. R. 861; *sub nom.* R. v. LABOUCHERE, VALLOMBROSA'S (DUKE) CASE, 50 L. T. 177; 15 Cox, C. C. 415, D. C.

*Annotations*.—**Mentd.** R. v. Yates (1884), 1 T. L. R. 193; *Re* An Application for Attachment for Contempt of Court (1886), 2 T. L. R. 351; R. v. Ennor (1887), 3 T. L. R. 366; Wood v. Cox (1888), 4 T. L. R. 652; R. v. Masters (1889), 6 T. L. R. 44; R. v. Russell, *Ex p.* Morris (1905), 21 T. L. R. 749; *Ex p.* Freeman-Mitford (1914), 30 T. L. R. 693; Weld-Blundell v. Stephens, [1919] 1 K. B. 520.

**738.** ———.]—*The Times.*—The report of a case from *The Times* was allowed to be read, having been verified by an affidavit by the barrister who had acted as *The Times* reporter.—WALTER v. EMMOTT (1885), 54 L. J. Ch. 1061, n. C. A.

**739. Manuscript note.**—*Re* RICHARDS, *Ex p.* HAWLEY, No. 733, *ante*.

**740. Value of particular reports**—*Anderson's Reports.*—ANDERSON'S authority as a reporter stands high (HAMILTON, J.).—A-G. v. REYNOLDS, [1911] 2 K. B. 888; 80 L. J. K. B. 1073; 104 L. T. 852.

**741.** ———.]—*Atkyn's Reports.*—*Atkyn's Reports* are extremely inaccurate (LORD MANSFIELD, C.J.).—OLIVE v. SMITH (1813), as reported in 5 Taunt. 56; 128 E. R. 607.

*Annotations*.—**Mentd.** Arbouin v. Tritton (1816), Holt, N. P. 408; Graham v. Russell (1816), 2 Marsh. 561; Hutton v. Bragg (1816), 2 Marsh. 339; Key v. Flint (1817), 8 Taunt. 21; Rose v. Hart (1818), 8 Taunt. 499; Sampson v. Burton (1820), 2 Brod. & Bing. 89; Easton v. Cato (1822), 1 Dow. & Ry. K. B. 530; Young v. Bank of Bengal (1836), 1 Moo. P. C. C. 150; Pearnley v. Wright (1840), 1 Scott, N. R. 657; Alsager v. Currie (1844), 12 M. & W. 751; Bittleston v. Timmis (1845), 14 L. J. C. P. 117; Naoroji v. Chartered Bank of India (1868), L. R. 3 C. P. 444.

**742.** ———.]—*Barnardiston's Reports.*—LORD MANSFIELD absolutely forbade the citing *Barnardiston's Reports, Chancery*, for it would be only misleading students, to put them upon reading it. He said it was marvellous, however, to those who knew the Serjeant & his manner of taking notes, that he should so often stumble upon what was right; but yet, there was not one case in his book, which was so throughout.—ZOUCH d. WOOLSTON v. WOOLSTON (1761), as reported in 2 Burr. 1136; 97 E. R. 752.

*Annotations*.—**Mentd.** Doe d. Milborne v. Milborne (1788), 2 Term Rep. 721; Roe d. Brune v. Prideaux (1808), 10 East, 158.

**743.** ———.]—*BARNARDISTON* was a bad reporter (LORD KENYON, C.J.).—R. v. STONE (1801), 1 East, 639; 102 E. R. 247.

*Annotations*.—**Mentd.** R. v. Crispe (1806), 3 Smith, K. B. 377; R. v. Turner (1816), 5 M. & S. 206; Doe d. Bridger v. Whitehead (1838), 3 Nev. & P. K. B. 557; R. v. Hughes (1879), 4 Q. B. D. 614.

**744.** ———.]—In *Barnardiston's Reports, Chancery*, there are reports of very great authority (LORD ELDON).—DUFFIELD v. ELWES (1827), as reported in 1 Bli. N. S. 497; 4 E. R. 959, H. L.

*Annotations*.—**Mentd.** Duffield v. Duffield (1829), 1 Dow. & Cl. 395; Staniland v. Willott (1852), 3 Mac. & G. 664; Veal v. Veal (1859), 27 Beav. 303; *Re* Patterson, Mitchell v. Smith (1864), 4 New Rep. 131; *Re* Mead, Austin v. Mead (1880), 43 L. T. 117; *Re* Richardson, Shillito v. Hobson (1885), 53 L. T. 746; *Re* Dillon, Duffin v. Duffin (1890), 44 Ch. D. 76; *Re* Beaumont, Beaumont v. Ewbank, [1902] 1 Ch. 889; *Re* Wasserberg, Union of London & Smith's Bank v. Wasserberg, [1915] 1 Ch. 195; *Re* Lee, Treasury Solicitor v. Parrott (1918), 87 L. J. Ch.

**745.** ———.]—*Bunbury's Reports.*—The cases in *Bunbury's Reports* are loose notes which were never meant to be published (LORD MANSFIELD, C.J.).—TINKLER v. POOLE (1770), as reported in 5 Burr. 2657; 98 E. R. 396.

*Annotations*.—**Consd.** R. v. Edwards (1853), 9 Exch. 32. **Refd.** Shipwick v. Blanchard (1795), 6 Term Rep. 298.

**746.** ———.]—Although LORD MANSFIELD cast some imputation on *Bunbury's Reports*, the learned Serjeant who edited them gives them a very different character; & it may be doubted whether the observations attributed to LORD MANSFIELD were not the result of some hasty expressions on his part, before he was fully aware of the value of the notes. Now Serjeant Wilson, who edited *Bunbury's Reports*, speaks thus about them: "The learned author attended Westminster Hall above forty years, chiefly at the Exchequer bar, but for the last thirty years thereof in that ct. only. He retired in the year 1743, & when he took leave of the ct. had been many years postman there. His long experience in the several branches of business in the Exchequer induced gentlemen of the profession to desire his notes, which in his lifetime were all or the greatest part of them transcribed, are in many hands, & frequently cited in Westminster Hall. From some apprehensions that these cases might get into the press improperly, & come out imperfect, & indeed, by the desire of some gentlemen eminent in the profession, the editor was persuaded to give the public a true copy of such cases only as the author took in ct. with his own hand, & are settled & corrected by himself from his notes." These notes having been collected & published under such circumstances, & by persons of such experience & learning, it certainly appears to me rather a rash proceeding to give them the character which Lord Mansfield is represented to have done. The learned editor proceeds to say: "All the marginal notes in this book are the author's own, except one in page 302 of *Walker v. Jackson, coram* Lord Chancellor Hardwicke, July 22, 1743." Since the expressions of LORD MANSFIELD have been alluded to, I have thought it right thus to bring before the ct. the character given to these very notes by the learned Serjeant who had the responsibility of publishing them, he himself bearing as high character as any member of the bar (PLATT, B.).—R. v. EDWARDS (1853), 9 Exch. 32; 1 C. L. R. 706; 23 L. J. Ex. 42; 21 L. T. O. S. 302; 156 E. R. 14; *on appeal, sub nom.* EDWARDS v. R. (1854), 9 Exch. 628, Ex. Ch.

*Annotations*.—**Mentd.** Wright v. Mills (1859), 4 H. & N. 488; Migotti v. Colvill (1879), 4 C. P. D. 233; Clarke v. Bradlaugh (1881), 8 Q. B. D. 63.

**747.** ———.]—*Campbell's Reports.*—READHEAD v. MIDLAND RY. CO., No. 748, *post*.



**748. — Carrington & Payne's Reports.]—**Counsel having cited two cases from *Espinasse's Reports* & from *Carrington & Payne's Reports*, BLACKBURN, J., said that neither reporter had such a character for intelligence & accuracy as to make it at all certain that the facts were correctly stated, or that the opinion of the judge was rightly understood.

Counsel having cited a case from *Campbell's Reports*, BLACKBURN, J., said that the ct. might depend upon the accuracy of that reporter.

It will be very fit, if the case at bar is taken to a ct. of error, that the reasoning of the American ct. should be carefully & respectfully considered; & if it appear to the ct. of error satisfactory, they may act upon it. But it is clear that we cannot treat the American decision as an authority (BLACKBURN, J.).—*READHEAD v. MIDLAND RY. CO.* (1867), L. R. 2 Q. B. 412; 36 L. J. Q. B. 181; 15 W. R. 831; *sub nom.* *REDHEAD v. MIDLAND RY. CO.*, 8 B. & S. 371; 16 L. T. 485; *on appeal*, *sub nom.* *READHEAD v. MIDLAND RY. CO.* (1869), L. R. 4 Q. B. 379, Ex. Ch.

*Annotations:—Mentd.* Buxton v. N. E. Ry. (1868), 9 B. & S. 824; The Duero (1869), 38 L. J. Adm. 69; Francis v. Cockerell (1870), 10 B. & S. 950; John v. Bacon (1870), L. R. 5 C. P. 437; Stanton v. Richardson, Richardson v. Stanton (1872), L. R. 7 C. P. 421; Wright v. Mid. Ry. (1873), L. R. 8 Exch. 137; Searle v. Laverick (1874), L. R. 9 Q. B. 122; Thorn v. London Corp. (1874), 43 L. J. Ex. 115; Richardson v. G. E. Ry. (1875), L. R. 10 C. P. 486; Kopitoff v. Wilson (1876), 1 Q. B. D. 377; The Virgo (1876), 35 L. T. 519; Randall v. Newsom (1877), 2 Q. B. D. 102; Steel v. State Ind. S.S. Co. (1877), 3 App. Cas. 72; Hymen v. Nye (1881), 6 Q. B. D. 685; Robertson v. Amazon Tug & Lighterage Co. (1881), 7 Q. B. D. 598; Pounder v. N. E. Ry. (1892), 1 Q. B. 385; Maori King (Cargo Owners) v. Hughes, (1895) 2 Q. B. 550; Jackson v. Mumford (1902), 8 Com. Cas. 61; Smitten v. Orient Steam Navigation Co. (1907), 23 T. L. R. 359; Clarke v. West Ham Corp., (1909) 2 K. B. 858; Wing v. London General Omnibus Co., (1909) 2 K. B. 652; Bamfield v. Goole & Sheffield Transport Co., [1910] 2 K. B. 94; The West Coast (1911), 80 L. J. P. 97; Newberry v. Bristol Tramways & Carriage Co. (1912), 107 L. T. 801; Cox v. Coulson, [1916] 2 K. B. 177; Maclean v. Segar, [1917] 2 K. B. 325; Liebig's Extract of Meat Co. v. Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381; Brannigan v. Harrington (1921), 37 T. L. R. 349; Phillips v. Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

**749. — Carthew's Reports.]—**CARTHEW in general was a good reporter (LORD KENYON, C.J.).—*R. v. HEAVEN* (1788), 2 Term Rep. 772; 100 E. R. 416.

*Annotations:—Mentd.* R. v. Portsmouth Corp. (1824), 3 B. & C. 152; R. v. Patteson (1832), 2 L. J. K. B. 33.

**750. — Coke's Reports.]—**Part XII. of *Coke's Reports* is not so accurate as the rest of his reports, not having been published by him in his lifetime but from his notes afterwards (HOLROYD, J.).—*LEWIS v. WALTER* (1821), 4 B. & Ald. 605; 100 E. R. 1058.

*Annotations:—Reid.* M'Pherson v. Daniels (1829), 10 B. & C. 263; Speck v. Phillips (1839), 8 L. J. Ex. 277; Tidman v. Ainslie (1854), 10 Exch. 63. *Mentd.* Roberts v. Brown (1834), 10 Bing. 519; Stockdale v. Hansard (1840), 3 State Tr. N. S. 723.

**751. — — —.]—**Part XII. of *Coke's Reports* is not a book of any great authority (PARKE, J.).—*M'PHERSON v. DANIELS* (1829), 10 B. & C. 263; 5 Man. & Ry. K. B. 251; 8 L. J. O. S. K. B. 14; 109 E. R. 448.

*Annotations:—Reid.* Ward v. Weeks (1830), 7 Bing. 211; Speck v. Phillips (1839), 8 L. J. Ex. 277; Tidman v. Ainslie (1854), 10 Exch. 63. *Mentd.* Delegal v. Highley (1837), 3 Bing. N. C. 950; C— v. Lindsell (1847), 9 L. T. O. S. 24; R. v. Noon (1852), 6 Cox, C. C. 137; Watkin v. Hall (1868), L. R. 3 Q. B. 396; Johnson v. Emerson (1871), L. R. 6 Exch. 329; Allen v. Flood, [1898] A. C. 1.

**752. — — —.]—**It has been said that the two last volumes of *Coke's Reports* have not received his finishing hand. They were not finished I think till after his death, & therefore it

is said they are not quite so much to be depended on as the prior volumes (LORD CRANWORTH, C.).—*WENSLEYDALE PEERAGE CASE* (1856), as reported in 8 State Tr. N. S. 479, 553, H. L.

*Annotations:—Mentd.* Buckhurst Peerage (1876), 3 App. Cas. 1; A.-G. for Dominion of Canada v. A.-G. for Province of Ontario (1897), 67 L. J. P. C. 17; Rhondda's Claim, [1922] 2 A. C. 339.

**753. — Dickens' Reports.]—**Much may, no doubt, be said against the accuracy of many of the reports in *Dickens*; but there are many of them, in which he himself interfered & made suggestions to the ct. I have always considered these cases of higher authority than the rest, because you have there an opportunity of seeing what was suggested by a very experienced officer, & what the ct. did in consequence (LORD COTTENHAM, C.).—*FISHER v. FISHER* (1847), 2 Ph. 236; 16 L. J. Ch. 320; 9 L. T. O. S. 330; 11 Jur. 410; 41 E. R. 933, L. C.

**754. — Dyer's Reports—Marginal notes.]—**The marginal notes in *Dyer* are good authority; they were written by TRELEY, C.J. (BULLER, J.).—*MILWARD v. THATCHER* (1787), 2 Term Rep. 81; 100 E. R. 45.

*Annotations:—Mentd.* R. v. Bristol Corp. (1822), 1 Dow. & Ry. K. B. 389; R. v. Jones (1831), 1 B. & Ad. 677; R. v. Patteson (1832), 1 B. & Ad. 9; R. v. Poole (1837), 1 Jur. 942.

**755. — — —.]—**The marginal notes in *Dyer* are always to be regarded with deference, coming from an authority so considerable as TRELEY, C.J. (GIBBS, C.J.).—*JONES d. HENRY v. HANCOCK* (1816), 4 Dow. 145; 3 E. R. 1119, H. L.

**756. — Godbolt's Reports.]—**A.-G. v. REYNOLDS, [1911] 2 K. B. 888; 80 L. J. K. B. 1073; 104 L. T. 852.

**757. — Gouldsbrough's Reports.]—**A.-G. v. REYNOLDS, [1911] 2 K. B. 888; 80 L. J. K. B. 1073; 104 L. T. 852.

**758. — Equity Cases Abridged.]—**Volume 2 of *Equity Cases Abridged* is of no very high character. It is not so high in character as the first volume (LORD ELDON).—*DUFFIELD v. ELWES* (1827), as reported in 1 Bli. N. S. 407; 4 E. R. 959, H. L.

*Annotations:—Mentd.* Duffield v. Duffield (1829), 1 Dow. & Cl. 395; Staniland v. Willott (1852), 3 Mac. & G. 664; Veal v. Veal (1859), 27 Beav. 303; R. v. Patterson, Mitchell v. Smith (1864), 4 New Rep. 151; R. v. Mead, Austin v. Mead (1869), 43 L. T. 117; R. v. Richardson, Shillito v. Hobson (1885), 53 L. T. 746; R. v. Dillon, Duffin v. Duffin (1890), 44 Ch. D. 76; R. v. Beaumont, Beaumont v. Ewbank, [1902] 1 Ch. 889; R. v. Wasserberg, Union of London & Smith's Bank v. Wasserberg, [1915] 1 Ch. 195; R. v. Lee, Treasury Solicitor v. Parrott (1918), 87 L. J. Ch. 594.

**759. — Espinasse's Reports.]—***Espinasse's Reports*, in days nearer their own time, when their want of accuracy was better known than it is now, were never quoted without doubt & hesitation; & a special reason was often given as an apology for citing that particular case (LORD DENMAN, C.J.).—*SMALL v. NAIKNE* (1849), as reported in 13 Q. B. 840; 116 E. R. 1484.

*Annotation:—Reid.* Wenman v. Mackenzie (1855), 5 E. & B. 447.

**760. — — —.]—***READHEAD v. MIDLAND RY. CO.*, No. 748, *ante*.

**761. — Keble's Reports.]—**SHORT v. COFFIN, No. 765, *post*.

**762. — — —.]—***Levinz's Reports* are entitled to greater consideration than the reports of KEBLE, who was a bad reporter (LORD KENYON, C.J.).—*DOE d. SHORE v. PORTER* (1789), 3 Term Rep. 13; 100 E. R. 429.

*Annotations:—Mentd.* R. v. Stone (1795), 6 Term Rep. 295; James v. Dean (1805), 11 Ves. 383; Wilkinson v. Calvert (1878), 3 C. P. D. 360; Sidebottom v. Holland, [1893] 1 Q. B. 378; Croft v. Blay, [1919] 1 Ch. 277.



Sect. 5.—Reports of judicial decisions.]

**763.** ———.]—**KEBLE** is of no high repute as an accurate reporter; & the ct. would be slow to act on a case in that book, if it were unsupported by others (**WILLIAMS, J.**).—**FARRALL v. HILDITCH** (1859), 5 C. B. N. S. 840; 28 L. J. C. P. 221; 5 Jur. N. S. 962; 7 W. R. 409; 141 E. R. 337.

*Annotations:—***Mentd.** *Sherborn v. Tollemache* (1863), 13 C. B. N. S. 742; *Lay v. Mottram* (1865), 19 C. B. N. S. 479; *Reeves v. Watts* (1866), 7 B. & S. 523; *Jackson v. N. E. Ry.* (1877), 7 Ch. D. 573.

**764.** ———.]—**Leonard's Reports.**—**A.-G. v. REYNOLDS**, [1911] 2 K. B. 888; 80 L. J. K. B. 1073; 104 L. T. 852.

**765.** ———.]—**Levinz's Reports.**—**LEVINZ** is a much better reporter than **KEBLE** (**LORD MANSFIELD, C.J.**).—**SHORT v. COFFIN** (1771), 5 Burr. 2730; 98 E. R. 433.

*Annotations:—***Mentd.** *Burroughs v. Stevens* (1814), 5 Taunt. 554; *Dunbar v. Hitchcock* (1815), 3 M. & S. 591; *Richardson v. Mellish* (1825), 3 Bing. 346; *Marianski v. Cairns* (1852), 19 L. T. O. S. 277.

**766.** ———.]—**DOE d. SHORE v. PORTER**, No. 762, *ante*.

**767.** ———.]—**Lewin's Crown Cases.**—**LEWIN** was not an accurate reporter (**BLACKBURN, J.**).—**R. v. FRANCIS** (1874), as reported in 43 L. J. M. C. 97, C. C. R.

*Annotations:—***Mentd.** *R. v. Cooper* (1875), 1 Q. B. D. 19; *Blake v. Albion Life Assce. Soc.* (1870), 45 L. J. Q. B. 663; *R. v. Stephens* (1888), 58 L. T. 776; *R. v. Rhodes*, [1899] 1 Q. B. 77; *R. v. Ollis*, [1900] 2 Q. B. 758; *R. v. Mean* (1904), 69 J. P. 27; *R. v. Wyatt*, [1904] 1 K. B. 188; *R. v. Bond*, [1906] 2 K. B. 389; *R. v. Charlesworth* (1910), 4 Cr. App. Rep. 167; *R. v. Stone* (1910), 6 Cr. App. Rep. 89; *R. v. Mason* (1914), 111 L. T. 336.

**768.** ———.]—**Modern Reports.**—Volume 12 of *Modern Reports* is not a book of any authority (**BULLER, J.**).—**R. v. LYME REGIS CORPN.** (1779), 1 Doug. K. B. 79; 99 E. R. 55.

*Annotations:—***Mentd.** *Everard v. Paterson* (1816), 2 Marsh. 304; *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 401.

**769.** ———.]—Volume 6 of *Modern Reports* is a book of authority (**WILLES, J.**).—**SANDON v. JERVIS** (1859), as reported in E. B. & E. 935; 120 E. R. 758, Ex. Ch.

*Annotations:—***Mentd.** *Thomas v. Rawlings* (1859), 28 L. J. Ex. 347; *Nash v. Lucas* (1867), L. R. 2 Q. B. 590.

**770.** ———.]—*Modern Reports* are a somewhat loose compilation (**BLACKBURN, J.**).—**R. v. ALLEN** (1862), as reported in 8 Jur. N. S. 230.

**771.** ———.]—**Moseley's Reports.**—Where counsel cited in argument a case from *Moseley's Reports* **LORD MANSFIELD, C.J.**, said that counsel should not have quoted that book.—**QUANTOCK v. ENGLAND** (1770), as reported in 5 Burr. 2628; 98 E. R. 382.

*Annotations:—***Mentd.** *Bickerdike v. Bollman* (1786), 1 Term Rep. 405; *Ex p. Dowdney, Ex p. Seaman* (1809), 15 Ves. 479; *Jellis v. Mountford* (1821), 4 B. & Ald. 256; *Mavor v. Pyne* (1825), 3 Bing. 285.

**772.** ———.]—*Moseley's Reports* possess a very considerable degree of accuracy (**LORD ELDON, C.**).—**MILLS v. FARMER** (1815), 1 Mer. 55; 19 Ves. 488, n.; 35 E. R. 597, L. C.

*Annotations:—***Mentd.** *Pischel v. Paris* (1825), 2 Sim. & St. 384; *Cherry v. Mott* (1836), 1 My. & Cr. 123; *A.-G. v. Ironmongers' Co.* (1841), C. P. 208; *Aria v. Emanuel* (1861), 9 W. R. 366; *Willoughby v. Storer* (1870), 22 L. T. 896; *Lyons (Mayor) v. Bengal Advocate-General* (1876), 1 App. Cas. 91; *Pocock v. A.-G.* (1876), 3 Ch. D. 342; *Blasco v. Jackson* (1887), 35 Ch. D. 460; *Re Slevin, Slevin v. Hepburn*, [1891] 1 Ch. 373; *Re White, White v. White*, [1893] 2 Ch. 41; *Re Rynier, Rynier v. Stanfield*, [1895] 1 Ch. 19; *Re Davis, Hannon v. Hillyer*, [1902] 1 Ch. 876; *Re Huxtable, Huxtable v. Crawford* (1902), 71 L. J. Ch. 876; *Re Eades, Eades v. Eades*, [1920] 2 Ch. 353; *Re Willis, Shaw v. Willis*, [1921] 1 Ch. 44.

**773.** ———.]—*Moseley's Reports* contain many good cases (**LORD ELDON, C.**).—**PARKHURST v. LOWTEN** (1819), 2 Swan. 195, n.; 36 E. R. 598, L. C.

*Annotations:—***Mentd.** *Morgan v. Shaw* (1819), 4 Madd. 54;

*Goodale v. Gawthorn* (1850), 4 De G. & Sm. 97; *Osborn v. London Dock Co.* (1855), 10 Exch. 698; *Bursall v. Tanner* (1855), 16 Q. B. D. 1; *Waterhouse v. Barker*, [1924] 2 K. B. 759.

**774.** ———.]—**Noy's Reports.**—*Noy's Reports* have always been considered as a bad authority (**BULLER, J.**).—**PETRIE v. HANNAY** (1789), 3 Term Rep. 418; 100 E. R. 652.

*Annotations:—***Mentd.** *Biggs v. Lawrence* (1789), 3 Term Rep. 454; *Mitchell v. Cockburne* (1794), 2 Hy. Bl. 379; *Steers v. Lashley* (1794), 6 Term Rep. 61; *Booth v. Hodgson* (1795), 6 Term Rep. 405; *Aubert v. Maze* (1801), 2 Bos. & P. 371; *Ex p. Bulmer* (1807), 13 Ves. 313; *Ex p. Daniels* (1807), 14 Ves. 191; *Webb v. Brooke* (1810), 3 Taunt. 6; *Clayton v. Dilly* (1811), 4 Taunt. 165; *Re Scott, Re Bell* (1813), 1 M. & S. 751; *Simpson v. Bloss* (1816), 7 Taunt. 246; *Cannan v. Bryce* (1819), 3 B. & Ald. 179.

**775.** ———.]—**Owen's Reports.**—*Owen's Reports* are of high authority (**HAMILTON, J.**).—**A.-G. v. REYNOLDS**, [1911] 2 K. B. 888; 80 L. J. K. B. 1073; 104 L. T. 852.

**776.** ———.]—**Peere Williams' Reports.**—*Peere Williams' Reports* are very valuable reports & the edition by Mr. Cox a very valuable edition (**ARDEN, M.R.**).—**WOODS v. HUNTINGFORD** (1796), 3 Ves. 128; 30 E. R. 930.

*Annotations:—***Mentd.** *Butler v. Butler* (1800), 5 Ves. 534; *Oxford v. Rodney* (1808), 14 Ves. 417; *Clarendon v. Barham* (1842), 1 Y. & C. Ch. Cas. 688; *Hedges v. Hedges* (1852), 5 De G. & Sm. 330.

**777.** ———.]—The cases in Volume 3 of *Peere Williams' Reports* are not of equal authority with the cases in the two first volumes (**SHADWELL, V.-C.**).—**GERVIS v. GERVIS** (1847), 14 Sim. 654; 16 L. J. Ch. 422; 9 L. T. O. S. 450; 11 Jur. 578; 60 E. R. 512.

**778.** ———.]—**Saunders' Reports.**—**SAUNDERS** was the most accurate reporter of his time (**WILMOT, J.**).—**BISSEX v. BISSEX** (1765), 3 Burr. 1729; 97 E. R. 1069.

*Annotations:—***Mentd.** *Nash v. Brown* (1848), 6 C. B. 584; *Ryalls v. R.* (1849), 12 L. T. O. S. 557.

**779.** ———.]—The cases are collected with great ability by Serjeant Williams in a note in his edition of *Saunders' Reports*, to which I refer in general (**LORD KENYON, C.J.**).—**DOE d. FOQUETT v. WORSLEY** (1801), 1 East, 416; 102 E. R. 161.

*Annotations:—***Mentd.** *Doe d. Littledeale v. Smeddle* (1818), 2 B. & Ald. 126; *Doe d. Clift v. Birkhead* (1849), 4 Exch. 110.

**780.** ———.]—The cases are very accurately stated in Serjeant Williams' edition of *Saunders' Reports*, & I cannot lay down the principle in better terms than he has used (**LORD ALVANLEY, C.J.**).—**KENRICK v. BEAUCLERCK** (1802), 3 Bos. & P. 175; 127 E. R. 96.

*Annotations:—***Mentd.** *White v. Parker* (1835), 1 Bing. N. C. 573; *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636; *Marshall v. Ginnell* (1882), 21 Ch. D. 790.

**781.** ———.]—**Solicitors' Journal.**—The decision is only reported quite shortly in the *Weekly Notes* & the *Solicitors' Journal*; & in any case, therefore, is not of anything like the same authority as if it had appeared in any of the regular reports.

A report in the *Weekly Notes* or the corresponding publication, the *Solicitors' Journal*, is not ordinarily an authority which the ct. can accept, except perhaps on questions of practice—certainly not on an important question of general law (**SARGANT, J.**).—**Re CHAPLIN & STAFFORDSHIRE POTTERIES WATERWORKS CO.'S CONTRACT**, [1922] 2 Ch. 824; 92 L. J. Ch. 34; 128 L. T. 186; 38 T. L. R. 618.

*Annotation:—***Mentd.** *Re Kemnal & Still's Contract*, [1923] 1 Ch. 293.

**Taunton's Reports.**—Volume 8 of *Taunton's Reports* is of doubtful authority. It was not supervised by Mr. Taunton himself but made up from his notes (**PARKE, B.**).—**HADLEY v.**

**BAXENDALE** (1854), 9 Exch. 347, n.; 23 L. J. Ex. 179; 18 Jur. 358; 156 E. R. 148.

**Annotations.**—*Mentd.* *Herring v. Tomlin* (1854), 23 L. T. O. S. 92; *Etcher v. Taylor* (1855), 17 C. B. 21; *Mann v. General Steam Navigation Co.* (1856), 26 L. T. O. S. 247; *Simons v. Patchett* (1857), 26 L. J. Q. B. 195; *Portman v. Middleton* (1858), 4 C. B. N. S. 322; *Portman v. Nichol* (1858), 31 L. T. O. S. 152; *Randall v. Raper* (1858), E. B. & E. 84; *Broom v. Hall* (1859), 7 C. B. N. S. 503; *Smeed v. Foord* (1859), 1 E. & E. 602; *Allsop v. Allsop* (1860), 5 H. & N. 534; *Cale. Ry. v. Colt* (1860), 3 L. T. 252; *De Mattos v. Gibson* (1860), 1 John & H. 79; *Gee v. L. & Y. Ry.* (1860), 6 H. & N. 211; *Le Peintur v. S. E. Ry.* (1860), 2 L. T. 170; *Prior v. Wilson* (1860), 1 L. T. 549; *Richardson v. Dunn* (1860), 8 C. B. N. S. 655; *Anderson v. N. E. Ry.* (1861), 4 L. T. 216; *Collard v. S. E. Ry.* (1861), 7 H. & N. 79; *Henderson v. N. E. Ry.* (1861), 9 W. R. 519; *Wilson v. L. & Y. Ry.* (1861), 9 C. B. N. S. 632; *Borries v. Hutchinson* (1865), 18 C. B. N. S. 445; *O'Hanlan v. G. W. Ry.* (1865), 6 B. & S. 484; *Phelps v. L. & N. W. Ry.* (1865), 13 W. R. 782; *Williams v. Reynolds* (1865), 6 B. & S. 495; *Knowles v. Nunn* (1866), 14 L. T. 592; *Mullett v. Mason* (1866), Har. & Ruth. 779; *Wilson v. Newport Dock Co.* (1866), L. R. 1 Exch. 177; *Woodger v. G. W. Ry.* (1867), L. R. 2 C. P. 318; *British Columbia Saw-Mill Co. v. Nettleship* (1868), L. R. 3 C. P. 499; *Cory v. Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181; *Engel v. Fitch* (1869), L. R. 4 Q. B. 659; *Godwin v. Francis* (1870), 39 L. J. C. P. 121; *Prenn v. Liverpool Royal Bank* (1870), L. R. 5 Exch. 92; *Horne v. Mid. Ry.* (1873), L. R. 8 C. P. 131; *Larios v. Bonany v. Gurety* (1873), L. R. 5 P. C. 346; *Bain v. Fothergill* (1874), L. R. 7 H. L. 158; *Baxendale v. L. C. & D. Ry.* (1874), L. R. 10 Exch. 35; *Elbinger Akt. v. Armstrong* (1874), L. R. 9 Q. B. 473; *Sawdon v. Andrew* (1874), 30 L. T. 23; *Bradshaw v. L. & Y. Ry.* (1875), L. R. 10 C. P. 189; *Hobbs v. L. & S. W. Ry.* (1875), L. R. 10 Q. B. 111; *Smith v. Green* (1875), 1 C. P. D. 92; *Sanders v. Stuart* (1876), 1 C. P. D. 326; *Barratt v. L. B. & S. C. Ry.* (1877), *De Colyar's County Court Cases*, 195; *The Parana* (1877), 2 P. D. 118; *Wilson v. General Iron Screw Colliery Co.* (1877), 47 L. J. Q. B. 239; *Phillips v. L. & S. W. Ry.* (1879), 5 C. P. D. 280; *Lilley v. Doubleday* (1881), 7 Q. B. D. 510; *McMahon v. Field* (1881), 7 Q. B. D. 591; *Thol v. Henderson* (1881), 8 Q. B. D. 457; *Baldwin v. L. C. & D. Ry.* (1882), *De Colyar's County Court Cases*, 224; *Smith v. Day* (1882), 21 Ch. D. 421; *The Notting Hill* (1884), 9 P. D. 105; *De Mattos v. Great Eastern S.S. Co.* (1885), 1 T. L. R. 283; *Grébert-Bornis v. Nugent* (1885), 15 Q. B. D. 85; *Skinner v. City of London Marine Inse. Corp.* (1885), 14 Q. B. D. 882; *Rodoconachi v. Milburn* (1886), 17 Q. B. D. 316; *Williams v. Peel River Land & Mineral Co.* (1886), 55 L. T. 689; *Couper v. Richards* (1887), 3 T. L. R. 739; *Hammond v. Bussey* (1887), 20 Q. B. D. 79; *The Argentino* (1888), 13 P. D. 191; *Finlay v. Chirney* (1888), 20 Q. B. D. 494; *White v. Peto* (1888), 58 L. T. 710; *Welch, Perrin v. Anderson* (1891), 61 L. J. Q. B. 167; *Armstrong v. Allan* (1892), 67 L. T. 738; *Lepia v. Rogers* (1893) 1 Q. B. 31; *Ebbetts v. Conquest*, [1895] 2 Ch. 377; *Marcus v. Myers & Davis* (1895), 11 T. L. R. 327; *Marsh v. Joseph*, [1897] 1 Ch. 213; *South African Territories v. Wallington*, [1897] 1 Q. B. 892; *Agius v. Great Western Colliery Co.*, [1899] 1 Q. B. 413; *Hoscock v. Nicholson*, [1904] 1 K. B. 725; *Prince of Wales Dry Dock Co. (Swansea) v. Fowles Forge & Engineering Co.* (1904), 90 L. T. 527; *Furness, Withy v. Hall* (1909), 25 T. L. R. 233; *Jackson v. Watson*, [1909] 2 K. B. 193; *Sapwell v. Bass*, [1910] 2 K. B. 486;

(No. 2) (1913), 29 T. L. R. 559; *Colnatt v. Myham*, [1913] 2 K. B. 220; *Hoole U. D. C. v. Fidelity & Deposit Co. of Maryland* (1916), 115 L. T. 24; *Quirk v. Thomas*, [1916] 1 K. B. 516; *Watts, Watts v. Mitsui*, [1917] A. C. 227; *Turpin v. Victoria Palace*, [1918] 2 K. B. 539; *British Automatic Co. v. Haynes*, [1921] 1 K. B. 377; *Monte Video Gas & Dry Dock Co. v. Clan Line Steamers* (1921), 37 T. L. R. 866; *Pinnock v. Lewis & Peat*, [1923] 1 K. B. 690.

**783. — Vesey Junior's Reports.**—**VESEY, JUNIOR**, was a very careful & accurate reporter (**LORD CAMPBELL, C.**).—**TURNER v. WRIGHT** (1860), 2 De G. F. & J. 234; 29 L. J. Ch. 598; 2 L. T. 649; 6 Jur. N. S. 809; 8 W. R. 675; 45 E. R. 612, L. C.

**Annotation.**—*Mentd.* *Re Hanbury's S. E.*, [1913] 2 Ch. 357.

**784. — Weekly Notes.**—Cases cannot be cited from the *Weekly Notes* for, though they are, no doubt, generally accurate, they are too concise to be safely read as authorities. They are only useful for the purpose for which they are intended, to inform the ct. & the profession that certain points have been decided.—**NEWSON v. PENDER** (1884), as reported in 27 Ch. D. 50, n., C. A.

**Annotations.**—*Mentd.* *Scott v. Pape* (1886), 31 Ch. D. 554;

*Wigram v. Fryer* (1887, 56 L. J. Ch. 1098; *Smith v. Baxter*, [1900] 2 Ch. 138.

**785. — — — — —**—**BRIDGEND GAS & WATER CO. v. DUNRAVEN (LORD)** (1885), 31 Ch. D. 219, 221; 55 L. J. Ch. 91.

**786. — — — — —**—We do not allow the *Weekly Notes* to be read as authority (**COTTON, L.J.**).—**POOLEY'S TRUSTEE v. WHETHAM** (1886), as reported in 33 Ch. D. 76, C. A.

**Annotation.**—*Mentd.* *Re Clough, Bradford Commercial Banking Co. v. Cure* (1887), 35 Ch. D. 7.

**787. — — — — —**—The former rule, that cases ought not to be cited from the *Weekly Notes*, observed where the reasoning of the ct. was not given & the note was not easy to follow.—*Re LOVERIDGE, DRAYTON v. LOVERIDGE*, [1902] 2 Ch. 859; 71 L. J. Ch. 865; 87 L. T. 294; 51 W. R. 232; 46 Sol. Jo. 701.

**788. — — — — —**—There is one reported case on this very Act—*G. v. M.*—for I cannot pay any regard to *T. v. M.*, a case merely noted in the *Weekly Notes* (**FARWELL, J.**).—**BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE FLOUR & PROVISION SOCIETY v. BUTTERKNOWLE COLLIERY CO.** (1904), 73 L. J. Ch. 335; 90 L. T. 149; 68 J. P. 177; 20 T. L. R. 204; *affd.* [1904] 2 Ch. 419, 430, C. A.; *sub nom.* **BUTTERKNOWLE COLLIERY CO. v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE CO.**, [1906] A. C. 305, H. L.

**Annotations.**—*Mentd.* *Markham v. Pacer*, [1908] 1 Ch. 697; *Butterley Co. v. New Hucknall Colliery Co.*, [1910] A. C. 381; *Board v. Moira Colliery Co.*, [1915] 1 Ch. 257; *Jones v. Consolidated Anthracite Collieries & Dynevor*, [1916] 1 K. B. 123; *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488; *Thomson v. St. Catharine's College, Cambridge*, etc., [1919] A. C. 468; *Wellton v. Butterley Co.*, [1920] 1 Ch. 130; *Consett Industrial & Provident Soc. v. Consett Iron Co.*, [1922] 2 Ch. 135.

**789. — — — — —**—I should hesitate to accept a note in the *Weekly Notes* as a binding authority (**WARRINGTON, J.**).—**STIRLING v. BURDETT**, [1911] 2 Ch. 418; 81 L. J. Ch. 49; 105 L. T. 573.

**790. — — — — — Construction of will.**—(1) A note on the construction of a will in the *Weekly Notes* is really no guide or assistance to the construction of another will. There is a rule that the *Weekly Notes* is not to be referred to on points of principle. It is useful with regard to notes on practice, & useful in giving a note of decisions intended to be reported at greater length, but a mere note on the construction of a will is of no assistance to the ct. in construing another will (**SWINFEN EADY, L.J.**).

(2) Our decision is inconsistent with the decision of **PETERSON, J.**, which **EVE, J.**, followed. Speaking for myself, I do not consider **EVE, J.**, was bound to follow **PETERSON, J.**, or even entitled to follow him. I remember the Master of the Rolls saying that, on the matter of the construction of a will, he should never regard himself as bound by the decision of another judge. It is the duty of the judge to express his view of what is the true construction of the words before him, having regard to the relevant facts in the case before him; & he is not bound in such a matter by the decision of another judge (**WARRINGTON, L.J.**).—*Re MASSON, MORTON v. MASSON* (1917), 86 L. J. Ch. 753; 117 L. T. 548; 61 Sol. Jo. 676, C. A.

**791. — — — — —**—*Re CHAPLIN & STAFFORDSHIRE POTTERIES WATERWORKS CO.'S CONTRACT*, No. 781, *ante*.

**792. — — — — — Winch's Reports.**—The cases in *Winch's Reports* are in general well reported (**LORD KENYON, C.J.**).—**TROWARD v. CAILLAND** (1795), 6 Term Rep. 439; 101 E. R. 637; *affd.* (1796), 8 Bro. Parl. Cas. 71, H. L.

**793. — — — — — Reports in newspapers.**—**R. v. LABOUCHERE**, No. 737, *ante*.

## JUDICATURE, SUPREME COURT OF.

*See* COURTS.

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

*See* COURTS ; DEPENDENCIES.

## JUDICIAL DECISIONS.

*See* BARRISTERS ; ESTOPPEL ; EVIDENCE ; JUDGMENTS AND ORDERS.

## JUDICIAL SEPARATION.

*See* HUSBAND AND WIFE.

## JUDICIAL TRUSTEE.

*See* PRACTICE AND PROCEDURE ; TRUSTS AND TRUSTEES.

## JUDICIARY.

*See* COURTS.

## JURAT.

*See* EVIDENCE.

# JURIES.

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Coroner's Jury . . . . . *See* CORONERS.  
County Courts . . . . . „ COUNTY COURTS.

Inquisition . . . . . *See* CORONERS.  
Inquisition of Escheat . . . . . „ CROWN PRACTICE.



NOTE.—The principal Acts relating to juries in England are the *Juries Acts*, 1825 (c. 50), 1862 (c. 107), 1870 (c. 77), and 1922 (c. 11), referred to in this Title as *1825 Act*, *1862 Act*, *1870 Act* and *1922 Act*, respectively.

## Part I.—Right to Jury.

1. At common law — Offence created by statute—No contrary provision.]—If a statute create an offence, without saying how it shall be tried, it shall be tried by a jury.—*R. v. STURNEY* (1702), 7 Mod. Rep. 99; 87 E. R. 1121.  
In civil matters.]—See PRACTICE.  
— In county courts.]—See COUNTY COURTS, Vol. XIII., p. 499.

## Part II.—Functions of Juries.

2. Restricted to matters in controversy.]—*TONKIN v. CROCKER & BILLING* (1894), 2 L. J. 1211; *Holt*, K. B. 452; 2 Ld. Raym. 860; 125 E. R. 672.  
Annotation:—*Reid*, Mitchell v. Torup (1766), Park. 227.  
Grand jury.]—See Part VI., Sect. 2, post.  
Evidence.]—See Part VII., Sect. 10, sub-sect. 5, E., post; & EVIDENCE, Vol. XXII., pp. 22 et seq.  
Giving a verdict.]—See Part VII., Sect. 13, post.  
Whether prisoner stands mute of malice.]—See CRIMINAL LAW, Vol. XIV., pp. 249, 250.

## Part III.—Qualification, Disqualification and Exemption of Jurors.

### SECT. 1.—LIABILITY TO SERVE.

Every person included in jurors' book—Though disqualified or exempt.]—See 1922 Act, s. 2.  
Disqualification.]—See Sect. 3, post.  
Exemption.]—See Sect. 4, post.

### SECT. 2.—QUALIFICATION.

In general.]—See 1825 Act, s. 1; Sex Disqualification (Removal) Act, 1919 (c. 71), s. 1; & 1922 Act, s. 2.

— Evidence of ratable value.]—See Rating & Valuation Act, 1925 (c. 90), s. 20 (1).

In City of London.]—See 1825 Act, s. 50, & 1922 Act, s. 8 (2) (a).

In counties.]—See Local Government Act, 1888 (c. 41), ss. 31 & 89 (2), & Municipal Corporations Act, 1835 (c. 76), s. 61.

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Aliens.]—See 1870 Act, s. 8; Aliens Restriction (Amendment) Act, 1919 (c. 92), s. 8; & 1922 Act, Sched.

Coroner's jury.]—See CORONERS, Vol. XIII., p. 243, Nos. 139–144.

Special jurors.]—See Part VII., Sect. 20, sub-sect. 2, post.

### PART I.

a. Grounds for granting.]—Appet. for a trial by jury must show that the case can be better tried with than without a jury.—*GODFREY v. MARSHALL*, [1917] 1 W. W. R. 1097; 11 Alta. L. R. 37.—CAN.

b. Discretion of judge to allow—Court exercising special jurisdiction—Insolvency.]—*Re HEINER*, Ex p. PUBLIC TRUSTEE, [1925] S. R. Q. 140.—AUS.

c. —.]—*WILSON v. KINNEAR*, [1925] 4 D. L. R. 843.—CAN.

d. —.]—Where the assessment of damages has elements of difficulty, the order of the referee or judge in chambers that the issues be tried by a jury will be considered by the Ct. of Appeal as having been made in the exercise of a judicial discretion which will not be interfered with.—*KINGSBURY v. WASHINGTON*, [1925] 4 D. L. R. 632; 3 W. W. R. 436; 35 Man. L. R. 246; *revers*, [1925] 3 D. L. R. 326; 2 W. W. R. 430.—CAN.

e. Where jury refused by judge in chambers.]—The right or claim mentioned in County Cts. Act, 1887 (c. 47), s. 42, is that which forms the subject of the action, not the right to take any particular step in the course of

the action; & an order made in chambers in a county ct. action, striking out a jury notice, is not an order finally disposing of a right to claim within the sect., but is in its nature an interlocutory order, & not appealable.—*McPHERSON v. WILSON* (1890), 13 P. R. 339.—CAN.

f. In action against railway company—9 & 10 Geo. v. c. 13, s. 15.]—By above sect., plff is entitled to have a cause against deft. tried by a judge & jury to the same extent as if the action were against another subject or a private corp.—*MICHAUD v. CANADIAN NORTHERN RY.*, [1924] 3 D. L. R. 1; 29 Can. Ry. Cas. 362; 51 N. B. R. 220.—CAN.

g. —.]—*SEMPLE v. CANADIAN NATIONAL RY. CO.* (1924), 55 O. L. R. 189.—CAN.

h. Action for injunction.]—An action for an injunction is proper for trial by jury.—*CANADIAN PACIFIC RY. CO. v. PARKE* (1896), 5 B. C. R. 507.—CAN.

i. Appeal cause—Question of fraud.]—Jury granted in an appeal cause upon the ground that the cause turned on the question of fraud.—*SKINNER v. LANE* (1854), 2 N. S. R. (James) 183.—CAN.

l. Jury de medietate lingue.]—

Allen defts. are not entitled in Nova Scotia, in any case, civil or criminal, to a jury de medietate lingue.—*R. v. BURDELL* (1861), 5 N. S. R. (1 Old.) 126.—CAN.

m. —.]—If the right to a jury de medietate lingue ever existed in P. E. Island it is abolished by the Jury Act.—*R. v. THOMPSON & WALSH* (1863), 1 P. E. I. 226.—CAN.

n. —.]—Prisoner, a Canadian speaking French, demanded a mixed jury. There were not upon the panel a sufficient number of persons qualified in the French language. Instead of fixing another day for the trial & having summoned the persons next upon the jury roll, the sheriff called upon a person then in ct., who, without objection, acted as a jurymen. Prisoner was found guilty. Upon a writ of error:—*Held*: the trial was a nullity.—*R. v. LEVEQUE* (1883), 3 Man. L. R. 582.—CAN.

o. —.]—In Manitoba a prisoner if he so desires, is entitled to be tried by a jury composed for the one half at least of persons skilled in the language of the defence, if the language is the French or English language.—*R. v. PLANTE* (1891), Man. L. R. 537.—CAN.

## SECT. 3.—DISQUALIFICATION.

**In general.**—See 1825 Act, s. 1; 1922 Act, s. 2.  
**Person whose name is not in the register of electors—Except as tales-men.**—See 1922 Act, s. 8 (2) (b).

**Woman who is a vowed member of religious order—Living in convent or other religious community.**—See 1922 Act, s. 8 (2) (b).

**Convicts & outlaws.**—See 1870 Act, s. 10.

**Aliens.**—See Sect. 2, *ante*.

**Infants.**—See 1825 Act, s. 1.

## SECT. 4.—EXEMPTION.

See 1870 Act, s. 9, Sched.

**3. Notary public.**—ANON. (1843), 1 L. T. O. S. 507.

**4. Servants of the Royal Household—Gentleman pensioner.**—A gentleman pensioner, being an officer on the Cheque Roll, is exempt from serving on juries.—BLAGNEY'S CASE (1735), *Lee temp. Hard.* 202; 95 E. R. 129.

**5. Officers of the Post Office.**—Persons in the service of the Post Office are exempt from serving on juries.—*Ex p. ATKINSON* (1834), 10 Bing. 399; 2 Dowl. 773; 4 Moo. & S. 160; 131 E. R. 950; *sub nom. Re ATKINSON*, 3 L. J. C. P. 152.

**6. Commissioner of Customs.**—*R. v. RICHMOND* (1844), 2 L. T. O. S. 346.

**7. Persons employed by Inland Revenue Commissioners—Member of foreign bank in London—Employed for deduction of income tax.**—A member of the firm of foreign bankers, which carries on business in London & is employed by the Inland Revenue Comrs. in the collection of income tax on foreign dividends & is paid by poundage, is not employed by the Inland Revenue Comrs. within 1870 Act, s. 9, & sched. to that Act, & is not on that ground exempt from jury service.—*Ex p. VAN DRUTEN* (1913), 30 T. L. R. 198.

**Registered dentists.**—See Dentists Act, 1878 (c. 33), s. 30.

**Method of claiming exemption.**—See 1922 Act, s. 2 (2).

**Exemption after previous service.**—See Part X., *post*.

**Inhabitants of the city & liberty of Westminster—Exemption in respect of Middlesex County Sessions.**—See 1870 Act, s. 9.

**Coroner's jury.**—See CORONERS, Vol. XIII., p. 243, No. 146.

## SECT. 5.—EXCUSE FROM ATTENDANCE.

See 1922 Act, ss. 2, 3.

**8. Old age.**—ANON. (1607), Brownl. 41; 123 E. R. 652.

*Annotation.*—*Dbtd. Mansell v. R.* (1837), 8 E. & B. 54.

**9. —.**—A juryman being put on the panel excused himself on account of age, being eighty; he was discharged.—ANON. (1773), *Lofft*, 213; 98 E. R. 616.

—.]—See, *now*, 1825 Act, s. 1.

**10. Physical or mental infirmity—Jurisdiction of court.**—MANSELL *v. R.*, No. 233, *post*.

## SECT. 6.—EXCLUSION OF WOMEN JURORS.

See Sex Disqualification (Removal) Act, 1919 (c. 71), s. 1 (b).

**11. Exclusion of women from a jury—Judge's discretion—Proof that discretion has not been exercised judicially.**—The discretion which a judge at a trial has of excluding women from a jury must be exercised judicially, & unless it is shown that it has not been so exercised the ct. will not order a *venire de novo*.—*R. v. VAQUIER* (1924), 18 Cr. App. Rep. 112, C. C. A.

## Part IV.—Jury Lists and Jurors' Books.

See, *now*, 1922 Act, s. 1.

**12. Preparation of jury list—Irregularities—Whether ground for new trial.**—The verdict of a jury in an action will not be set aside on account of irregularities in the due revision of the jury list

unless the litigant applying proves that he has been prejudiced thereby.—*MONTREAL STREET RY. CO. v. NORMANDIN*, [1917] A. C. 170; 86 L. J. P. C. 113; 116 L. T. 102; 33 T. L. R. 174, P. C.

## PART III. SECT. 3.

**p. Revised Statutes, c. 109—Whether applicable to jurors.**—*Seemle*: the above Act, removing certain disqualifications of "judges, justices of the peace, or persons empowered by law to exercise judicial functions," does not apply to jurors.—*R. v. KING'S MUNICIPALITY* (1886), 19 N. S. R. (7 R. & G.) 68; 7 C. L. T. 119.—CAN.

**q. Age limit.**—The age limit provided for by Juries Act, 1903, s. 1, operates as a disqualification, & not merely as an exemption.—*MORGAN v. O'REGAN* (1908), 38 N. B. R. 399; 4 E. L. R. 573.—CAN.

**r. Imperfect knowledge of the English language.**—After the jury in a criminal case had retired to consider their verdict it appeared that there was a foreigner on the jury who but very imperfectly understood English. The chairman then read over the evi-

dence & it was translated by an interpreter. The jury found prisoner guilty on a case stated by the chairman.—*Held*: if the judge was satisfied the juror could have discharged his duties properly, the conviction should be affirmed but if from ignorance of the English language the juror was unable to do so, there was no trial.—*R. v. HORROR* (1865), 2 W. W. & A. B. 124.—AUS.

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**t. Time for applying for exemption.**—An application at the assizes to be discharged as a juror, on account of his being beyond the legal age.—*Held*: too late; such application should be made at the revision of the jury lists.—*Re EWING* (1843), 3 *Craw.* & D. 124.—IR.

**u. To whom application made.**—The judges at the commission have no power to displace with the attend-

ance of a juror on the ground of incapacity, on his own application; he should apply to the magistrates.—*R. v. KELLY* (1842), *Arm. M. & O.* 249.—IR.

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**b. Preparation of.**—*Re MCNAB & DALY* (1862), 22 U. C. R. 170.—CAN.

**c. —.**—SPROULE *v. R.* (1886) 1 B. C. R. pt. 2, 219.—CAN.

**d. Grand jurors—Residence & occupation must be given.**—The omission of the residences & occupations of grand jurors in the list & in the panel are sufficient grounds for quashing an indictment for felony.—*R. v. BELYEA* (1854), 2 N. S. R. (James) 220.—CAN.

**e. Drafting panel—Whether fee payable.**—*Re FOURSETT & LAMBERTON QUARTER SESSIONS* (1863), 22 U. C. R. 412.—CAN.

NOTE.—The principal Acts relating to juries in England are the *Juries Acts*, 1825 (c. 50), 1862 (c. 107), 1870 (c. 77), and 1922 (c. 11), referred to in this Title as *1825 Act*, *1862 Act*, *1870 Act* and *1922 Act*, respectively.

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1. At common law — Offence created by statute — No contrary provision.] — If a statute create an offence, without saying how it shall be tried, it shall be tried by a jury.—*R. v. STURNEY* (1702), 7 Mod. Rep. 99; 87 E. R. 1121.  
In civil matters.]—See PRACTICE.  
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## PART III. SECT. 3.

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**t. Time for applying for exemption.**—An application at the assizes to be discharged as a juror, on account of his being beyond the legal age:—*Held*: too late; such application should be made at the revision of the jury lists.—*Re EWING* (1843), 3 *Craw. & D.* 124.—IR.

**u. To whom application made.**—The judges at the commission have no power to displace with the attend-

ance of a juror on the ground of incapacity, on his own application; he should apply to the magistrates.—*R. v. REILY* (1842), *Arm. M. & O.* 249.—IR.

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**e. Drafting panel—Whether fee payable.**—*Re FOUWETT & LAMBERTON QUARTER SESSIONS* (1863), 22 U. C. R. 412.—CAN.

## Part V.—Summoning of Jurors.

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**13. In the High Court of Justice—Whether for any particular Division.]**—Jurymen are now summoned to serve in the High Ct. of Justice & not in any particular division of it.—PEARSON v. FISHER (1875), 1 Char. Pr. Cas. 1.

**14. Person exempt summoned—Whether action lies against sheriff.]**—R. v. PERCIVAL (1865), 1 Sid. 243; 82 F. R. 1083.

*Annotation*:—Mentd. R. v. Tuchin (1704), 2 Ld. Raym. 1061.

**Jurors owing suit of court.]**—See COPYHOLDS, Vol. XIII., p. 101, No. 1285.

**Enforcement of attendance.]**—See COPYHOLDS, Vol. XIII., p. 101, No. 1205.

**Number of jurors.]**—See 1825 Act, s. 22; County Common Juries Act, 1910 (c. 17), s. 1.

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#### SUB-SECT. 1.—BY THE SHERIFF.

See 1825 Act, ss. 13-15, & ss. 40-42; C. L. P. Act, 1852 (c. 76), ss. 104-107; & 1870 Act, s. 10.

**15. Where sheriff party to the cause.]**—STANTON v. SULARD (1599), Cro. Eliz. 654; 78 E. R. 893.

*Annotation*:—Mentd. Montague v. Davies, Benachi, [1911] 2 K. B. 595.

**Other of two sheriffs.]**—See CORONERS, Vol. XIII., p. 237, Nos. 57-59.

**16. Writ addressed to sheriff—Whether sheriff can take advantage of.]**—The sheriff cannot take advantage of the *venire facias* being directed to him in his own cause.—LOADER v. SAMWELL (1619), Cro. Jac. 551; 79 E. R. 472.

**Writ addressed to coroners.]**—See, generally, CORONERS, Vol. XIII., pp. 236, 237.

**17. Delivery of process to sheriff—Time for.]**—The jury process must be sent to the sheriff, in the case of common jurors, ten days, & in the case of special jurors, three days at the least before the commission day, at the Assizes.—CHARLTON v. BUREFITT (1832), 1 Moo. & S. 450.

### PART V. SECT. 1.

**1. Time for summoning—Six days before time for appearance.]**—NEW BRUNSWICK RY. CO. v. MURRAY (1878), 18 N. B. R. (2 P. & B.) 43.—CAN.

#### PART V. SECT. 2, SUB-SECT. 1.

**15 I. Where sheriff party to the cause.]**—It is no objection on the part of the sheriff, in an action against him, that a jury have been summoned by himself, & not by the coroner.—AINSLIE v. HAPPELJE (1847), 3 U. C. R. 275.—CAN.

**15 II. —.]**—Where the sheriff is interested some indifferent person appointed by the ct. must strike the jury.—CLANDINAN v. DICKSON (1851), 8 U. C. R. 281.—CAN.

**15 III. —.]**—*Semble*: at common law the coroner is the proper officer to empanel the jury in a trial in which the high sheriff is a party.—PICKERING v. THOMPSON (1911), 45 I. L. T. 212.—IR.

**15 IV. —.]**—WEYER v. WEYER 1854), 23 L. T. O. S. 12.—IR.

**g. Where arrest directed by sheriff.]**—It is no ground for quashing an indictment that some of the grand jury were related to the officers who arrested prisoner, neither is a sheriff disqualified from selecting & summoning the grand jury, because he directed the arrest.—R. v. MAILLOUX (1876), 16 N. B. R. (3 Pug.) 493.—CAN.

**h. Fee for summoning jury—Amount of.]**—The sheriff of H., for many years, since 1853, had charged for the panel of jurors for both the county ct. & sessions & mileage for summoning each juror according to the distance from the ct. house to his residence, without reference to the distance actually travelled to serve all:—*Held*: the sheriff was entitled to charge for both panels, but only to mileage for the distance actually travelled to summon all the jurors.—HAIDIMAND COUNTY CORPN. v. MARTIN (1860), 19 U. C. R. 178.—CAN.

**j. —.]**—*Re* DAVIDSON & MILLER (1864), 24 U. C. R. 66.—CAN.

**k. —.]**—*Re* DAVIDSON &

**18. Fee for summoning jury—Right to—Cause tried by judge alone.]**—A cause set down in the jury list entitles the sheriff to his fee for summoning the jury, even though taken by the judge alone.—BLACKBURN v. BLACKBURN (1907), 51 Sol. Jo. 345.

#### SUB-SECT. 2.—BY THE CORONER.

**Where sheriff interested.]**—See CORONERS, Vol. XIII., pp. 236-238.

**19. —What constitutes interest.]**—A *venire facias* shall be awarded to coroners upon a surmise that pltf. is servant to the sheriff.—CHAM v. MATTHEW (1597), Cro. Eliz. 581; 78 E. R. 824.

**20. Jury wrongly summoned by coroner—Whether ground for new trial.]**—Where a *venire facias* was awarded to the coroner where it ought to have been awarded to the sheriff; it was held not to be remedied by any of the statutes.—BAYNHAM'S CASE (1588), 5 Co. Rep. 36 b; 77 E. R. 108.

*Annotations*:—*Re*ld. Blackmore's Case (1610), 8 Co. Rep. 150 a; Elre v. Bannister (1618), Hut. 24.

#### SUB-SECT. 3.—BY ELISORS.

**21. Where sheriffs & coroners of interested parties.]**—HOLLAND v. HERON (1752), Barnes, 465; 94 E. R. 1006.

See, generally, CORONERS, Vol. XIII., p. 237, Nos. 61-64.

#### SUB-SECT. 4.—OTHER CASES.

**22. Bailiff of liberty—Bailiff to obey precept of sheriff.]**—By letters patent reciting that the liberty of H. was an ancient liberty, & that the lords were bailiffs of the same, & had exercised returns & executions of writs & processes within the liberty, the King granted to A. B. his heirs & assigns, that he should have within the liberty of H. the return & execution of all writs, processes,

WATERLOO COUNTY QUARTER SESSIONS (1863), 22 U. C. R. 405.—CAN.

**1. —When payable.]**—The sheriff's fees attach when a portion of the duty has been done, & he is in no default but stands ready to perform the remaining part when required without additional fee.—WALSH v. CORMACK (1850), 3 Nhd. L. R. 158.—NFLD.

**m. Special direction to sheriff—When necessary.]**—TANAKA v. RUSSELL (1902), 9 B. C. R. 336.—CAN.

**n. Sheriff of Toronto.]**—*Held*: since 24 Vict., c. 53, the sheriff of the county of the city of Toronto, not the high bailiff, is entitled to be selector of, & to ballot for & summon, the jurors for cts. held in the city.—*Re* TORONTO CITY (SHERIFF) v. TORONTO CITY (RECORDER) (1867), 26 U. C. R. 346.—CAN.

#### PART V. SECT. 2, SUB-SECT. 3.

**o. In criminal case.]**—In a criminal case, the jury process may be directed to elisors.—R. v. DICKSON (1832), Alc. & N. 113.—IR.

& precepts of His Majesty, by the lords' proper bailiffs, officers, & ministers, so that no sheriff of the King, his heirs or successors, should enter into the liberty to execute anything, unless it touched His Majesty or his Crown, or in default of the lords' bailiffs & officers. The bailiffs of the liberty had regularly attended the quarter sessions, & made returns of the jurors resident within the liberty:—*Held*: the bailiff of the liberty was bound in obedience to the precept of the sheriff, to summon the jury within the liberty, to attend the quarter sessions.—*R. v. JARAM* (1825), 4 B. & C. 692; 7 Dow. & Ry. K. B. 163; 3 Dow. & Ry. M. C. 361; 107 E. R. 1218.

*See, now*, Sheriff's Act, 1887 (c. 55), s. 34; Local Government Act, 1888 (c. 41), s. 48 (1).

### SECT. 3.—WHENCE SUMMONED—VENUE.

*See* R. S. C., Ord. 36, r. 1, & r. 10.

23. Where whole county concerned—Trial by a jury of neighbouring county.—Where a whole county is concerned in a trial, it shall be by a jury of a neighbouring county.—*ANON.* (1701), 12 Mod. Rep. 503; 88 E. R. 1477.

24. — — — Non-repair of county bridge.—

On an information against a county for not repairing a bridge the A.-G. may try the cause in any adjacent county & award the venue either to the body of that county or to the vicinity of any particular place therein.—*R. v. WILTS (INHABITANTS)* (1704), 6 Mod. Rep. 191; 87 E. R. 946.

*Annotation*:—*Mentd.* R. v. Cumberland (1795), 6 Term Rep. 194.

25. Local prejudice—Local custom in question—Impartial trial unlikely—Jury from Middlesex to save expense.—*THANET (EARL) v. PATERSON* (1738), Barn. Ch. 247; West temp. Hard. 454; 27 E. R. 632, L. C.

28. Jurors of county interested—Jury chosen from districts unaffected.—Where an impartial trial cannot be had by reason that the property in dispute extends over a very large portion of a county, & consequently a great number of persons from whom the jury would be chosen are interested, the ct. will order the jury to be chosen from those hundreds in which there is no reason to suppose that they are interested.—*A.-G. v. HALLETT* (1848), 11 L. T. O. S. 151.

Change of venue—In criminal matter.—*See* CRIMINAL LAW, Vol. XIV., pp. 150, 151.

—In civil matters.—*See* R. S. C. Ord. 36, PRACTICE.

## Part VI.—Juries of Inquiry and Presentment.

### SECT. 1.—IN GENERAL.

27. For what purposes ordered—Assessment of damages—On issues of law & fact.—Where issues are joined in fact & in law on the same count, & plff. obtains judgment on the issue in law, & then proceeds to try the issue in fact, the jury process must be awarded to assess damages on the issue in law as well as to try the issue in fact; although the latter issue goes to the whole cause of action in the count. Where plff. in such a case delivered an issue & notice of trial with a venue only to try the issue in fact; although the latter issue goes to the whole cause of action in the count, the ct. set them aside for irregularity, with costs.—*CODRINGTON v. LLOYD* (1838), 8 Ad. & El. 419; 1 Per. & Dav. 157; 1 Will. Woll & H. 672; 8 L. J. Q. B. 41; 112 E. R. 909.

*Annotations*:—*Reid*, Gregory v. Brunswick (1846), 3 C. B. 481. *Mentd.* Green v. Elgie (1843), 5 Q. B. 99; Rundle v. Little (1844), 6 Q. B. 174; Collett v. Foster (1857), 26 L. J. Ex. 412.

—Action for penalty for breach of covenant.—*See* No. 28, *post*.

—On judgment in default.—*See* DAMAGES, Vol. XVII., pp. 163, 164.

—Assessment of arrears of tithe rentcharge.—*See* No. 35, *post*.

—In criminal matters—Whether accused stands mute of malice.—*See* CRIMINAL LAW, Vol. XIV., p. 249, Nos. 2420 *et seq.*

—On plea of pregnancy.—*See* Sect. 5, *post*.

—Coroner's inquests—Super visum corporis.—*See* CORONERS, Vol. XIII., pp. 241 *et seq.*

—On fires.—*See* CORONERS, Vol. XIII., p. 261.

—On treasure trove.—*See* CORONERS, Vol. XIII., p. 236.

—Whether necessary.—*See* CONSTITUTIONAL LAW, Vol. XI., p. 588, No. 888.

—Inquiry as to title to property taken in execution.—*See* EXECUTION, Vol. XXI., p. 510.

—Under Sewers Act, 1833 (c. 22).—*See* SEWERS & DRAINS.

—Under Highways Act, 1835 (c. 50), s. 89—Stopping-up highway as unnecessary.—*See* HIGHWAYS, Vol. XXVI., p. 481, No. 1958.

28. When necessary—Assessment of damages—Action for penalty for breach of covenant.—8 & 9 Will. 3, c. 11, s. 8, which enacts "that in actions on any penal sum for non-performance of covenants, etc., plff. may assign as many breaches, etc., & if judgment shall be given for plff. on nihil dicit plff. may suggest on the roll as many breaches, etc., as he shall think fit, upon which shall issue a writ to the sheriff to summon a jury before the justice of assize, etc., to inquire, etc., & to assess the damages," etc., is compulsory on plff. & he cannot enter up judgment for the whole penalty on a judgment by default, as he might have done at common law.—*ROLES v. ROSEWELL* (1794), 5 Term Rep. 538; 101 E. R. 302.

*Annotations*:—*Reid*, Walcot v. Goulding (1799), 8 Term Rep. 126. *Mentd.* Doe d. Jersey v. Smith (1819), 7 Price 281; Jones v. Harrison (1851), 17 L. T. O. S. 41.

29. Constitution—Whether limited to twelve jurors—Inquest of office.—In inquests of office there may be more or less than twelve jurors.—*KING v. FITCH* (1635), Cro. Car. 414; 79 E. R. 959.

30. — — — YORK (DUKE) v. OATES (1684), 10 State Tr. 125.

### PART V. SECT. 3.

p. Jury summoned from two counties—Proclamation separating counties for jury purposes—Precept subsequently

issued to united counties—But before proclamation enforced.—*R. v. KENNEDY* (1867), 26 U. C. R. 326—CAN.

a Likelihood of jurymen having

formed preconceived opinions—Action against borough council—Jury panel largely drawn from residents & burgesses.—*SMITH v. INVERCAULHILL CORPN.* (1912), 32 N. Z. L. R. 47.—N.Z.



**Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2. Sects. 3 & 4.]**

**31. —**—[A writ of inquiry though executed by thirteen jurors is good.—*CHESTON v. CRAWLEY* (1741), 7 Mod. Rep. 450; 2 Stra 1159; 87 E. R. 1350.

**32. — Necessity for twelve jurors.]**—Twelve jurors must appear on record.—*R. v. ST. MICHAEL, SOUTHAMPTON (INHABITANTS)* (1770), 2 Wm. Bl. 718; 96 E. R. 421.

**33. — Right of challenge.]**—*ANON.* (1703), 6 Mod. Rep. 43; 87 E. R. 806.

**34. — Disqualification—Prisoners for debt.]**—The ct. set aside an inquisition taken on a writ of inquiry, because some of the jury were debtors in prison, & taken out of custody for the purpose of attending.—*STAINTON v. BEADLE* (1791), 4 Term Rep. 473; 100 E. R. 1126.

*Annotation:—Mentd. Bull v. Pinkus* (1838), 2 Jur. 256.

**35. How obtained—Whether on ex parte application—Assessment of arrears of tithe rentcharge.]**—Under Tithe Act, 1836 (c. 71), s. 82, where the half-yearly payment of rentcharge on land shall be in arrear, & unpaid for the space of forty days, & there shall be no sufficient distress upon the premises liable to the payment thereof, it shall be lawful for any judge of Her Majesty's cts. of record at Westminster, upon an affidavit of the facts, to order a writ to issue to the sheriff, requiring him to summon a jury to assess the arrears of the rentcharge remaining unpaid, & to return the inquisition thereupon taken to some one of the superior cts., etc.:—*Held*: such order could be made on an *ex p.* application to the judge.—*Re HAMMERSMITH RENT-CHARGE* (1849), 4 Exch. 87; 7 Dow. & L. 41; 19 L. J. Ex. 66; 14 L. T. O. S. 85; 13 J. P. Jo. 400; 154 E. R. 1136.

*Annotations:—Reid. Mot. Ry. v. Turnham* (1863), 14 C. B. N. S. 212. *Mentd. Abley v. Dale* (1850), 10 C. B. 62; *Buchanan v. Kinning* (1851), 2 L. M. & P. 526; *Cooper v. Wandsworth District Board of Works* (1863), 14 C. B. N. S. 180; *R. v. Cheshire Lines Committee* (1873), L. R. 8 Q. B. 341; *Wood v. Wood* (1874), L. R. 9 Exch. 190.

**36. Presentment—Whether a “verdict.”]**—The word “verdict” strictly means a verdict upon the trial of an issue; but in common parlance, it is applied to the finding of a jury upon an inquisition of damages, & is so used in Lord Denman's Act (*CRESSWELL, J.*)—*REED v. SHRUBSOLE* (1849), 7 C. B. 630; 6 Dow. & L. 707; Cox, M. & H. 226; 18 L. J. C. P. 225; 13 L. T. O. S. 96; 13 Jur. 497; 137 E. R. 250; *sub nom.* *REID v. SHRUBSOLE*, Rob. L. & W. 15; *sub nom.* *READ v. SHRUBSOLE*, 13 J. P. 286.

*Annotations:—Reid. Prow v. Squire* (1851), 10 C. B. 912. *Mentd. Slater v. Mackay* (1849), 8 C. B. 553; *Abley v. Dale* (1852), 21 L. J. C. P. 104.

#### PART VI. SECT. 2, SUB-SECT. 1.

**1. Qualification.—Alien.]**—An alien is disqualified from acting as a grand juror.—*R. v. DAVIES & MILLING* (No. 3) (1893), 19 V. L. R. 289.—**AUS.**

**t. — Coroner.]**—A coroner is not disqualified by common law from serving on a grand jury, nor by statute from serving on the grand jury of the county of the city of Dublin.—*Re NOWLAN* (1839), 2 Jebb & S. 1; 2 L. L. R. 7.—**IR.**

**a. — Distant relative of defendant.]**—A true bill being found against deft. for libel, deft. moved to have same quashed on the ground that one of the grand jurors who found the bill was of affinity to deft. In the seventh degree:—*Held*: not sufficient to quash an indictment.—*R. v. LAWSON* (1888), 2 P. E. f. 398.—**CAN.**

**b. — Objection on grounds of pre-**

*judice.]*—The question as to whether or not a grand juror is prejudiced, is for the judge of assize to decide, & his decision cannot be reviewed on a stated case.—*R. v. HAYES* (1903), 11 B. C. R. 4; *affg.* (1902), 23 C. L. T. 342; 9 B. C. R. 574.—**CAN.**

**c. — Political prejudice.]**—Deft. was indicted for riot during which the Orange Lodge in C. had been attacked & damaged. On the grand jury which found the bill against deft. were some Orangemen, though it did not appear that, beyond being members of the assocn., they had any personal interest in the hall:—*Held*: the Orangemen, as such, were not disqualified to act as grand jurors.—*R. v. COLLINS* (1878), 2 P. E. l. 249.—**CAN.**

**d. — Grand juror prosecutor—No participation in trial.—But name on caption.]**—Affidavits showing that prosecutor was not present when the bill

**37. — Admissibility as evidence.]**—In an action for insecurely keeping a mining shaft, issue was joined on deft.'s possession of the shaft. Deft. had stated, that if a miner's jury should say it was his, he would remunerate plff. The miner's jury gave their verdict in writing, that the shaft was in the possession of deft.:—*Held*: (1) the finding was admissible in evidence, on the principle on which admissions made by a third person to whom a party refers are admissible; (2) as the instrument did not, on the face of it, purport to be an award, an award stamp was unnecessary.—*SYBRAY v. WHITE* (1836), 1 M. & W. 435; 2 Gale, 68; Tyr. & Gr. 746; 5 L. J. Ex. 173; 150 E. R. 504.

*Annotations:—As to (2) Reid. Carr v. Smith* (1843), 5 Q. B. 128. *Generally, Mentd. Barnes v. Ward* (1850), 9 C. B. 392; *Williams v. Groucott* (1863), 4 B. & S. 149.

*See, generally, EVIDENCE, Vol. XXII., pp. 80 et seq.*

**38. — Whether subject to stamp duty as an award.]**—*SYBRAY v. WHITE*, No. 37, *ante*.

*See, generally, ARBITRATION, Vol. II., pp. 531, 532.*

### SECT. 2.—GRAND JURIES.

#### SUB-SECT. 1.—IN GENERAL.

**Qualification.]**—*See* 1825 Act, s. 1; & Sex Disqualification (Removal) Act, 1919 (c. 70).

**39. — Whether limited to freeholders.]**—Grand Jury must be freeholders; but to what amount is uncertain.—*BLUNT'S CASE* (1595), Cro. Eliz. 413; 78 E. R. 655.

**40. —**—[A person may serve on the Grand Jury although he is not a freeholder.—*ANON.* (1810), Russ. & Ry. 177; 168 E. R. 747, C. C. R.

*Annotation:—Reid. R. v. Duffy* (1818), 4 Cox, C. C. 172.

**41. — Irish peer.]**—An Irish peer ought not to serve upon a Grand Jury unless he is a member of the House of Commons.—*IRISH PEER'S CASE* (1806), Russ. & Ry. 117; 168 E. R. 713, C. C. R.

**Number.]**—*See* CRIMINAL LAW, Vol. XIV., pp. 237, 238, Nos. 2244, 2245.

**42. Jurisdiction — Conditions precedent — Prosecutor bound to prosecute.]**—The binding over to prosecute, which is necessary to give the Grand Jury of the Central Criminal Ct. jurisdiction in certain cases of misdemeanour, under Central Criminal Ct. Act, 1834 (c. 36), s. 13, must take place before a magistrate, etc., previous to the session of that Ct. & cannot be done by the Ct. itself.—*R. v. CARLTON* (1834), 6 C. & P. 651; 2 Nev. & M. M. C. 620.

*Annotation:—Expld. R. v. Gregory* (1845), 7 Q. B. 274.

was found by the grand jury, & took no part in the matter, were not received, his name appearing as one of the jurors in the caption of the indictment as returned on the *certiorari*.—*R. v. CUNARD* (1839), 2 N. B. R. (Ber.) 500.—**CAN.**

**e. Number.]**—*R. v. Cox* (1898), 31 N. S. R. (19 R. & G.) 311.—**CAN.**

**f. —**—[Upon the sheriff summoning thirteen grand jurors, Jurors Act, Sched. B is complied with in that portion of British Columbia to which it applies.—*R. v. BONNER* (1913), 18 B. C. R. 454.—**CAN.**

**g. —**—[In a county where twelve grand jurors are required to concur in the finding of a true bill, the Ct. of Appeal must assume, in the absence of evidence to the contrary, that a true bill returned by the grand jury was so found by the requisite number.

43. ————]—It is not necessary that the performance of any of the conditions specified in Vexatious Indictments Act, 1859 (c. 17), s. 1, should be averred on the fact of the indictment, or proved before the petty jury.—**KNOWLSEN v. R.** (1864), 5 B. & S. 532; 4 New Rep. 268; 33 L. J. M. C. 219; 10 L. T. 691; 29 J. P. 5; 10 Jur. N. S. 1177; 12 W. R. 957; 9 Cox, C. C. 483.

*Annotations*.—**Apld.** **Boaler v. R.** (1888), 57 L. J. M. C. 85. **Consd.** **R. v. Waller**, [1910] 1 K. B. 364. **Reid.** **R. v. Cuthbert, Brown & Newman** (1867), 31 J. P. 455.

44. ———— **Accused bound to appear.**]—**KNOWLSEN v. R.**, No. 43, *ante*.

45. **Liabilities of jurors—No liability in respect of duty.**—**AGARD v. WILDE** (1617), 3 E. R. 1251.

*See, further*, CRIMINAL LAW, Vol. XIV., p. 238, Nos. 2251, 2252.

46. ———— **For misconduct—Refusal to find true bill.**—**R. v. WINDHAM** (1667), 2 Keb. 180; 81 E. R. 113.

47. **Suspension under Grand Juries (Suspension) Act, 1919 (c. 4).**—**R. v. HOLMEN**, [1918] 2 K. B. 861; **R. v. KNOWLES** (1918), 34 T. L. R. 440; **R. v. McLAIN, R. v. BARR** (1922), 91 L. J. K. B. 562.

*Act expired on Dec. 23, 1921. The cases decided thereunder are therefore set out in the form in which they appear above.*

**Power to dispense with at quarter sessions—Where no business.**—*See* Criminal Justice Act, 1925 (c. 86), s. 19.

48. **Evidence—Admissibility of secondary evidence.**—If on an indictment for forgery being presented to the Grand Jury, it appear that the forged instrument cannot be produced, either from its being in the hands of prisoner, or from any other sufficient cause, the Grand Jury may receive secondary evidence of its contents.

An indictment for forgery being presented to the Grand Jury, a witness declined to produce certain deeds before them:—*Held*: if the deeds form a part of the evidence of the witness's title to his own estate, he is not compellable to produce them, but that, if they do not, the Grand Jury may compel their production.—**R. v. HUNTER** (1829), 3 C. & P. 591.

*Annotation*.—**Mentd.** **Re Young** (1847), 9 L. T. O. S. 394.

*See, generally*, CRIMINAL LAW, Vol. XV., pp. 238 *et seq.*

49. **Finding—Nature of.**—Strictly speaking the whole finding of the Grand Jury, from first to last, constitutes but one indictment against all the persons who have committed all the offences therein presented.—**R. v. HEYWOOD** (1861), Le. & Ca. 451; 33 L. J. M. C. 133; 10 L. T. 464; 28 J. P. 375; 12 W. R. 761; 9 Cox, C. C. 179; 169 E. R. 1468, C. C. R.

*Annotations*.—**Mentd.** **R. v. Elliott** (1908), 99 L. T. 200.

—**R. v. SPINTUM** (1913), 18 B. C. R. 606.—**CAN.**

**h. Constitution of Grand Jury—Drafting done by sheriff—Not by selector.**—**R. v. DUBOIS** (1919), 30 B. C. R. 394.—**CAN.**

**k. Power to present for vagrancy.**—Grand Juries in Ireland are empowered by statute to present for vagrancy, as well females as males.—**R. v. EGAN** (1840), 1 Cr. & D. 338.—**IR.**

**l. Power to present for malicious injuries.**—The Grand Jury has full power to make a presentment for compensation for malicious injuries, although the presentment for such injuries had been thrown out at the presentment sessions.—**Re JACKSON** (1866), 10 Cox, C. C. 221.—**IR.**

**m. Objection to grand juror—How made.**—The proper mode of objecting to a grand juror is by plea in abatement & not by challenge.—**R. v. SHERIDAN** (1811), 31 State Tr. 513, 568, 572.—**IR.**

**n. Bills ignored by Grand Jury—Right of prosecutor to expenses.**—When the bills are ignored by the grand jury, no order can be made for a prosecutor's expenses.—**Re PROSECUTOR'S EXPENSES** (1825), Jebb, Cr. & Pr. Cas. 42.—**IR.**

**o. Bills rejected under influence of defendants.**—Information granted because two Grand Juries had thrown out two bills of indictment against defendants, under the influence of defendants.—**ANON.** (1801), Rowe, 727.—**IR.**

**p. Grand juror acting as such after**

**R. v. Lockett, Grizzard, Gutwirth & Silverman**, [1914] 2 K. B. 720.

*See, generally*, CRIMINAL LAW, Vol. XV., pp. 240, 241.

## SUB-SECT. 2.—MEMBERS OF GRAND JURY AS WITNESSES.

50. **For what purposes evidence admissible—As to evidence given.**—**ANON.** (1640), Clay. 84.

51. ———— **Identity of party.**—**SYKES v. DUNBAR** (1799), 2 Selwyn's N. P. 13th ed. 1015.

*Annotations*.—**Mentd.** **Purcell v. McNamara** (1808), 1 Camp. 199; **Williams v. Taylor** (1829), 3 Moo. & P. 350.

52. ———— **As to number of grand jurors.**—The caption of the indictment on which deft. had been convicted was drawn up by the clerk of the peace from the minutes of sessions, & returned with the indictment to the Crown Office. It stated the presentment to be made by the oaths of A. B., C. D., etc., naming twelve grand jurors, & others, good & lawful men, etc. A rule was obtained, with a view to a writ of error, calling on the clerk of the peace to show cause why the caption should not be amended by inserting the true names & number of the grand jury sworn:—*Held*: the ct. would refuse to receive an affidavit from a grand jurymen as to the number of grand jurors or what passed in the grand jury room.—**R. v. MARSH** (1837), 6 Ad. & El. 236; 2 Har. & W. 366; 1 Nev. & P. K. B. 187; Will. Woll. & Dav. 150; 6 L. J. M. C. 153; 1 J. P. 245; 1 Jur. 38; 112 E. R. 89.

*Annotations*.—**Mentd.** **O'Brien v. R.** (1849), 3 Cox, C. C. 360; **R. v. Yates** (1883), 48 J. P. 102.

53. ———— **As to proceedings of Grand Jury.**—**R. v. MARSH**, No. 52, *ante*.

54. ———— **Proof of identity of defendant—In action for malicious prosecution.**—In action for malicious prosecution, pltf. may call one of the Grand Jury, to prove that deft. was prosecutor on the indictment.—**FREEMAN v. ARKELL** (1823), 1 C. & P. 135, N. P.; *subsequent proceedings* (1824), 2 B. & C. 494.

## SECT. 3.—LUNACY JURIES.

*See* LUNATICS.

## SECT. 4.—CORONER'S JURY.

**Where coroner acting in place of sheriff.**—*See* CORONERS, Vol. XIII., p. 238, Nos. 73–75.

**Proceedings at inquests.**—*See* CORONERS, Vol. XIII., pp. 243, 244, Nos. 137–165; pp. 247, 248, Nos. 201–220; pp. 251–260, Nos. 265–410.

**Adjournments.**—*See* CORONERS, Vol. XIII., pp. 246, 247, Nos. 186–192.

**discharge.** The Ct. of K. B. will not attach a grand juror for anything done by him as a grand juror, if done while he was acting as a grand juror; but they will attach one who had been a grand juror, for acting as such after having been discharged.—**R. v. BAKER** (1800), 10 W. 603.—**IR.**

**q. Quaker on Grand Jury—Form of caption.**—Where a Quaker is upon the Grand Jury it is enough to state in the caption that the indictment has been found "upon the oath & affirmation of twelve good & lawful men, etc." without stating the names of the grand jurors or who were sworn, or who affirmed, or showing that any of them was by his religious opinions entitled to be affirmed.—**R. v. O'CONNELL** (1844), 3 L. T. O. S. 323.—**IR.**

*Sect. 4.—Coroner's jury. Sect. 5 & 6. Part VII. Sects. 1, 2 & 3: Sub-sects. 1, 2 & 3.]*

— *Verdict.*—See CORONERS, Vol. XIII., p. 247, Nos. 193-200; pp. 248-251, Nos. 221-264.

— *Disbursements to jurors.*—See CORONERS, Vol. XIII., pp. 260, 261, No. 418.

— *Qualification & exemption of jurors.*—See CORONERS, Vol. XIII., p. 243, Nos. 139-146.

#### SECT. 5.—JURY OF MATRONS.

55. In criminal matters—On plea of pregnancy after conviction for murder—Time for plea.]—R. v. THOMAS (1906), 70 J. P. Jo. 316.

56. ——— How constituted.]—R. v. THOMAS (1906), 70 J. P. Jo. 316.

57. ——— Form of oath.]—R. v. WYCHERLEY (1838), 8 C. & P. 262.

58. ——— ———.]—R. v. THOMAS (1906), 70 J. P. Jo. 316.

59. ——— Professional assistance—How given.]—If a jury of matrons wish to have the evidence

of a surgeon before they give their verdict, they should return into ct. & the surgeon should be examined as a witness in open ct.—R. v. WYCHERLEY (1838), 8 C. & P. 262.

See, further, CRIMINAL LAW, Vol. XIV., p. 330, Nos. 3448-3452.

60. In civil matters—On writ de ventre inspiciendo.]—Petition for issue of writ de ventre

One B. was tenant for life of certain property, remainder to trustees for 1,000 years on trust to raise £3,000 for B.'s issue remainder to petitioners in fee. B. died & his wife who was then living in adultery represented herself to be with child by him. Writ ordered to issue the jury to be a jury of women.—BLAKEMORE v. BLAKEMORE (1845), 1 Holt, Eq. 328; 71 E. R. 769; *sub nom.* Re BLAKEMORE, 14 L. J. Ch. 336.

See, generally, DESCENT, Vol. XVIII., pp. 11, 12.

#### SECT. 6.—UNDER SEWERS ACT, 1833.

See SEWERS & DRAINS.

## Part VII.—Juries of Issue and Assessment.

### [SECT. 1.—IN GENERAL.

See 1825 Act, s. 26.

61. Number of jurors—Must be twelve.]—The Law of the land is that matters of fact shall be tried by verdict of twelve men.—YORK (ARCHBP.) & SEDGWICK'S CASE (1612), Godb. 201; 78 E. R. 122.

62. ——— In inferior court—Whether for less than twelve good.]—A custom to try causes in an inferior ct. by six jurors instead of twelve is bad.—TREDYMOCK v. PERRYMAN (1632), Cro. Car. 259; 79 E. R. 827.

Annotations:—*Reid*. Tomkins's Case (1675), Freem. K. B. 322; Paul v. Knight (1732), Kel. W. 223.

63. ——— ———.]—A custom to try by six jurors [in an inferior ct.] is good, if specially alleged.—ROGERSON v. JACOB (1673), Freem. K. B. 318; 3 Keb. 251; 89 E. R. 235.

— A trial by six jurors [in an inferior ct.] is not good, even by special custom.—TOMKINS'S CASE (1675), Freem. K. B. 322; 89 E. R. 238.

65. ——— ———.]—(Custom to try in inferior cts. by six jurors only is not good (RAYMOND, C.J.).—PAUL v. KNIGHT (1732), Kel. W. 223; 25 E. R. 580.

— In county court.]—See County Courts Act, 1888 (c. 43), s. 102; County Courts Act, 1903 (c. 42), s. 4.

66. More than twelve entering box—Elimination of surplus.]—When thirteen jurymen enter the jury box, one without answering to his name, & the mistake is undiscovered until about to be sworn, the practice is for the judge to decide which

one out of the thirteen shall quit the box.—O'CONNOR v. LAWSON (1843), 1 L. T. O. S. 506.

67. More than twelve sworn—Elimination of surplus.]—On the trial of a special jury cause *ad nisi prius*, it being discovered, after pltf.'s case had commenced, that there were thirteen jurymen in the box, the judge discharged them, & directed that twelve of them should be recalled & sworn, which was done. Deft.'s counsel protested against this course, & withdrew from the cause, which was then taken as undefended, & a verdict found for pltf. This ct. refused to set the verdict aside, & award a *venire de novo*, inasmuch as the judge who tried the cause was correct in treating the proceedings with thirteen jurymen as a nullity, & in discharging them as soon as the error was discovered.

If the jurymen last called could have been ascertained, the judge should have directed him to leave the box, & have continued the trial with the remaining twelve (PARKE, B.).—MUIRHEAD v. EVANS (1851), 6 Exch. 447; 2 L. M. & P. 294; 20 L. J. Ex. 211; 17 L. T. O. S. 65; 15 Jur. 385; 155 E. R. 618.

68. ——— Jury resworn—Whether ground for new trial.]—MUIRHEAD v. EVANS, No. 67, *ante*.

### SECT. 2.—THE JURY PANEL.

See C. L. P. Act, 1852 (c. 76), ss. 106, 107; 1870 Act, s. 10; & 1922 Act, s. 5.

69. Number—In criminal matters.]—VANE'S

#### PART VII. SECT. 1.

611. Number of jurors—Must be twelve.]—O'BRIEN v. R. (1890), 26 L. R. Ir. 451.—IR.

6111. ———.]—KINNEAR v. NEW ZEALAND LOAN & MERCANTILE AGENCY CO. (1905), 25 N. Z. L. R. 784.—N.Z.

r. ——— Order to summon nine.]—An order to summon nine jurors is not authorised by 47 Vict. c. 14, s. 5; & a trial by a jury selected from such jurors & the twelve *petit* jurors is a

nullity.—R. v. ENGLISH (1892), 31 N. B. R. 305.—CAN.

t. ——— Where less than twelve sufficient.]—HOGG v. FARRILL (1896), 4 B. C. R. 534.—CAN.

a. ———.]—GILL v. WESTLAKE, [1910] A. C. 197.—I. of M.

b. Less than usual number—By consent of parties.]—LOANE v. BLACK, [1925] 3 D. L. R. 940.—CAN.

e. ———.]—Begg & Co. v.

NAUJOKS (1903), 23 N. Z. L. R. 565.—N.Z.

#### PART VII. SECT. 2.

691. Number—In criminal matters.]—Where the sheriff had summoned twenty-six persons as *petit* jurors, & the judge struck off the last five names on the list:—*Held*: the summoning of the additional number did not vitiate the panels & the last five names were properly struck off.—R. v.

CASE (1662), Kel. 14; 6 State Tr. 120; 84 E. R. 1060.

*Annotations:—Mentd.* Bellow's Case (1673), 1 Vent. 254. *R. v. Preston-on-the-Hill* (1736), Lee temp. Hard. 349. *Edmonds' Case* (1821), 1 State Tr. N. S. 785; *R. v. Rice & Hayes* (1846), 8 L. T. O. S. 238; *R. v. Dowling* (1848), 3 Cox, C. C. 509.

70. ——— **Second panel—Jury from first panel disagreeing.**—A new panel of seventy two jurors may be ordered by the judge to be summoned during the assizes, & a conviction for felony by a jury selected therefrom, after challenging, though more than forty-eight is valid.—*R. v. CROPPER* (1837), 2 Mood. C. C. 18, C. C. R.

71. **Right of defendant to copy of panel.**—The law allows deft. a copy of the panel, to provide himself for his challenges.—*ANON.* (1669), 1 Mod Rep. 15; 86 E. R. 695.

72. **Right of accused to copy of panel—On charge of felony.**—On a trial for felony prisoner is entitled to have the indictment read over slowly once, & once only. Prisoner is not entitled to a copy of the jury panel; a juror cannot be examined on the *voir dire* without cause being first shown.—*R. v. DOWLING* (1848), 7 State Tr. N. S. 381; 12 J. P. 678; 3 Cox, C. C. 509.

*Annotation:—Mentd.* *R. v. Meany* (1867), 15 W. R. 1082.

**On charge of treason.**—See CRIMINAL LAW, Vol. XV., p. 630, Nos. 6673–6677.

73. **Right of accused to have panel read over.**—*R. v. LACEY*, No. 91, *post*.

### SECT. 3.—VIEW BY JURY.

#### SUB-SECT. 1.—IN GENERAL.

See 1825 Act, ss. 23, 24; C. L. P. Act, 1852 (c. 76), s. 114; & R. S. C. Ord. 50, rr. 3, 4 & 5.

74. **Viewers must sit on jury at trial.**—Defts. had obtained a rule for a view, which was accordingly had, but upon the trial coming on at the assizes all the viewers were empanelled & engaged in trying a cause in another ct. As this, however, was the last cause on the list, the learned judge, against the consent of defts., determined upon trying it, & other jurors were empanelled instead of the viewers, & a verdict was returned for plffs.:—*Held*: this was a mistrial, & a rule for a new trial was accordingly made absolute.—*KINGSTON UNION GUARDIANS v. LANDED ESTATES CO., LTD.* (1873), 28 L. T. 644.

75. **View in county other than county of trial—Whether allowed.**—The ct. has no power to order a sheriff of one county to take the jury to have a view in another county.—*MALINS v. DUNRAVEN* (1845), 1 New Pract. Cas. 220; 5 L. T. O. S. 99; 9 Jur. 690.

76. ——— **Jurisdiction of court to order.**—*STOKE v. ROBINSON* (1889), 6 T. L. R. 31, D. C.

— **In criminal matters.**—See CRIMINAL LAW, Vol. XIV., p. 304, Nos. 3200, 3201.

77. **Costs of view.**—Plff. in trespass for breaking his close, who recovers less than 40s. is not entitled to costs of increase merely because a view was granted, before trial, though upon the application of deft.—*FLINT v. HILL* (1809), 11 East, 184; 103 E. R. 974.

78. ——— **The costs of a view cannot be allowed, unless the writ contain the name of a**

shower appointed by deft. as well as by plff.—*TAYLOR v. THOMPSON* (1831), 7 Bing. 403; 5 Moo. & P. 255; 9 L. J. O. S. C. P. 104; 131 E. R. 112.

#### SUB-SECT. 2.—WHEN AND HOW GRANTED.

See R. S. C. Ord. 50, r. 5.

79. **When granted—In civil matters—Where model can be produced.**—In an information for duties against the proprietors of a glass manufactory the ct. will not grant a view of the premises where the question may be tried by the production of a model.—*A.-G. v. GREEN* (1814), 1 Price, 130; 145 E. R. 1354.

80. ——— **Action for work & labour.**—Deft. being sued in *assumpsit*, for work done by plff. as a carpenter & bricklayer, & for bell hanging, painting, & papering done to deft.'s house, applied to plff. to appoint a shower on his part, for the purpose of a view by the jurors; & on plff.'s refusal, obtained a side bar rule for a view which contained the name of deft.'s shower only, with blanks for the time & place of the meeting of the jurors:—*Held*: this was not a case for a view, & the side bar rule must be set aside.—*STONES v. MENHEM* (1848), 2 Exch. 382; 17 L. J. Ex. 215; 154 E. R. 541.

81. ——— **Benefit doubtful—Infringement of easement of light.**—The benefit of sending a case of this kind [infringement of light] to a jury is doubtful. The jury can contribute nothing but the view; & their view is likely to be prejudiced, since they see only the existing state of the light, which may be equal to the ordinary state of the light in the neighbourhood.—*DENT v. AUCTION MART CO., PILGRIM v. SAME, MERCERS' CO. v. SAME* (1866), L. R. 2 Eq. 238; 35 L. J. Ch. 555; 14 L. T. 827; 30 J. P. 661; 12 Jur. N. S. 447; 14 W. R. 709.

*Annotations:—Mentd.* *Martin v. Headon* (1866), L. R. 2 Eq. 425; *Senior v. Pawson* (1866), L. R. 3 Eq. 330; *Calcraft v. Thompson* (1867), 15 W. R. 387; *Lanfranchi v. Mackenzie* (1867), L. R. 4 Eq. 421; *Luscombe v. Steer* (1867), 17 L. T. 229; *Beadol v. Porry* (1868), 19 L. T. 760; *Potts v. Smith* (1868), 18 L. T. 629; *Kolk v. Pearson* (1870), 23 L. T. 458; *City of London Brewery Co. v. Tennant* (1873), 43 L. J. Ch. 457; *Dickinson v. Harbottle* (1873), 28 L. T. 186; *Aynsley v. Glover* (1874), L. R. 18 Eq. 544; *Pennington v. Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *Moore v. Hall* (1878), 3 Q. B. D. 178; *Bryant v. Lefever* (1879), 4 C. P. D. 172; *A.-G. v. Queen Anne Garden & Mansions Co.* (1889), 60 L. T. 759; *Bass v. Gregory* (1890), 25 Q. B. D. 481; *Dicker v. Popham, Hatford* (1890), 63 L. T. 379; *Warren v. Brown*, [1900] 2 Q. B. 722; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Colls v. Home & Colonial Stores*, [1904] A. C. 179.

— **In criminal matters.**—See CRIMINAL LAW, Vol. XIV., p. 304.

82. **How granted—Whether on motion ex parte.**—Parties may if they please obtain a view now under R. S. C. Ord. 50, r. 5, & they can do so *ex p.* where they have the consent of the other side (*FIELD, J.*).—*PICKARD v. GREAT NORTHERN RY. CO.*, [1883] W. N. 194; Bitt. Rep. in Ch. 246.

#### SUB-SECT. 3.—CONDUCT OF VIEW.

83. **Whether evidence may be given.**—Whether land was parcel of one manor or another

*MAILLOUX* (1876), 16 N. B. R. (3 Pug.) 493.—CAN.

721. **Right of accused to copy of panel—On charge of felony.**—*Re CHANTLER* (1905), 5 O. W. R. 574; 9 O. L. R. 529.—CAN.

722. ——— **—**—A prisoner indicted for felony is not entitled to a

copy of the jury panel, or to copies of the panels returned at former sessions of the ct.—*R. v. MITCHELL* (1848), 3 Cox, C. C. 1.—IR.

d. **Order for extra panel.**—By less than majority of judges.—Prisoner was tried by a jury called from an extra panel, the order for which was

by only three judges:—*Held*: the order was valid although not signed by a majority of the judges.—*R. v. QUINN* (1878), 13 N. S. R. (1 R. & G.) 139.—CAN.

#### PART VII. SECT. 3, SUB-SECT. 3.

831. **Whether evidence may be given.**—If any information pertinent to the

**Sect. 3.—View by jury: Sub-sect. 3. Sects. 4 & 5:**  
**Sub-sects. 1 & 2, A.]**

was in issue, the jury were ordered to view the land & that upon the view no evidence should be given them, but *non obstante* evidence was given to some of them. When they came to be sworn they were challenged therefor. Those who had not received evidence were sworn & two of them were appointed triers to try if the others who were challenged were indifferent or not. The jurors who had disobeyed the directions of the ct. were fined. Pltfs. were nonsuited.—*DALSTON & NICHOLS v. ALL-SOULS COLLEGE, OXFORD (MASTER & FELLOWS) (1623),* Palm. 303; 81 E. R. 1125.

**84. — Indication of boundaries & places.]**—*GOODTITLE d. SYMONS v. CLARK (1746),* Barnes, 457; 94 E. R. 1002.

**85. Communication between parties & viewers—Or showers & jurors—How far allowed.]**—Neither party, nor either of the showers, should hold any communication with such of the jury who view the *locus in quo*, touching the matter in issue.—*GRIFFITH v. THOMAS (1827),* 5 L. J. O. S. K. B. 126.

**SECT. 4.—CALLING THE JURY.**

See 1825 Act, s. 26; & 1922 Act, s. 5.

**86. Method of selecting jurors—By ballot.]**—*R. v. FROST, No. 99, post.*

**87. — Men & women together.]**—I directed attention to Rule 3 of the Women Jurors (Criminal Court) Rules, 1920, which shows plainly that the number of women on a panel of jurors should be in the same proportion to the number of men as the total number of women is to the total number of men on the juror's book. When once the panel has been selected according to this rule, the jury must be selected in the ordinary way.

There is no rule which states that the number of men & women serving on a jury shall be equal, & I wish to make it clear that the names of the men & of the women on the panel must not be placed in two separate boxes & drawn alternately; they must be placed in one box & drawn indiscriminately, until the jury is made up (LORD READING, C.J.).—*R. v. EVANS & PRITCHARD (1920),* 15 Cr. App. Rep. 111, C. C. A.

case be given to a juror at a view, there must be a new trial, even though such information be true in fact.—*SMITH v. NEILD (1889),* 10 N. S. W. L. R. 171; 6 N. S. W. W. N. 55.—**AUS.**

**84i. — Indication of boundaries & places.]**—While the jury were viewing premises, one of them asked for information; the shower replied that he could not inform him, & the juror then told him to ask pltf.; he did so, & pltf., in view & hearing of the juror, pointed to a place on the land, & said "Here".—*Held:* this amounted to pltf. giving evidence to the jury, & a new trial was ordered.—*BENNETT v. SMITH (1877),* 17 N. B. R. (1 P. & B.) 27.—**CAN.**

**8. Communication between parties & viewers—How far allowed.]**—Where a jury of view supped & slept at pltf.'s house after completing the view:—*Held:* no ground for disturbing a verdict for pltf., it appearing that no communication respecting the suit had taken place between pltf. & the jury.—*SPENCE v. TRENHOLM (1867),* 19 N. B. R. (1 Han.) 77.—**CAN.**

**1. — — —.]**—Deft., while the jury

were viewing the *locus in quo*, conversed & otherwise interfered with them, & provided refreshments for them at his house:—*Held:* a good ground for setting aside a verdict.—*ANDERSON v. MOWATT (1880),* 20 N. B. R. (4 P. & B.) 255.—**CAN.**

**PART VII. SECT. 4.**

**86i. Method of selecting jurors—By ballot.]**—In criminal cases, the names of the jurors cannot be taken by ballot, unless the persons then representing the Crown consent.—*R. v. CARROLL (1840),* 1 Caw. & D. 337.—**IR.**

**86ii. — — —.]**—*R. v. COLGAN (1841),* 2 Caw. & D. 80.—**IR.**

**8. Right of accused to have whole panel in court.]**—On an indictment for wilful murder, the accused has no right to have the whole panel present when the jury to try him are being called.—*R. v. PATRICK & MCCARTHY (1866),* 5 Nfld. L. R. 167.—**NFLD.**

**PART VII. SECT. 5, SUB-SECT. 1.**

**88i. Challenge to the array—Not**

**SECT. 5.—CHALLENGE.**

**SUB-SECT. 1.—TIME FOR CHALLENGE.**

**88. Challenge to the array—Whether after issue joined.]**—A plaintiff after issue joined cannot tender a challenge for consanguinity in the sheriff.—*GREEN v. DENNIS (1601),* Cro. Eliz. 844; 78 E. R. 1071.

**89. — Not until full jury have appeared.]**—*VICARS v. LANGHAM (1618),* Hob. 235; Jenk. 310; 80 E. R. 381, Ex. Ch.

*Annotation:—Folld. R. v. Edmonds (1821),* 4 B. & Ald. 471.

**90. — — —.]**—*R. v. EDMONDS, No. 131, post.*

**91. — — —.]**—(1) On an indictment for felony the prisoner may by permission of the ct., have the jury panel read over, with the additions & addresses of the jurors.

(2) No challenge can be made until a full jury has appeared in the box.

(3) The panel may be read over, by leave of the ct., before the jury are sworn.

(4) On a challenge to the favour, that the juror did not stand indifferent, triers having been appointed:—*Held:* the juror could not be asked if he had been a special constable during the recent disturbances, but might be asked if he had expressed any opinion as to the result of the trial.—*R. v. LACEY (1848),* 3 Cox, C. C. 517; *sub nom. R. v. CUFFEY, 7 State Tr. N. S. 467; 12 J. P. 807.*

**92. — Before jury sworn.]**—A challenge to the array must be formally tendered before the jury are sworn.—*BRUNSKILL v. GILES (1832),* 9 Bing. 13; 2 Moo. & S. 41; 1 L. J. C. P. 143; 131 E. R. 519.

**93. Challenge to the polls—Not until full jury have appeared.]**—*VICARS v. LANGHAM (1618),* Hob. 235; Jenk. 310; 80 E. R. 381, Ex. Ch.

*Annotation:—Folld. R. v. Edmonds (1821),* 4 B. & Ald. 471.

**94. — — —.]**—*R. v. EDMONDS, No. 131, post.*

**95. — — —.]**—*R. v. LACEY, No. 91, ante.*

**96. — As jurors called.]**—On a trial for murder, jurors should be challenged as they are called.—*R. v. MORGAN (1610),* 1 Bulst. 84; 80 E. R. 783; *subsequent proceedings, sub nom. EGERTON v. MORGAN, 1 Bulst. 69.*

*Annotations:—Mentd. Wilson v. Law (1694),* 4 Mod. Rep. 290; *R. v. Yandell (1792),* 4 Term Rep. 521; *R. v. Middlesex Sheriff (1804),* 4 East, 604; *R. v. Barthelemy & Morney (1852),* Dears. C. C. 60.

**97. — Before juror is sworn.]**—*WHARTON'S CASE (1602),* Yelv. 24; 80 E. R. 17.

*Annotations:—Mentd. Rushel's Case (1670),* T. Jo. 13; *Grenville v. College of Physicians (1700),* 12 Mod. Rep. 386.

*until full jury have appeared.]*—The proper time for putting in a challenge to the array, is after twelve of the jurors have appeared, & before they have been sworn.—*R. v. FITZPATRICK (1838),* Caw. & D., Abr. C. 513.—**IR.**

**98i. Challenge to the polls—As jurors called.]**—The proper mode & time for objecting to a juror is by challenge when he is called to be sworn.—*OLIVER v. BELYEA (1849),* 6 N. B. R. (1 All.) 462.—**CAN.**

**98ii. — — —.]**—*LAVIN & HEALY'S CASE (1843),* Ir. Cr. Rep. 813.—**IR.**

**98iii. — — —.]**—It is too late to challenge a juror after he has been sworn, even if the ground for challenge was not known at the time.—*R. v. EARL (1894),* 10 Man. L. R. 303.—**CAN.**

**98iv. — — —.]**—*R. v. PILGAR (1912),* 23 O. W. R. 433; 4 O. W. N. 330; 27 O. L. R. 337; 8 D. L. R. 830.—**CAN.**

**98v. — — —.]**—*WOOD'S CASE (1841),* Ir. Cr. Rep. 276.—**IR.**

**97i. — Before juror is sworn.]**—*SOMERS v. WILBUR (1881),* 20 N. B. R. (4 P. & B.) 502.—**CAN.**



98. —[In challenging an individual juror the strict rule is that, before the officer of the ct. administers the oath to him, the counsel for the prisoner must declare whether he intends to challenge, & if he declines it is then for the counsel for the Crown to declare whether he intends to do so; but after the oath is administered, it is too late for either party to interfere.—*R. v. BRANDRETH* (1817), 32 State Tr. 755.

*Annotations*.—*Expld. R. v. Frost* (1839), 9 C. & P. 129. *Mentd. R. v. Grant, Ranken & Hamilton* (1848), 7 State Tr. N. S. 507.

99. — **Before juror's oath begun.—When oath begun.**—(1) In a case of treason where the prisoner's counsel asked that the names of the jurors should be taken from a ballot box instead of being called over in the order in which they stood in the panel, which was alphabetical, & this proposition was acquiesced in by the A.-G., the ct. allowed the names of the jurors to be taken from a ballot box; but if the A.-G. had objected, the ct. would not have granted the application.

(2) The challenge of a juror, either by the Crown or by the prisoner, must be before the oath is commenced. The moment the oath has begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the ct. to do so; but if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby.

(3) Although the Crown has no peremptory challenge, it may order any juror to stand by, & postpone showing its grounds of objection, until the whole panel has been gone through.—*R. v. FROST* (1840), 9 C. & P. 129; 2 Mood. C. C. 140; 4 State Tr. N. S. 85; *Gurneys' Rep.* 749; 1 Town. St. Tr. 1; 169 E. R. 56.

*Annotations*.—*As to* (1) *Refd. Mansell v. R.* (1857), *Dears. & B.* 375. *As to* (3) *Refd. Gray v. R.* (1844), 6 State Tr. N. S. 117. *Generally, Mentd. Redford v. Birley* (1822), 1 State Tr. N. S. 1071; *R. v. Tyrrell* (1843), 2 L. T. O. S. 175; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *R. v. Lacey* (1845), 3 Cox, C. C. 517; *R. v. O'Brien* (1848), 7 State Tr. N. S. 1; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *R. v. Bird* (1850), 5 Cox, C. C. 20; *R. v. Bernard* (1858), 8 State Tr. N. S. 887; *R. v. Burke* (1867), 10 Cox, C. C. 519; *Dillon v. O'Brien & Davis* (1887), 16 Cox, C. C. 245; *R. v. Crippen*, [1911] 1 K. B. 149; *R. v. Bliss Hill* (1918), 82 J. P. 194.

100. — — — — —[A challenge of a juror on behalf of a prisoner must be made before the juror takes the book in hand to be sworn.—*R. v. HOLYMAN* (1842), 6 J. P. 702.

101. — — — — —[Where a jury *de medietate* is claimed by a foreigner on a trial for murder, the Crown is compelled to show cause of challenge to a foreign juror after the panel has been called over, notwithstanding that the panel has not been exhausted by giving formal challenges. The challenge must be made before the book is given into the hands of the juror & the officer has recited the oath, & it is too late, though made before the juror kiss the book.

The names on the panel were called over in order & upon intimation from either the prisoner or the Crown that the juror named was objected to, he was ordered to stand aside whilst those against whom no objection was offered went into the box. When the panel had been gone through in this manner, ten jurymen only were in the box, of whom eight were Englishmen & two foreigners:—*Held*: the panel was not exhausted.

The order to stand by is nothing. The panel

must also be exhausted by giving challenges. The foreigners who can be found & are not returned on the panel are to be added to the panel & form a supplemental panel as regards this panel, & all challenges be given; there is no difference between that panel & the rest of the panel. . . . When the six Englishmen appear, the spirit of the statute is to secure six foreigners; & if that number cannot be got, the sheriff is then, either by going out into the streets, or in some other way, to endeavour to procure the six foreigners, or as near the number of six as possible, to make up the twelve. In this case either party has a right to challenge; but the Crown has only a right to challenge for cause (*CHANNELL, B.*)—*R. v. GIORGETTI* (1865), 4 F. & F. 546.

*Annotation*.—*Expld. Levinger v. R.* (1870), L. R. 3 P. C. 282.

102. — **After juror sworn.—By account.**—A challenge not heard till the juror was sworn & marked, cannot be admitted without the consent of the A.-G.—*TYNDAL'S CASE* (1633), *Cro. Car.* 291; 79 E. R. 855.

103. — **Before prisoner given in charge.**—A challenge of a juror allowed after he had been sworn [ & before the prisoner was given in charge].—*R. v. FLINT* (1848), 3 Cox, C. C. 60.

104. — **Special jury.**—Even that which, in general, is matter of challenge, cannot be taken on the trial in the case of a special jury. The time for taking the objection is on the striking of the jury.—*R. v. SUTTON* (1828), 8 B. & C. 417; 108 E. R. 1097; *sub nom. R. v. DESPARD*, 2 Man. & Ry. K. B. 406; 1 Man. & Ry. M. C. 444; 6 L. J. O. S. M. C. 102.

*Annotations*.—*Refd. Mansell v. R.* (1857), 8 E. & B. 54; *R. v. Mellor* (1858), *Dears. & B.* 468.

105. **Challenge & trial of the tales.—After principal panel tried.**—In trespass *deft.* pleaded not guilty, & at the assizes a verdict was found for *pltf.*, & thereupon judgment was given for him, upon which *deft.* brought a writ of error, & assigned for error, that one of the jurors of the principal panel appeared only at the assizes, upon which, at the prayer of *pltf.*, a panel of *tales de circumstantibus* was returned by the sheriff, the title of which panel was, *Nomina decem talium*, etc., & under it the sheriff returned eleven jurors. Resolved: by 35 Hen. 8, c. 6, if one of the jurors only appears, the ct. may award *tales de undecem*.

The time of the challenge & trial of the tales is after the principal panel is tried; & if the principal panel is affirmed, the same triers shall try the tales; but if it is quashed, then the two triers of the principal panel shall not try them.—*DENBAWD'S CASE* (1612), 10 Co. Rep. 102 b; *Jenk.* 288; 77 E. R. 1081; *sub nom. DENBAUGH v. WOODLEY*, *Cro. Jac.* 316; *Cas. Pract.* K. B. 6.

*Annotations*.—*Refd. Gray v. R.* (1844), 7 State Tr. N. S. 117; *Levinger v. R.* (1870), 7 Moo. P. C. C. N. S. 69. *Mentd. Moyser v. Gray* (1836), *Cro. Car.* 446; *Grenville v. College of Physicians* (1700), 12 Mod. Rep. 380.

## SUB-SECT. 2.—TO THE ARRAY.

### A. In General.

103. **When challenge lies.—Jury struck by officer of court by consent.**—An attachment granted for challenging the array, after consent that the master should strike the jury.—*R. v. BURRIDGE* (1724), 2 Ld. Raym. 1364; 8 Mod.

## PART VII. SECT. 5, SUB-SECT. 2.—A.

**h. Form of challenge.**—When the facts stated in the challenge would not of necessity disqualify the sheriff from summoning the jury, & might or might not render him partial, the challenge

is to the favour, & it should, in addition to the facts relied on, contain an allegation that the sheriff was not impartial, otherwise it is bad.—*BROWN v. MALTBY* (1880), 20 N. B. R. (4 P. & B.) 92.—*CAN.*

**k. A question of law.**—A challenge to the array of jurors is a question of law arising on the trial.—*R. v. PLANTÉ* (1891), 7 Man. L. R. 537.—*CAN.*

**l. Effect of acquiescence in order for**



**Sect. 5.—Challenge: Sub-sect. 2, A. & B. (a) & (b).]**

Rep. 245; 1 Stra. 593; 92 E. R. 389; *sub nom.* R. v. BURROUGHS, 11 Mod. Rep. 385.

*Annotations:—*Expld. R. v. Johnson (1734), Cunn. 110. *Consd.* R. v. Edmonds (1821), 4 B. & Ald. 471. *Brown v. Esmonde* (1870), 18 W. R. 711. *Mentd.* Wilks v. Eames (1737), Andr. 51; R. v. Edwards & Symonds (1767), 4 Burr. 2105.

**107. Ground of challenge—Must not contradict record.]—**The array cannot be challenged if the cause of challenge contradicts the record.—*HOARE v. BROOM* (1595), Cro. Eliz. 369; 78 E. R. 616.

**Particular grounds.]—**See Sub-sect. 2, B., *post*.

**108. Form of challenge—Capable of forming part of record.]—**A challenge to the array or to the polls ought to be propounded in such a way at the trial as that it may be then put upon the *Nisi Prius* record, so that the other party may either demur or counterplead, or deny the matter of challenge; & unless the challenges are so put on the record, the party is not in a condition as a matter of right to insist upon them.

Although the ct. would probably in some cases, where a valid challenge has been made & overruled at *Nisi Prius*, but omitted to be put upon the record, grant a new trial, they will not do so where the party must have been aware of the ground of challenge before the trial, & might by moving to change the venue have obviated the objection.—*CARMARTHEN CORPN. v. EVANS* (1842), 10 M. & W. 274; 2 Dowl. N. S. 296; 11 L. J. Ex. 394; 152 E. R. 473.

*Annotation:—*Refd. *Brown v. Esmonde* (1870), 18 W. R. 711.

**109. — Not too general.]—**A challenge of the array, stating that the sheriff "Has not chosen the panel indifferently & impartially, as he ought to have done, & that the panel . . ." is bad on demurrer as being too general.—*R. v. HUGHES* (1843), 1 Car. & Kir. 235; 6 State Tr. N. S. App. 1101; 2 L. T. O. S. 76.

*Annotation:—*Refd. *Brown v. Esmonde* (1870), 18 W. R. 711.

### B. Grounds for Challenge.

#### (a) Sheriff Unindifferent.

**110. General rule.]—**(1) *Qu.*: whether the fact that the general list of persons duly found qualified & liable to act as jurors had not been properly made out pursuant to 3 & 4 Will. 4, c. 91, but that instead a list omitting the names of sixty persons found duly qualified had been made out illegally & fraudulently by some person or persons unknown for the purpose of prejudicing defts. in the case, is a good ground of challenge.

(2) If the sheriff is unindifferent—to use the legal expression—if he is not equal between the

*special jury.]—*Defts., in the original action, counterclaimed against pltf. & one R. On defts.' application an order for a special jury was made, pltf. & R. acquiescing:—*Held:* as R. acquiesced in the order for a special jury when it was made, & had not appealed, a challenge to the array by his counsel at the trial should be overruled.—*BANK OF BRITISH NORTH AMERICA v. WARD* (ROBERT) & Co. (1902), 9 B. C. R. 49.—CAN.

### PART VII. SECT. 5, SUB-SECT. 2.—B. (a).

**1101. General rule.]—**The ground of a challenge to the array ought to be or must be either unindifference, i.e. partiality or some default in the sheriff, or other officer who returns the jury panel.—*HAYES & HUGHES v. R. FOGARTY*

*v. R.* (1846), 8 L. T. O. S. 50.—IR.

**111. Sheriff related to party.]—**Deft. may challenge the array if affinity exists between the sheriff who summoned the jury & himself.—*WETMORE v. LEVY* (1861), 10 N. B. R. (5 All.) 180.—CAN.

**m. Interest of sheriff—Sheriff a party.]—**It is no ground for challenging the jury that the sheriff is one of the parties to the suit.—*HARRIS ENZIE* (1857), 3 N. S. R. (2 Thom.) 242.—CAN.

**n. — — — ]—**It is no objection, on the part of a sheriff in an action against him, that the jury have been summoned by himself.—*AINSLIE v. RAPELJE* (1847), 3 U. C. R. 275.—CAN.

**o. — — — ]—**In action between political parties.—*MCLEAN v. WHELAN* (1856), 1 P. E. I. 135.—CAN.

parties, that is a ground of challenge to the array (*LORD LYNTHURST, C.*).—*O'CONNELL v. R.* (1844), 11 Cl. & Fin. 155; 3 L. T. O. S. 429; 9 Jur. 25; 1 Cox, C. C. 413; 8 E. R. 1061; *sub nom.* R. v. O'CONNELL, 5 State Tr. N. S. 1, H. L.

*Annotations:—*As to (1) *Refd.* *Hayes & Rice v. R. Fogarty v. R.* (1846), 8 L. T. O. S. 50. As to (2) *Refd.* *R. v. Heane* (1864), 4 B. & S. 947; *Irwin v. Grey* (1867), L. R. 2 H. L. 20. *Generally, Mentd.* *R. v. Ramadan & Verity* (1844), 2 L. T. O. S. 288, n.; *King v. R.* (1845), 9 Jur. 833; *R. v. Downing & Powys* (1845), 1 Cox, C. C. 158; *Gregory v. Brunswick* (1846), 3 C. B. 481; *R. v. Gompertz* (1846), 9 Q. B. 824; *Campbell v. R.* (1847), 11 Q. B. 814; *Re Dunn* (1847), 5 C. B. 215; *A-G v. Vernon* (1848), 12 J. P. 251; *A-G v. Warren* (1848), 10 L. T. O. S. 445; *Campbell v. R.* (1848), 10 L. T. O. S. 396; *Douglas v. R.* (1848), 17 L. J. M. C. 176; *Dunn v. R.* (1848), 13 Jur. 233; *Gregory v. R.* (1848), 15 Q. B. 957; *R. v. Mitchell* (1848), 3 Cox, C. C. 1; *Shea v. R. Dwyer v. R.* (1848), 3 Cox, C. C. 141; *Ryalls v. R.* (1849), 11 Q. B. 795; *Wright v. R.* (1849), 14 Q. B. 148; *Irvine (or Douglas) v. Kirkpatrick* (1850), 17 L. T. O. S. 32; *Ex p. Purdy* (1850), 9 C. B. 201; *Holloway v. R.* (1851), 17 Q. B. 317; *R. v. Rowlands, Peel, Green, Winters, Platt, Duffield, Woodnorth & Gaunt* (1851), 2 Den. 364; *Ex p. Rose* (1852), 18 Q. B. 751; *Kendall v. Wilkinson* (1855), 24 L. J. M. C. 89; *R. v. Eagleton* (1855), 24 L. J. M. C. 158; *New River Co. v. Hertford Land Tax Comrs.* (1857), 2 H. & N. 129; *A-G v. Sillem* (1864), 2 H. & C. 581; *Latham v. R.* (1864), 5 B. & S. 635; *Sillem v. A-G.* (1864), 33 L. J. Ex. 134; *Burton v. Low* (1867), 16 L. T. 385; *Mulcahy v. R.* (1867), 15 W. R. 446; *R. v. Murphy* (1869), 18 L. J. M. C. 535; *R. v. Castro* (1874), L. R. 9 Q. B. 350; *Anderson v. Morice* (1876), 1 App. Cas. 713; *White v. R.* (1876), 13 Cox, C. C. 318; *Castro v. R.* (1881), 6 App. Cas. 229; *Mackonachie v. Penzance* (1881), 6 App. Cas. 424; *R. v. Parnell* (1881), 14 Cox, C. C. 508; *Combe v. De la Bere* (1882), 22 Ch. D. 316; *Enraght v. Penzance* (1882), 7 App. Cas. 240; *R. v. Bradlaugh* (1883), 15 Cox, C. C. 217; *R. v. Manning* (1883), 12 Q. B. D. 241; *Mogul S.S. Co. v. McGregor, Gow* (1885), 15 Q. B. D. 476; *R. v. Pierce* (1887), 3 T. L. R. 586; *R. v. Stephens* (1888), 23 T. L. R. 479; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; *R. v. Quinn* (1898), 19 Cox, C. C. 79; *R. v. Plummer*, [1902] 2 K. B. 339; *Sykes v. Barraclough*, [1904] 2 K. B. 675.

**111. Sheriff related to party.]—**A. brings trespass against B., who is feoffee to the use of C. The sheriff is cousin to B. but not to C. Pltf. may challenge an array made by this sheriff.—*ANON.* (1484), Jenk. 164; 145 E. R. 106.

**112. — — — ]—***ANON.* (1489), Y. B. 4 Hen. 7, fo. 3, pl. 5.

*Annotation:—*Refd. *Hunsdon v. Baker* (1599), Cro. Eliz. 663.

**113. — — — ]—***DABIER v. LAMBE* (1575), Benl. 33; 73 E. R. 955.

**114. — — — Sheriff related to both parties.]—**Deft. challenged the array, because the sheriff was cousin to pltf., which was confessed; but it was said, that the sheriff is as near of kin to deft.: & upon this it was demurred, & by advice the array was quashed.—*AUDLEY v. SUTTRELL* (1583), Cro. Eliz. 23; 78 E. R. 289.

**115. — — — What relationship material.]—**The consanguinity of the sheriff to deft. given as cause of challenge, & afterwards stated to be to his wife, is an immaterial variance. In challenging for

*p. — — — Action pending against sheriff—By prisoner's husband.]—*It is a ground of principal challenge to the array that prisoner's husband has an action pending against the sheriff for assault committed on prisoner.—*R. v. MILNE* (1880), 20 N. B. R. (4 P. & B.) 394.—CAN.

*q. — — — In defendant municipality.]—*It is a ground for challenge to the array that the sheriff who summoned the jury is a ratepayer of deft. municipality.—*MELLON v. KINGS' MUNICIPALITY* (1895), 33 N. B. R. 8.—CAN.

*r. — — — ]—**MILMORE v. WOODSTOCK TOWN* (1907), 38 N. B. R. 133; 3 E. L. R. 204.—CAN.

*t. Sheriff related to person standing security for costs.]—*It is no principal cause of challenge to the array, that

consanguinity, there must be an averment that the sheriff was of kin at the time of arraying the panel.—*MARSHALL v. EURE* (1537), 1 Dyer, 37 91; 73 E. R. 82.

*Annotation*:—*Reid*. *Mulcahy v. R.* (1867), 15 W. R. 446.

116. —.—.—.]—If husband & wife are vouched, for the warranty of the lands of the wife, & the sheriff who returns the jury is cousin in the ninth degree to the husband, this is a good principal challenge to the array, for cousinage is a good cause of challenge, let it be ever so many degrees distant, & the law presumes that the sheriff being of the same lineage will bear affection to the other, & though in this case the one cannot be heir to the other of the land in dispute, yet the one may be heir to the other of other land.—*VERNON v. MANNERS* (1572), 2 Plowd. 425; 3 Dyer, 319 a; 75 E. R. 640.

117. —.—.—.]—*BANISTER v. AIRE* (1621), Benl. 95; 73 E. R. 967.

Effect of challenge to the array.—By whom fresh panel returned.]—*See* Part V., Sect. 2, *ante*.

118. Interest of sheriff—Tenant to one party.]—In a *monstrous de droit* for lands in word to the Queen, it is a good cause of challenge to the array that the sheriff is tenant to pltf. though he is also tenant to the Queen.—*HUNSDON (LORD) v. BAKER* (1599), Cro. Eliz. 663; Moore, K. B. 553; 78 E. R. 901.

119. — Issue on election of alderman—Sheriff a member of corporation.]—On issues taken on the return of a *mandamus* to restore pltf. to the office of alderman of S.:—*Held*: a good cause of challenge to the array, on the part of deft., that the sheriff who returned the jury was one of the aldermen of S.—*KYNASTON v. SHREWSBURY (CORPN.)* (1737), as reported in Andr. 85, 104; 95 E. R. 309, 318; on *appeal sub nom. SHREWSBURY TOWN v. KYNASTON*, 7 Bro. Parl. Cas. 396, H. L. *Annotation*:—*Reid*. *R. v. Edmonds* (1821), 4 B. & Ald. 471.

120. — Though interest slight.]—There is no principle in law more settled than this, that any degree, even the smallest degree of interest in the question depending, is a decisive objection to a juror, or to the officer by whom the jury is returned (LORD MANSFIELD, C.J.).—*HESKETH v. BRADDOCK* (1766), 3 Burr. 1847; 97 E. R. 1130.

*Annotations*:—*Distd.* *R. v. Martin* (1848), 6 State Tr. N. S. 925. *Reid*. *R. v. Edmonds* (1821), 4 B. & Ald. 471. *Mentd.* *Graves v. Colby* (1838), 9 Ad. & El. 356.

121. — Sheriff a party—Prosecutor.]—If a sheriff return the jury to try an indictment in which he is prosecutor, the objection must be made by way of challenge; & cannot be moved in arrest of judgment.—*R. v. SHEPPARD* (1773), 1 Leach, 101; 168 E. R. 153.

122. — Onus of proof.]—Upon a challenge for cause, the person making the challenge must be prepared to prove the cause. On an indictment under 9 Geo. 1, c. 22, for setting fire to a barn; in support of a challenge to the panel, because the sheriff is an inhabitant of the hundred,

it is necessary to prove, that the notice has been given within two days of the injury, & that the examination has been delivered, which the statute requires.—*R. v. SAVAGE* (1824), 1 Mood. C. C. 51; 168 E. R. 1182.

123. Under-sheriff attorney in the cause.]—Judgment upon a writ of inquiry set aside, because the jury were returned by the attorney for pltf.

If the under-sheriff is attorney in the cause & returns the jury, no doubt it is a good cause of challenge (ASHHURST, J.).—*BAYLIS v. LUCAS* (1779), 1 Cowp. 112; 98 E. R. 995.

124. —.]—The attorney for the defendant, being under-sheriff, & having summoned the jury, is no ground for a new trial after a verdict for the defendant in a case of contradictory evidence. *Semble*, the plaintiff should take advantage of it by challenging the array at the trial.—*MASON v. VICKERY* (1804), 1 Smith, K. B. 304.

125. Whether sheriff can prove indifference—Challenge on ground of relationship.]—*DABIER v. LAMBE* (1575), Benl. 33; 73 E. R. 955.

126. —.]—*Qu.*: whether the sheriff, whose array is challenged, is a competent witness to prove his indifference.—*R. v. DOLBY* (1821), 1 Car. & Kir. 238.

*Annotation*:—*Reid*. *R. v. Hughes* (1843), 1 Car. & Kir. 235.

#### (b) Other Grounds.

127. Jury appointed at nomination of party.]—*WILLIAM'S & FLOYD'S CASE* (1623), Godb. 428; 78 E. R. 251.

128. Return made by alderman or freeman—In information against alderman.]—In an information *quo warranto* against an alderman, the array may be challenged, if returned by an alderman or a freeman.—*R. v. DELME* (1714), 10 Mod. Rep. 199; 88 E. R. 692.

*Annotations*:—*Mentd.* *Brocas v. London (Corpn)* (1720), 1 Stra. 307; *R. v. Hughes* (1727), 1 Barn. K. B. 41.

129. Jurors' book improperly compiled.]—*O'CONNELL v. R.*, No. 110, *ante*.

130. Panel drawn from former jury book—Effect of adjournment of hearing.]—(1) 3 & 4 Will. 4, c. 91, makes a clear distinction between disqualification & exemption. Where, therefore, a jurymen was returned whose age exceeded sixty years, that fact only operated in his favour as an exemption, but was not a ground for challenge as a personal disqualification.

(2) 3 & 4 Will. 4, c. 91, directs a jurors' book to be made up in each year for use in the year following, & declares that such book shall be in use from Jan. 1 for & during one year. In Nov. 1865, at a sitting of a special commission, a panel was returned from the then existing jury book; the jurors were not then called, but the sitting was duly adjourned to Jan. 19, 1866, at which time the trial took place, when the jurors named in the return of Nov. 1865, were called:—*Held*: this was not a ground of challenge to the array.

(3) One of the jurors, who had been duly

the sheriff by whom the jury were returned is married to a sister of the person who is security for the costs, & who has aided pltf. with money to carry on the suit; but the ct. will in such case, on application by deft., award the venire to the coroner. *MURKINSON v. MARSH* (1845), 4 N. B. R. (2 Kerr) 608.—*CAN.*

a. Action against officers of corporation—Sheriff a corporation.]—*DODD v. GRANT v. BOYCE* (1869), 12 N. E. R. (1 Han.) 431.—*CAN.*

b. Where list of selected jurors prepared for sheriff.]—*Semble*: the reasons for quashing the panel, as for favour, which were founded on the

discretion of the sheriff in selecting jurors, do not apply at the present time, as the sheriff empanels the jury from lists of selected jurors prepared for him.—*R. v. ANDERSON* (1877), Temp. Wood 177.—*CAN.*

c. Unequal proportion of Roman Catholics returned.]—The mere fact of a disproportion existing between the number of Roman Catholics on the panel returned by the sheriff & on the jurors' book of the year is not sufficient evidence of unindifference in the sheriff.—*R. v. MITCHEL* (1848), 6 State Tr. N. S. 599.—*IR.*

d. —.]—*R. v. DUFFY* (1848), 7 State Tr. N. S. 795.—*IR.*

#### PART VII. SECT. 5, SUB-SECT. 2. — B. (b).

129i. Jurors' book improperly compiled.]—It is no ground of challenge to the array that certain jurors were on the panel whose names did not appear to be on the jurors' book.—*FOGARTY v. R.* (1846), 10 I. L. R. 53.—*IR.*

129ii. —.]—*R. v. BURKE* (1867), 10 Cox, C. C. 519.—*IR.*

129iii. —.]—*R. v. RYAN*, [1914] 2 I. R. 283.—*IR.*

e. Unindifference of officer striking jury.]—*OULTON v. MORRIS* (1843), 4 N. H. R. (2 Kerr) 77.—*CAN.*

**Sect. 5.—Challenge: Sub-sect. 2, B. (b); sub-sect. 3, A. & B. (a).]**

returned in Nov. 1865, was not on the list for 1866:—**Held:** that was not a ground of challenge to him.—**MULCAHY v. R.** (1868), L. R. 3 H. L. 306, H. L.

**Annotations:**—*As to* (1) **Refd.** *Levinger v. R.* (1870), L. R. 3 P. C. 282. *As to* (2) **Consd.** *Montreal Street Ry. v. Normandin*, [1917] A. C. 170. *Generally*, **Mentd.** *R. v. Meany* (1867), 10 Cox, C. C. 506; *R. v. Parnell* (1881), 14 Cox, C. C. 508; *Mogul S.S. Co. v. McGregor*, Gow (1889), 23 Q. B. D. 598; *Quinn v. Leatham*, [1901] A. C. 495; *R. v. Tibbits*, [1902] 1 K. B. 77; *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 800; *R. v. Lynch* (1903), 51 W. R. 619; *R. v. Brallsford*, [1905] 2 K. B. 730; *R. v. Casement*, [1917] 1 K. B. 98; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Davies v. Thomas*, [1920] 2 Ch. 189.

**131. Unindifferency of officer striking jury—Jury struck by Master of Crown Office.**—(1) No challenge can be taken either to the array or to the polls, until a full jury have appeared; & therefore, where the challenges are taken previously, they are irregularly made.

(2) The disallowing of a challenge is not a ground for a new trial, but for a *venire de novo*; & every challenge must be propounded in such a way as that it may be put at the time upon the *nisi prius* record, so that the adverse party may either demur, or counterplead, or deny the matter of challenge, in which last case only triers are to be appointed; & therefore, where the challenges were not put on the record, defts. were held not to be in a condition to ask the opinion of this ct. as a matter of right, upon their sufficiency.

(3) There can be no challenge to the array on the ground of unindifferency in the Master of the Crown Office, he being the officer of the ct. expressly appointed to nominate the jury. The only remedy in such a case is to apply to the ct. by motion to appoint some other officer to nominate the jury.

The Master of the Crown Office, in nominating the jury, selected the names of the jurors, & did not take them by chance from the freeholders' book. He also took those only whose names had the addition of "esquire" or of some higher degree; & included some persons who were in the commission of the peace:—**Held:** in so doing he was perfectly right.

(4) He also included in his nomination some persons, who, as grand jurymen, had found the indictment, & persisted in his opinion as to their sufficiency, unless the Crown would consent to abandon them, which was done, & others were then substituted in their places:—**Held:** he was wrong in his opinion, but there was no ground for presuming partiality.

(5) The sheriff's officer had neglected to summon one of the twenty four special jurymen returned on the panel:—**Held:** this was no ground of challenge to the array for unindifferency on the part of the sheriff.

(6) It is not competent to ask jurymen, whether special jurymen or tales-man, if they have not, previously to the trial, expressed opinions hostile to defts. & their cause, in order to found a challenge

to the polls on that ground; but that such expressions must be proved by extrinsic evidence.—**R. v. EDMONDS** (1821), 4 B. & Ald. 471; 1 State Tr. N. S. 785; 106 E. R. 1009.

**Annotations:**—*As to* (1) **Consd.** *R. v. Cuffey* (1848), 7 State Tr. N. S. 467. *As to* (2) **Apld.** *Angell v. Angell* (1826), 11 Moore, C. P. 272. **Refd.** *Crane v. Public Prosecutor*, [1921] 2 A. C. 299. *As to* (5) **Consd.** *R. v. Martin* (1848), 6 State Tr. N. S. 925. *Generally*, **Refd.** *O'Connell v. R.* (1844), 1 Cox, C. C. 413; *Mansell v. R.* (1857), 8 E. & B. 54.

## SUB-SECT. 3.—TO THE POLLS.

### A. In General.

**132. Who may be challenged—Whether juror after view.**—Notwithstanding a view, a juror may be challenged when he comes to be sworn (**HOLT, C.J.**).—**ANON.** (1705), 6 Mod. Rep. 211; 87 E. R. 963.

**133. — Whether jurors on trial under writ of trial.**—**Qu.**: whether there is any right of challenge of jurors, on the trial of a cause under a writ of trial.—**PRYME v. TITCHMARSH** (1842), 10 M. & W. 605; 2 Dowl. N. S. 474; 12 L. J. Ex. 45; 152 E. R. 612; *sub nom.* **PRIME v. TITCHMARSH**, 7 J. P. 563; 7 Jur. 202.

**134. Questions to juror before challenge—As to matters of discredit.**—(1) Jurymen may not be examined to any matter criminal or infamous in order to challenge.

(2) If any of the jury have said already that I am guilty or they will find me guilty or I shall suffer & be hanged . . . is a good cause of challenge (**TREBY, C.J.**).

(3) The King has power to challenge without showing cause till the panel be gone through (**TREBY, C.J.**).—**R. v. COOK** (1696), 13 State Tr. 311; *sub nom.* **ANON.**, 1 Salk. 153.

**Annotations:**—*As to* (1) **Refd.** *R. v. Edmonds* (1821), 4 B. & Ald. 471. *As to* (2) **Consd.** *Ramadge v. Ryan* (1832), 9 Bing. 333. **Refd.** *R. v. Edmonds* (1821), 4 B. & Ald. 471. *As to* (3) **Consd.** *Mansell v. R.* (1857), Dears. & B. 375. *Generally*, **Refd.** *O'Neill v. R.* (1854), 6 Cox, C. C. 495; *Mulcahy v. R.* (1867), 15 W. R. 446.

**135. — To show bias.**—**R. v. EDMONDS**, No. 131, *ante*.

**136. — As to qualification.**—**R. v. COOK** (1696), 13 State Tr. 311; *sub nom.* **ANON.**, 1 Salk. 153.

**Annotations:**—**Refd.** *R. v. Edmonds* (1821), 4 B. & Ald. 471; *Ramadge v. Ryan* (1832), 9 Bing. 333; *O'Neill v. R.* (1854), 6 Cox, C. C. 495; *Mansell v. R.* (1857), Dears. & B. 375; *Mulcahy v. R.* (1867), 15 W. R. 446.

**137. — — — — —.**—**R. v. EDMONDS**, No. 131, *ante*.

**138. — To test expediency of challenge.**—Where a party has the right of challenge, he is not entitled to ask a jurymen questions for the purpose of eliciting whether it would be expedient to exercise such right.—**R. v. STEWART** (1845), 1 Cox, C. C. 174.

**Annotations:**—**Mentd.** *R. v. Prince* (1868), 38 L. J. M. C. 8; *R. v. Middleton* (1873), L. R. 2 C. C. R. 38.

**139. Prosecution by society—Right of defendant to list of members.**—A prosecution having

**f. — — —.**—**STILES v. GILBERT** (1857), 8 N. B. R. (3 All.) 603.—**CAN.**

**g. — — —.**—**WOODSTOCK RY. CO. v. TUPPER** (1869), 12 N. B. R. (1 Han.) 454.—**CAN.**

**h. Change of law.**—Where a new Act governing the selection & summoning of juries comes into force after a jury for a particular assize has been selected & summoned under the old Act, but before the trial commences, this is not a good objection to the

panel.—**R. v. McNAMARA** (1914), 19 B. C. R. 193.—**CAN.**

**k. Breach of duty by sheriff—In directory provisions.**—A challenge to the array of a special jury which imputes to the sheriff a breach of duty in merely the directory & not the mandatory provisions of Jury Act is bad in substance.—**Brown v. EDMONDE** (1870), 18 W. R. 711.—**IR.**

**l. Annual jury list not prepared.**—It is not a ground of challenge to the

array that the sheriff had not annually prepared a jury list.—**FARNELL v. CONWAY** (1918), 45 N. B. R. 343.—**CAN.**

**m. Inclusion of unqualified persons.**—It is not a ground of challenge to the array, that some of the jurors named in the sheriff's panel are not on the list of persons qualified to serve as jurors.—**Dow v. DIBLER** (1867), 12 N. B. R. (1 Han.) 55.—**CAN.**

**n. — — —.**—**R. v. MAILLOUX** (1876), 16 N. B. R. (3 Pug.) 493.—**CAN.**

been instituted by the Society for the Suppression of Vice against deft., & a rule nisi having been obtained, to furnish deft. with a list of the members of the Society: & the counsel for the Society, on showing cause, having offered to furnish the officer of the ct. with the names of the members of the Society, the rule was discharged on an undertaking to that effect.—*R. v. NICHOLSON* (1840), 8 Dowl. 422; 4 Jur. 558.

**140.** ———.]—Where a deft. has been indicted for a libel by a certain assocn., but has not pleaded to the indictment &, under these circumstances, applies for a rule calling on the solrs. of the assocn. to furnish him with a list of the persons so associated, in order to set them aside at the reduction of the special jury list, the ct. will refuse the motion as premature.—*R. v. RICHARDSON* (1840), 4 Jur. 319.

**141. Form of challenge.**—*CARMARTHEN CORPN. v. EVANS*, No. 108, ante.

**142. Effect of challenge—Whether withdrawn juror may be sworn afterwards.**—A juror challenged and withdrawn, may be afterwards sworn.—*MILLS v. SNOWBALL* (1589), Cro. Eliz. 142; 78 E. R. 399.

**143.** ———.]—It is a mistrial if any juror who has been challenged by the parties, afterwards tries the cause.—*MOOR v. VAUGHAN* (1595), Cro. Eliz. 430; 78 E. R. 670.

**144.** ———.]—*REGICIDES' CASE*, No. 238, post.

**145.** ———.]—**Juror sworn as talesman.**—If a juror who was challenged appear on the tales & try the cause, judgment shall be stayed.—*HUNGATE v. HAMOND* (1590), Cro. Eliz. 188; 78 E. R. 445.

*Annotation*:—*Refd. Hudson v. Banks* (1604), Cro. Jac. 28.

**146.** ———.]—A man challenged as a jurymen cannot be sworn as a talesman.—*PARKER v. THORNTON* (1725), 2 Ld. Raym. 1410; 1 Stra. 640; 92 E. R. 418.

**147. Loss of right of challenge—Special jury struck by request.**—Person not hindered of his ancient right of challenge, by the striking of a special jury at his request.—*R. v. JOHNSON* (1734), Cunn. 110; 2 Stra. 1000; 94 E. R. 1094.

*Annotation*:—*Refd. R. v. Edmonds* (1821), 4 B. & Ald. 471.

**Joinder of felony misdemeanour.**—*See* Indictments Act, 1915 (c. 90), s. 4.

## B. Peremptory.

### (a) By Accused.

*See* 1825 Act, s. 29.

**148. In what cases allowed—On charge of felony.**—In an appeal of manslaughter it was agreed that deft. might challenge twenty peremptorily just as in the case of an indictment.—*NEWMAN v. PUNTER* (1555), Moore, K. B. 12; 72 E. R. 406.

*Annotation*:—*Refd. Gray v. R.* (1844), 11 Cl. & Fin. 427.

**149.** ———.]—**Not confined to capital offences.**—The right of a deft. to a peremptory challenge of jurors to the number of twenty, exists in all cases of felony, & is not confined to those which are punishable capitally.—*GRAY v. R.* (1844), 11 Cl. & Fin. 427; 6 State Tr. N. S. 117; 1 Car. & Kir. 505, n.; 3 L. T. O. S. 449; 8 Jur. 879; 8 E. R. 1164, H. L.

*Annotations*:—*Refd. O'Brien v. R.* (1849), 2 H. L. Cas. 465; *Mansell v. R.* (1857), 8 E. & B. 54; *Levinger v. R.* (1870), L. R. 3 P. C. 282. *Mentd. Campbell v. R.* (1847), 11 Q. B. 814; *Grace v. Ossory* (Lord Bp.) (1848), 4 Cox, C. C. 159; *R. v. Martin* (1848), 6 State Tr. N. S. 925; *King v. R.* (1849), 14 Q. B. 31; *R. v. Padernan* (1850), 4 Cox, C. C. 359; *Winsor v. R.* (1866), L. R. 1 Q. B. 289; *Tipperary Case* (1875), 3 O'M. & H. 19.

**150.** ———.]—**Misprison of treason.**—*GARNET'S CASE* (1605), 3 Co. Inst. 27.

*Annotations*:—*Consd. Gray v. R.* (1844), 11 Cl. & Fin. 427. *Refd. Levinger v. R.* (1870), 39 L. J. P. C. 49.

**151.** ———.]—**Joined with misdemeanour.**—*See* Indictments Act, 1915 (c. 90), s. 4.

*See, also*, No. 158, post.

**151.** ———.]—**On all capital charges.**—*GARNET'S CASE* (1605), 3 Co. Inst. 27.

*Annotations*:—*Consd. Gray v. R.* (1844), 11 Cl. & Fin. 427. *Refd. Levinger v. R.* (1870), 39 L. J. P. C. 49.

**152.** ———.]—**On charge of treason.**—*R. v. MACGUIRE (LORD)* (1645), 4 State Tr. 653.

*Annotations*:—*Refd. R. v. Martin* (1848), 6 State Tr. N. S. 925. *Mentd. Wensleydale Peerage Case* (1856), 8 State Tr. N. S. 479.

**153.** ———.]—**CHARNOCK'S CASE** (1696), 3 Salk. 80; Holt, K. B. 133; 12 State Tr. 137; 91 E. R. 704.

*Annotation*:—*Mentd. R. v. Duffy* (1849), 4 Cox, C. C. 294.

*See, also*, No. 158, post.

**154.** ———.]—**On charge of misdemeanour.**—*R. v. READING* (1679), 7 State Tr. 259.

*Annotations*:—*Consd. Gray v. R.* (1844), 11 Cl. & Fin. 427. *Mentd. R. v. Boyes* (1860), 2 F. & F. 157; *R. v. Boyes* (1861), 1 B. & S. 311.

## PART VII. SECT. 5, SUB-SECT. 3.—A.

**1411. Form of challenge.**—A party challenging a juror should make his objection in such a manner that the judge, or the clerk of the ct. can hear him; & unless he does so, he cannot raise the objection after the juror is sworn.—*PITFIELD v. KIMBALL* (1885), 25 N. B. R. 193.—*CAN.*

**1411h.** ———.]—*R. v. CONRAH* (1839), 1 Crow. & D. 36.—*IR.*

**c. Right to order jurors to stand aside—Right of Crown.**—Upon the trial of a party indicted for misdemeanour, the Crown has a right to cause jurors to stand aside until the whole panel is gone through.—*R. v. BENJAMIN* (1854), 4 C. P. 179.—*CAN.*

**p.** ———.]—On a criminal trial the Crown has a right to direct jurors called to stand aside, & is not bound to challenge for cause until the whole panel is perused.—*R. v. CHASSON* (1876), 16 N. B. R. (3 Pug.) 546.—*CAN.*

**q.** ———.]—*R. v. SMITH* (1876), 38 U. C. R. 218.—*CAN.*

**r.** ———.]—*R. v. MURRAY & MAHONEY* (1915), 33 W. L. R. 148; 9 W. W. R. 804.—*CAN.*

**t.** ———.]—*R. v. CHURTON*, [1919] 1 W. W. R. 774.—*CAN.*

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**a.** ———.]—*R. v. PYKE & MCGILL* (1909), 29 N. Z. L. R. 376.—*N.Z.*

**b.** ———.]—**Right of private prosecutor.**—*R. v. PATTESON* (1875), 36 U. C. R. 129.—*CAN.*

**c.** ———.]—A private prosecutor has the same right as the Crown to direct jurors to stand aside.—*R. v. MCLEAN* (1877), 17 N. B. R. (1 P. & B.) 377.—*CAN.*

**d.** ———.]—The right of ordering jurors to stand by, in cases of misdemeanour may be exercised by a private prosecutor equally with the Crown.—*R. v. MCGOWAN* (1858), cited in 11 I. C. L. R. at p. 188.—*IR.*

**e. At criminal trial.**—Upon the selection of a jury at a criminal trial, a jurymen may be peremptorily challenged or challenged for cause.—*R. v. HARRI* (1923), 69 D. L. R. 647; 51 O. L. R. 606; 36 Can. Crim. Cas. 305.—*CAN.*

**f. Right to continue challenge—After panel reduced to twenty-four.**—*R. v. CASEY* (1877), 13 Cox, C. C. 645.—*IR.*

**g.** ———.]—*R. v. PARNELL* (1890), 8 L. R. Ir. 17.—*IR.*

## PART VII. SECT. 5, SUB-SECT. 3.—B. (a).

**1481. In what cases allowed—On charge of felony.**—Every person arraigned for any treason, felony, or misdemeanour shall be admitted to challenge peremptorily to the number of twenty jurors.—*LEVINGER v. R.* (1870), 39 L. J. P. C. 49.—*AUS.*

**1481i.** ———.]—A right to challenge peremptorily does not exist in trials for transportable felonies.—*ANON.* (1832), 1 Crow. & D. 189, n.—*IR.*

**1521.** ———.]—**On charge of treason.**—*LEVINGER v. R.* (1870), 23 L. T. 362.—*AUS.*

**1541.** ———.]—**On charge of misdemeanour.**—*LEVINGER v. R.* (1870), 39 L. J. P. C. 49.—*AUS.*

**h.** ———.]—**Trial of foreigner.**—A foreigner on trial by a jury de medietate has no right of peremptory challenge as regards the foreign panel then returned by the sheriff.—*R. v. AH TOON* (1866), 3 W. W. & A.B. 31.—*AUS.*

**k.** ———.]—*LEVINGER v. R.* (1870), 23 L. T. 362.—*AUS.*

**l.** ———.]—**After challenge proper affectum.**—Prisoner may challenge a juror peremptorily, after a challenge to the juror proper affectum has been found

**Sect. 5.—Challenge: Sub-sect. 3, B. (a) & (b), & C. (a) & (b) i.]**

**155. ———.] — R. v. OATES (1685), 10 State Tr. 1079.**

**Annotation:—Mentd. Jones v. Randall (1774), 1 Cowp. 17.**

**156. ———.] — R. v. CELLIER (1680), 7 State Tr. 1183.**

**——— Joined with felony.]—See Indictments Act, 1915 (c. 90), s. 4.**

**157. ——— On collateral issues.] — R. v. RATCLIFFE (1746), 18 State Tr. 429; Fost. 40; 1 Wils. 150; 95 E. R. 543; sub nom. R. v. RADCLIFFE, 1 Wm. Bl. 3.**

**Annotations:—Reid. Gray v. R. (1844), 11 Cl. & Fin. 427. Mentd. R. v. D'Eon (1784), 1 Wm. Bl. 510; R. v. Rogers (1765), 3 Burr. 1809; Duberly v. Gunning (1791), Peake, 132; R. v. Garside & Mosley (1834), 2 Ad. & El. 266; R. v. Antrobus (1835), 2 Ad. & El. 788; R. v. Dowling (1848), 3 Cox, C. C. 509.**

**158. ——— In civil cases.] — The right to challenge the jury, whether it be a common or a special jury, peremptorily & without cause, does not exist in civil actions.**

**There is no right of peremptory challenge except in cases of felony & treason (PARKE, B.).—CREED v. FISHER (1854), 9 Exch. 472; 2 C. L. R. 1002; 23 L. J. Ex. 143; 22 L. T. O. S. 245; 18 Jur. 228; 2 W. R. 196; 156 E. R. 202.**

**Annotations:—Mentd. Rollin v. Steward (1854), 2 C. L. R. 959; Humphrey v. Nowland (1862), 15 Moo. P. C. C. 343.**

**159. ———.] — PEARSE v. ROGERS, No. 198, post.**

**160. ——— After challenge for cause disallowed.] — MULCAHY v. R. (1868), L. R. 3 H. L. 308, H. L.**

**Annotations:—Reid. Lovinger v. R. (1870), L. R. 3 P. C. 282. Mentd. R. v. Meany (1867), 15 W. R. 1082; R. v. Parnoll (1881), 14 Cox, C. C. 508; Mogul S.S. Co. v. McGregor, Gow (1889), 23 Q. B. D. 598; Quinn v. Leatham, [1901] A. C. 495; R. v. Tibbitts, [1902] 1 K. B. 77; Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; R. v. Lynch (1903), 61 W. R. 619; R. v. Brailsford, [1905] 2 K. B. 730; Montreal Street Ry. v. Normandin, [1917] A. C. 170; R. v. Casement, [1917] 1 K. B. 98; Valentine v. Hyde, [1919] 2 Ch. 129; Davies v. Thomas, [1920] 2 Ch. 189.**

**Challenge by one of two accused.]—See Sub-sect. 4, post.**

**161. To what number allowed—Joint indictment of accused.]—Where several are arraigned upon one indictment for the same offence, every prisoner may challenge peremptorily his number, & if one *venire facias* is awarded for all, he that is challenged by one shall be drawn against all. But in such case, before justices of gaol delivery, the panel may be severed, & the same jury be returned between the King & each of the prisoners by himself.—R. v. SALISBURY (1553), 1 Plowd. 100; 75 E. R. 158.**

**162. ———.] — CHARNOCK'S CASE (1696), 3 Salk. 80; Holt, K. B. 133; 12 State Tr. 1377; 91 E. R. 704.**

**Annotation:—Mentd. R. v. Duffy (1849), 4 Cox, C. C. 294.**

**163. ——— On charge of felony.] — NEWMAN v. PUNTER, No. 148, ante.**

**164. ———.] — GRAY v. R., No. 140, ante.**

**165. ——— On charge of treason.] — R. v. MCGUIRE (LORD) (1645), 4 State Tr. 653.**

**Annotations:—Reid. R. v. Martin (1848), 6 State Tr. N. S. 925. Mentd. Wensleydale Peerage Case (1856), 8 State Tr. N. S. 479.**

**166. ———.] — CHARNOCK'S CASE (1696), 3 Salk. 80; Holt, K. B. 133; 12 State Tr. 1377; 91 E. R. 704.**

**Annotation:—Mentd. R. v. Duffy (1849), 4 Cox, C. C. 294.**

**——— Procedure on indictment for attempt to injure the sovereign.]—See Treason Act, 1842 (c. 51), s. 1.**

**Effect of excessive challenge—On charge of high treason.]—See Treason Act, 1695 (c. 3), s. 2.**

**——— On charge of felony or piracy.]—See Criminal Law Act, 1827 (c. 28), s. 3.**

**167. Whether challenge can be withdrawn.] —**

**(1) Since 1825 Act the Crown is not to be put to show grounds of challenge of jurors, in a case of felony, till the panel is exhausted; & that statute makes no alteration of the law in this respect.**

**(2) A prisoner, in a case of felony, having challenged twenty jurors peremptorily, cannot withdraw one of those challenges, to challenge another juror, instead of one that he had previously challenged.—R. v. PARRY (1837), 7 C. & P. 836.**

**(b) By the Crown.**

**See 1825 Act, s. 29; 33 Edw. 1, c. 4 (1305).**

**168. General rule.]—SAVAGE v. BROOKS (1591), Moore, K. B. 595; 72 E. R. 781.**

**169. ——— Whether exception allowed.]—R. v. HAWKINS (1669), 6 State Tr. 921.**

**C. For Cause.**

**(a) In General.**

**170. What jurors may be challenged—Special jurors.]—WORSLEY v. FOQUET (1856), 27 L. T. O. S. 71.**

**171. ——— Appeal from ruling of judge—How brought.]—WORSLEY v. FOQUET (1856), 27 L. T. O. S. 71.**

**172. Whether limited.]—R. v. GEACH, No. 202, post.**

**173. Challenge for unindifference—How determined.]—DALSTON & NICHOLS v. ALL-SOULS COLLEGE OXFORD (MASTER & FELLOWS) (1623), Palm. 363; 81 E. R. 1125.**

**174. ——— Form of oath.]—ANON. (1689), 1 Salk. 152; 91 E. R. 140.**

**175. ——— What questions may be asked.] —R. v. LACEY, No. 91, ante.**

**Challenge for lack of qualification—How determined.]—See 1825 Act, s. 50.**

**(b) Grounds for Challenge.**

**i. In General.**

**176. Propter defectum—Juror over age.]—MULCAHY v. R., No. 130, ante.**

**177. ——— Juror not on current jury book—Effect of adjournment of hearing.]—MULCAHY v. R., No. 130, ante.**

**——— Alienage.]—See Aliens Restriction (Amendment) Act, 1919 (c. 92), s. 8.**

**178. Propter affectum—Relationship—Must be legitimate.]—ANON. (1368), Jenk. 47; 145 E. R. 35.**

**179. ——— Juror's wife akin to party.]—(1) If a juror's wife is of kin by blood to a pltf. or**

**going through of the panel.—R. v. CHURTON, [1919] 1 W. W. R. 774.—CAN.**

**161. To what number allowed—Joint indictment of accused.]—On the selection of the jury in a trial for seditious conspiracy, though the indictment contains a number of counts, the accused is limited to four peremptory challenges.—R. v. RUSSELL, [1920] 1 W. W. R. 624; 51 D. L. R. 1.—CAN.**

**PART VII. SECT. 5, SUB-SECT. 3.—B. (b).**

**m. On second perusal of panel.]—After the list of jurors has been called & gone through, a number having been directed at the instance of the Crown to stand aside, & a complete jury not obtained, although the Crown may not have exhausted its number of peremptory challenges, it cannot challenge peremptorily on the second**

**PART VII. SECT. 5, SUB-SECT. 3.—C. (b) (i).**

**n. Propter defectum—Alienage.]—The objection that one of the jurors is disqualified, being an alien, should be taken by challenge.—STEPHENSON**



deft., it is principal challenge, for this wife or her issue may happen to be heir to the party in the case, but to make this a good challenge this wife ought to be alive or to have left issue.

(2) Jurors ought to have three qualities: (a) to be *vicini* to the place where the matter at issue arises; (b) to be of sufficient estate according to law; & (c) to be impartial.—ANON. (1429), Jenk. 96; 145 E. R. 69.

180. — — —.]—A juror having been on the Grand Jury, or of the coroner's inquest, or being uncle to the prisoner, are good causes of challenge.—YOUNG v. SLAUGHTERFORD (1709), 11 Mod. Rep. 228; 88 E. R. 1007.

181. — — — Juror steward of manor—Where defendant a copyholder.]—ANON. (1536), Benl. 6; 73 E. R. 935.

182. — — — Juror's child baptised by plaintiff.]—ANON. (1537), Benl. 6; 73 E. R. 935.

183. — — — Juror of former trial selected on new trial.]—LONG'S CASE (1584), Cro. Eliz. 33; 78 E. R. 298.

184. — — — Juror previously arbitrator in same case.]—It is not a principal challenge, that one returned of the jury was chosen comr. by the other party, for examination of witnesses in the Ct. of Ch.; but it is a principal challenge, that one returned of the jury was an arbitrator for the other party.—PEACOCK'S CASE (1611), 9 Co. Rep. 70 b; 77 E. R. 837.

185. — — —.]—It is a principal challenge to a juror, that he was an arbitrator before in the same case, because it is intended, that he will incline to that party to which he inclined before: but it is contrary of a comr., because he is elected indifferent (COKE, C.J.).—FORTESCUE & COAKE'S CASE (1612), Godb. 193; 78 E. R. 117.

186. — — — Juror previously a commissioner for taking evidence.]—PEACOCK'S CASE, No. 184, *ante*.

187. — — —.]—FORTESCUE & COAKE'S CASE, No. 185, *ante*.

188. — — — Juror at trial of another prisoner—Prisoners jointly indicted but separately arraigned.]—REGICIDES' CASE, No. 238, *post*.

189. — — — Serving on Grand Jury—Finding true bill against accused.]—R. v. PERCIVAL (1665), 1 Sid. 243; 82 E. R. 1083.

Annotation:—Mentd. R. v. Tuchin (1704), 2 Ld. Raym. 1061.

190. — — — — — Though not bill on which accused charged.]—R. v. OATES (1685), 10 State Tr. 1079.

Annotation:—Mentd. Jones v. Randall (1774), 1 Cowp. 17.

191. — — —.]—YOUNG v. SLAUGHTERFORD, No. 180, *ante*.

192. — — —.]—On trial of an indictment for mis-demeanour by a special jury, a jurymen, after being sworn, stated himself to have been one of the grand jury who found the bill. He continued, however, in the box, deft. not consenting to his being withdrawn. It did not appear whether deft. knew of the objection before the juror stated it. On motion for a new trial by deft. after conviction:—*Held*: not a mistrial.—R. v. SULLIVAN (1838), 8

Ad. & El. 831; 1 Per. & Dav. 96; 1 Will. Woll. & H. 610; 8 L. J. M. C. 3; 3 J. P. 16; 112 E. R. 1053.

193. — — — Serving on coroner's inquest.]—YOUNG v. SLAUGHTERFORD, No. 180, *ante*.

194. — — — Juror foreman of jury—At trial of previous action for bribery at same election—Action between different parties.]—No cause of challenge that juror had been foreman of another jury who had tried another action between other parties for bribery, alleged to have been committed at the same election.—MARSH v. COPROCK (1840), 9 C. & P. 480.

195. — — — Expression of ill-will by juror—Intention to find accused guilty.]—R. v. COOK, No. 134, *ante*.

196. — — —.]—R. v. O'COIGLY, No. 227, *post*.

197. — — —.]—R. v. EDMONDS, No. 131, *ante*.

198. — — — Juror disapproving judge's ruling in favour of party challenging.]—A juror cannot, in a civil case, be challenged without cause; & it is no cause of challenge that, in a previous case, the juror has shown some dissatisfaction with the law as laid down by the judge in favour of the party challenging.—PEARSE v. ROGERS (1860), 2 F. & F. 137.

199. — — — Juror interested in cause—Though interest slight.]—HESKETH v. BRADDOCK, No. 120, *ante*.

200. — — — Where juror took part in subject-matter of indictment.]—It is a good ground of challenge that a juror has taken an active part in the affair out of which the indictment has arisen.—R. v. SWAIN (1838), 2 Lew. C. C. 116; 2 Mood. & R. 112; 168 E. R. 1098.

201. — — — Juror never returning verdict for Crown.]—It is not a good ground of challenge that a juror has sat several times on the assizes, & in no case, where he has been a jurymen, has a verdict for the Crown been given.—R. v. SAWDON (1838), 2 Lew. C. C. 117; 168 E. R. 1099.

202. — — — Juror client of accused attorney.]—(1) If on the trial of a case of felony the prisoner peremptorily challenge some of the jurors, & the counsel for the prosecution also challenge so many that a full jury cannot be had, the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been peremptorily challenged by the prisoner, & as each juror then appears, for the counsel for the prosecution to state their cause of challenge, & if they have sufficient cause & the prisoner does not challenge, for such juror to be sworn.

(2) It is no cause of challenge of a juror by the counsel for the prosecution in a case of felony, that the juror is a client of the prisoner who is an attorney.

(3) Nor that the juror has visited the prisoner as a friend since he has been in prison.

(4) In a case of felony, after a prisoner has challenged twenty of the jurors peremptorily, he may still examine any other of the jurors, who are

v. FRASER (1885), 24 N. B. R. 482.—CAN.

o. — — — Juror under age.]—*Semble*: the objection that one of the jury is a minor must be taken by challenge.—R. v. HILL, STRAD & NERHAM (1881), 2 N. S. W. L. R. 194.—AUS.

1831. Propriet affectum—Juror of former trial selected on new trial.]—The fact that a member of a special jury was one of the jurors at a former trial is a good ground of challenge at

a new trial.—HARRIS v. DUNSMUIR (1902), 9 B. C. R. 303.—CAN.

193 II. — — —.]—R. v. DUNNE (1832), 1 Craw & D. 190, n.—IR.

1881. — — — Juror at trial of another prisoner—Prisoners jointly indicted but separately arraigned.]—R. v. PYKE & MCGILL (1909), 29 N. Z. L. R. 376.—N.Z.

1961. — — — Expression of ill-will by juror.]—R. v. HUGHES (1842), 2 Craw. & D. 396; 1r. Cir. Rep. 274, 422.—IR.

196 II. — — —.]—Expressions of opinion by jurors are not ground of challenge unless they are corrupt declarations proceeding from ill-will against prisoner.—R. v. MARTIN (1848), 6 State Tr. N. S. 925.—IR.

p. — — — Juror interested in cause.]—A challenge averring that a juror was interested in the conviction of the prisoner under a charter granting to the corp. the goods of felons to be convicted within the city, the juror



*Sect. 5.—Challenge: Sub-sect. 3, C. (b) i., ii. & iii., (c), & D.; sub-sect. 4.]*

subsequently called, as to their qualification.—*R. v. GEACH* (1840), 9 C. & P. 499.

*Annotations:—As to (1) Consd. Mansell v. R. (1857), 8 E. & B. 51. Generally, Rejd. Gray v. R. (1844), 11 Cl. & Fin. 427.*

203. — *Juror visiting accused in prison.]—R. v. GEACH*, No. 202, *ante*.

204. — *Juror director of insurance company—Defendant another insurance company.]—In an action against an insurance office on a life policy, it is no objection to a special juror being sworn, that he is a director of another insurance office, unless that office has granted a policy on the life in question, & the amount of that policy be unpaid.—CRAIG v. FENN* (1841), Car. & M. 43, N. P.

205. — *Juror member of provisional committee—Defendant member of same committee.]—(1) Where it appeared that, on the trial of an action against a committeeman of a projected railway co., one of the jury was also a member of the committee, & had been sued in respect of the claim then in question, the ct. granted a new trial, on payment of costs.*

(2) The affidavit of a juror may be received to explain the circumstances under which he came into the jury box on the trial of a cause affecting his own interest, though his affidavit of what occurred in the box during the trial is not receivable.

One of the gentlemen who served as foreman was a brother provisional committeeman of the same co. with deft., who had the verdict. This appears to us to be wrong (LORD DENMAN, C.J.).—*BAILEY v. MACAULAY*, *BAILEY v. PEARSON*, *BAILEY v. HAINES*, *BAILEY v. BRACEBRIDGE*, *DAWSON v. HAY*, *WILSON v. HOLDEN* (1849), 13 Q. B. 815; 19 L. J. Q. B. 73; 14 L. T. O. S. 104; 14 Jur. 80; 110 E. R. 1475.

*Annotations:—Generally, Mentd. Norris v. Cottle* (1850), 2 H. L. Cas. 617; *Patrick v. Reynolds* (1857), 1 C. B. N. S. 727; *Pilot v. Craze* (1888), 4 T. L. R. 453.

206. — *Juror member of company—Company party to action.]—Where a public co. is a party to an action, the mere fact that one of the jurymen was a shareholder in the co. is no ground for granting a new trial.*

This was a motion for a new trial, on the ground of one of the jurymen being a shareholder in the railway co., & consequently open to a challenge if the fact had been known (POLLOCK, C.B.).—*WILLIAMS v. GREAT WESTERN RY. CO.* (1858), 3 H. & N. 869; 28 L. J. Ex. 2; 32 L. T. O. S. 147; 7 W. R. 97; 157 E. R. 720.

*Annotations:—Consd. Montreal Street Ry. Co. v. Normandin*, [1917] A. C. 170. *Rejd. Irwin v. Groy* (1865), 19 C. B. N. S. 584.

— *Juror indebted to party.]—See No. 211, post.*

207. — *Conscientious objection to capital punishment.]—MANSELL v. R.*, No. 233, *post*.

being a burgess, & also a ratepayer liable to be rated for the deficiency of the borough funds:—*Held: bad.*—*R. v. MATTIN* (1848), 6 State Tr. N. S. 925.—*IR.*

208 i. — *Juror member of company—Company party to action.]—A person named in the Act of Incorporation & in the list of subscribers, who never authorised his name to be used or held any shares in the co., ceases to be a member thereof after the first meeting to organise the co., & is not disqualified as a juror in an action brought by them.—PORTLAND & LANCASTER STEAM FERRY CO. v. PRATT* (1850), 7 N. B. R. (2 All.) 17.—*CAN.*

208 ii. — *—.]—In an action against an insurance co. where one of*

the jurors is a shareholder in the co., plff. should exercise his right of challenge if he objects to the juror's presence.—*RICHARDSON v. CANADA WEST FARMERS INSURANCE CO.* (1867), 17 C. P. 341.—*CAN.*

q. — *Money subscribed by juror towards prosecution.]—R. v. FITZPATRICK* (1838), *Craw. & D. Abr. C.* 513.—*IR.*

r. — *Juror a town councillor.]—The name of a town councillor stood on a special jury list after it had been reduced:—Held: he was liable to challenge for this disqualification when about to be sworn.—BARRETT v. LONG* (1851), 3 H. L. Cas. 395; 10 E. R. 134.—*IR.*

208. *Propter delictum—Juror having been attainted of felony.]—It appears . . . that if one be attainted of felony & pardoned he shall not be sworn of a jury . . . & this is a good challenge to a juror returned to serve that he hath been before attainted of felony & though pardoned for the same yet he is not a fit person to serve of a jury (COKE, C.J.).—BROWN v. CRASHAW* (1614), 2 Bulet. 154; 80 E. R. 1028.

*Annotation:—Rejd. Pendock d. Mackinder v. Mackinder* (1755), Willes, 665.

209. — *Juror answering in name of another.]—Where R. C. answered to the name of J. C. on the sheriff's panel, at the trial of a prisoner for a capital felony, it is mere matter of challenge, & after verdict cannot be taken advantage of by the party convicted, as a mistrial.—JURYMAN'S CASE* (1783), 12 East, 231, n.; 104 E. R. 90, C. C. R.

*Annotations:—Distd. Hill v. Yates* (1810), 12 East, 229; *Dovey v. Hobson* (1810), 2 Marsh. 154; *R. v. Tremaine* (1826), 7 Dow. & Ry. K. B. 684. *Consd. R. v. Mellor* (1853), 7 Cox, C. C. 454. *Appld. R. v. Bottomley* (1922), 127 L. T. 847.

*Grounds for challenge—Whether ground for new trial.]—See PRACTICE.*

ii. *Whether Challenge Principal or to the Favour.*

210. *Relationship—Juror's wife akin to party.]—ANON.* (1429), No. 179, *ante*.

211. *Juror indebted to party.]—That a juror is in debt to plff. or deft., is not ground for a "principal" challenge.—ANON.* (1534), Moore, K. B. 3; Ben. 13; Benl. 5; 72 E. R. 398.

212. *Juror steward of manor—Of which defendant a copyholder.]—ANON.* (1536), Benl. 6; 73 E. R. 935.

213. *Juror's child baptised by party.]—ANON.* (1537), Benl. 6; 73 E. R. 935.

214. *Juror on previous trial called on new trial.]—LONG'S CASE* (1584), Cro. Eliz. 33; 78 E. R. 298.

215. *Juror formerly arbitrator in same case.]—PEACOCK'S CASE*, No. 184, *ante*.

216. — *—.]—FORTESCUE & COAKE'S CASE*, No. 185, *ante*.

iii. *Discovery of Grounds during or after Trial.*

217. *Discovery of grounds during trial—Whether ground for discharging jury.]—If during the trial of a case of felony, it be discovered that the prisoner has a relation on the jury, this is no ground for discharging the jury, & the case must proceed.—R. v. WARDLE* (1842), Car. & M. 647.

*Whether ground for new trial.]—See PRACTICE.*

(c) *Time for Showing Cause.*

218. *General rule.]—If a party challenges the polls, he must show cause in the case of each juror as he challenges him.—LUKE v. CLERK* (1615), Moore, K. B. 846; 72 E. R. 944.

t. *No list returned for three years.]—It is not a ground of challenge to the polls that no list has been returned to the secretary-treasurer of the county for three years.—FARNELL v. CONWAY* (1918), 45 N. B. R. 343.—*CAN.*

a. *Juror incorrectly summoned.]—A challenge to the poll, on the ground that the juror was not summoned as by law he ought, is insufficient.—FOGARTY v. R.* (1846), 10 I. L. R. 53.—*IR.*

PART VII. SECT. 5, SUB-SECT. 3.—C. (e).

218 i. *General rule.]—Where a prisoner upon his arraignment challenges a juror for cause he is bound to state & prove the cause alleged at*

**219. — Before examination on the voir dire.]** —*R. v. DOWLING*, No. 72, *ante*.

**220. Challenge by the Crown.]**—*R. v. HARLESTON* (1870), *Y. B.* 44 *Edw.* 3, fo. 38, pl. 32; *Staundford's Pleas of the Crown*, 162 b.

*Annotation:—Refd.* Mansell v. R. (1857), 8 E. & B. 54.

**221. —.]** —*R. v. FITZHARRIS* (1681), 8 State Tr. 224.

*Annotations:—Consd.* Mansell v. R. (1857), *Dears.* & B. 375. *Mentd.* *R. v. Laver* (1722), 8 Mod. Rep. 82; *Stockdale v. Hansard* (1840), 3 State Tr. N. S. 723; *Bradlaugh v. Gossett* (1884), 50 L. T. 620.

**222. —.]** —*R. v. CONINGSMARK* (1882), 9 State Tr. 1.

*Annotation:—Refd.* Mansell v. R. (1857), 8 E. & B. 54.

**223. —.]**—The Crown is not bound to assign cause for a challenge until the panel has been gone through.—*R. v. GRAHME* (1691), 12 State Tr. 645; 4 *Hargrave's State Tr.* 406.

*Annotations:—Mentd.* *R. v. Knowles* (1694), 12 Mod. Rep. 55; *R. v. Crosby* (1695), 12 Mod. Rep. 72; *R. v. Laver* (1722), 8 Mod. Rep. 82; *R. v. Dowling* (1818), 3 Cox, C. C. 509; *R. v. McCafferty* (1867), 10 Cox, C. C. 603; *R. v. Meany* (1867), 10 Cox, C. C. 506.

**224. —.]**—*R. v. COOK*, No. 134, *ante*.

**225. —.]**—*R. v. COWPER* (1699), 13 State Tr. 1106.

*Annotation:—Consd.* Mansell v. R. (1857), *Dears.* & B. 375.

**226. —.]** —*R. v. HORNE TOOKE* (1794), 25 State Tr. 1.

*Annotations:—Refd.* *R. v. Frost* (1840), 4 State Tr. N. S. 85; Mansell v. R. (1857), 8 E. & B. 54. *Mentd.* *R. v. Stone* (1796), 25 State Tr. 1155; *Eagleton & Coventry v. Kingston* (1803), 8 Ves. 438; *R. v. Lambert & Perry* (1810), 31 State Tr. 335; *R. v. Watson* (1817), 32 State Tr. 1; *Rodford v. Birley* (1822), 3 Stark. 76; *R. v. Smith* (1828), 8 B. & C. 341; *R. v. Parry* (1837), 7 C. & P. 836; *R. v. Zuluetta* (1843), 1 Car. & Kir. 215; *Conway & Lynch v. R.* (1845), 5 L. T. O. S. 458; *R. v. Grant, Ranken & Hamilton* (1848), 7 State Tr. N. S. 507; *R. v. Meany* (1867), 15 W. R. 1082.

**227. —.]** —(1) Two men were indicted on a charge of high treason in that they did at M., in the county of K. aid in the hostile invasion of the Kingdom by ships & armed men. Objection was taken to the advantage gained by the Crown where the panel consisted of a large number of jurors it being asserted that forty-eight men was the extreme limit; but this objection was overruled, & the A.-G. was permitted to withhold assigning the cause of challenge until the panel was gone through.

(2) A juror was omitted from the jury on a challenge because he exclaimed on looking at the prisoners "damned rascals."—*R. v. O'COIGLY* (1798), 26 State Tr. 1191.

*Annotations:—As to (1)* *Refd.* *R. v. Frost* (1810), 4 State Tr. N. S. 85; Mansell v. R. (1857), *Dears.* & B. 375.

**228. —.]**—*R. v. FROST*, No. 99, *ante*.

**229. —.]**—*ANON.* (1837), 1 Jur. 674.

**230. —.]**—*R. v. PARRY*, No. 167, *ante*.

**231. —.]**—The counsel for the prosecution only followed the practice usual on such occasions & challenged the juror as he came to the book to be sworn; this might be done by both parties till the whole panel had been gone through; & if it should then appear that a full jury were not obtained, then the panel should be again called over, on which second occasion certainly the Crown was bound to assign some cause for challenging any juror to whom the counsel might object. In the first instance, it was clear that the Crown had a right to a peremptory challenge; & it might be exercised very fairly on the present occasion

(*VAUGHAN, J.*)—*R. v. DAGNES* (1839), 3 J. P. 293.

**232. —.]**—*R. v. GEACH*, No. 202, *ante*.

**233. —.]**—The record stated that P., named on the panel, was called, & elected, & tried, to the intent that he should be sworn; without being sworn, he said that he had conscientious scruples against capital punishments. The counsel for the Crown prayed that he should be ordered to stand by. The counsel for the prisoner prayed that the Crown should assign cause of challenge. The judge told him that if he felt that he could not do his duty he had better withdraw; & thereupon it was ordered by the ct. that he should stand by: *Held: this was a challenge by the Crown without assigning cause, & therefore the judge was right in ordering P. to stand by.*

*Semble: the judge has power to excuse a juror man from serving, or to order him to withdraw, if he is physically or morally incapable of performing his duty*—*MANSELL v. R.* (1857), 8 E. & B. 54; *Dears.* & B. 375; 8 State Tr. N. S. 831; 27 L. J. M. C. 4; 22 J. P. 19; 4 Jur. N. S. 432; 169 E. R. 1048, Ex. Ch.

*Annotations:—Refd.* *R. v. Giorgetti* (1865), 4 F. & F. 546; *Levinger v. R.* (1870), L. R. 3 P. C. 282. *Mentd.* *R. v. Anderson* (1861), 7 Jur. N. S. 122; *R. v. Fernandes* (1861), 6 H. & N. 717; *Winsor v. R.* (1866), 35 L. J. M. C. 121.

**234. —.]**—*R. v. GIORGETTI*, No. 101, *ante*.

**235. By accused—Charged with misdemeanour.]**

—On the trial of a misdemeanour on the Crown side of the assizes, it is a fair mode of practice to allow defts. to object to the jurors as they are called, without showing any cause, till the panel is exhausted, & then to recall the jurors in the same order in which they were called at first, & then not to allow any challenge except for cause, & this is the constant practice on the Welsh circuit, where challenges of jurors very frequently occur.—*R. v. BLAKEMAN* (1850), 3 Car. & Kir. 97.

#### D. By the Crown.

**Peremptory challenge—Whether Crown has right.]**—*See* Sub-sect. 2, B. (b), *ante*.

**Challenge for cause—When Crown must show cause.]**—*See* Nos. 220-234, *ante*.

#### SUB-SECT. 4.—JOINING OR SEVERING CHALLENGES.

**236. Joint indictment & arraignment—Challenge by one is by all.]**—*R. v. SALISBURY*, No. 161, *ante*.

**237. — —.]** —*ANON.* (1557), *Benl.* 7; 73 E. R. 935.

**238. — —.]** —(1) If several persons be indicted together in one indictment for one crime, in case some of them be found guilty by one jury, & afterwards some of the same jury be returned for trial of others in the same indictment; it is no challenge for those prisoners to say, that those jurors have already given their verdict, & found others guilty who are indicted in the same indictment for the same offence. . . . The finding one guilty is no argument that those jurors will find another guilty.

(2) If several prisoners be put upon one jury, & they challenge peremptorily, & sever in their challenges then he who is challenged by one is to be drawn against all. But in such case the panel

once & is not entitled to wait until the panel is exhausted.—*R. v. POWER*, [1920] V. L. R. 88.—*AUS.*

**2301. Challenge by the Crown.]**—On a criminal trial the Crown has a right to direct jurors called to stand

aside, & is not bound to challenge for cause until the whole panel is perused.—*R. v. CHAMSON* (1876), 16 N. B. R. (3 Pug.) 546.—*CAN.*

**22011. —.]**—*R. v. SMITH* (1876), 38 U. C. R. 218.—*CAN.*

#### PART VII. SECT. 5, SUB-SECT. 4.

b Defendants separately represented — & delivering separate defences.]—Defts., having delivered separate defences & being separately represented at the trial, claimed to be

**SECT. 5.—CHALLENGE: Sub-sects. 4 & 5. SECT. 6: Sub-sects. 1 & 2. SECT. 7.]**

might be severed & the same jury might be returned betwixt the King & every one of the prisoners, & then they are to be tried severally; & there the challenge of one prisoner is no challenge to disable the juror so challenged against another prisoner.

(3) A juror, once challenged, cannot be recalled.—**REGICIDES' CASE** (1680), 5 State Tr. 978, 979, 1010; Kel. 7; 84 E. R. 1056.

*Annotation:—Generally, Mentd. Crosthwaite v. Gardner* (1852), 18 Q. B. 640.

**239. Joint indictment & separate arraignment—Severance of panel—Challenge only applies to one trial.]—R. v. SALISBURY, No. 161, ante.**

**240. ————]—REGICIDES' CASE, No. 238, ante.**

**241. Severance of challenges—Effect of—Separate trial ordered.]—R. v. HARDY (1794), 24 State Tr. 199.**

*Annotations:—Reid. R. v. Barber, Fletcher & Dorey* (1844), 8 J. P. 644. **Mentd. It. v. Stone** (1796), 25 State Tr. 1155; It. v. Edwards (1812), 4 Taunt. 309; It. v. Watson (1817), 2 Stark. 116; Redford v. Birley (1822), 3 Stark. 110, n.; Redford v. Birley (1822), 3 Stark. 76; It. v. Blake (1844), 6 Q. B. 126; R. v. O'Connell (1844), 5 State Tr. N. S. 1; Conway & Lynch v. R. (1845), 5 L. T. O. S. 458; A.-G. v. Briant (1846), 15 M. & W. 169; R. v. Garbett (1847), 2 Cox, C. C. 448; It. v. Grant, Ranken & Hamilton (1848), 7 State Tr. N. S. 507; R. v. Duffy (1849), 7 State Tr. N. S. 795; R. v. Smith, O'Brien (1849), 7 State Tr. N. S. 3; R. v. Pet-herini (1850), 7 Cox, C. C. 79; Mulcahy v. R. (1867), 15 W. R. 446; R. v. Meany (1867), 15 W. R. 1082; Marks v. Boyfus (1890), 25 Q. B. D. 494.

**242. ————]—R. v. SEALEY (1844), 8 J. P. 328.**

*Annotation:—N.F. R. v. Fisher* (1848), 3 Cox, C. C. 68.

**——— Number of peremptory challenges allowed.]—See Nos. 161, 162, ante.**

**243. ——— Whether allowed—Where principal & accessory indicted together.]—Where a principal & accessory are indicted together, they will not be allowed to sever in their challenges, so as to be tried separately.—R. v. FISHER (1848), 3 Cox C. C. 68.**

**SUB-SECT. 5.—EFFECT OF OMISSION OR DISALLOWANCE OF CHALLENGE.**

**244. Omission to challenge at right time—Juror challenged but released by other party—Whether right of challenge revived.]—Where a juror is not challenged by one party, who had sufficient cause of challenge; & afterwards is challenged by the other side, & afterwards the party doth release his challenge; in that case, the first party cannot challenge the same juror again, because he did foreslow his time of challenge, & he had admitted the party for to be indifferent at the first.—**CANDEN & SYMMON'S CASE** (1613) Godb. 234; 78 E. R. 136.**

**As ground for new trial.]—See PRACTICE. Challenge improperly disallowed—As ground for new trial.]—See PRACTICE.**

entitled to four peremptory challenges each:—*Held: dofts. were only entitled to four peremptory challenges between them.—EMLEY v. CARSCALLEN* (1894), 24 O. R. 658.—**CAN.**

**PART VII. SECT. 6, SUB-SECT. 1.**

**a. New panel ordered—Requisite number not appearing.]—If on the trial of an action in the Supreme Ct. twenty persons do not appear from which a jury may be selected, the panel may be quashed.—**ROSS v. BRITISH COLUMBIA ELECTRIC RY. CO., LTD.****

(1900), 7 B. C. R. 394.—**CAN.**

**d. Failure to summon whole panel—Technical error in order for enlargement.]—An order made by the judge designated to preside at the assizes directing the sheriff to summon other persons to serve on the grand & petit juries in the places of those whom the sheriff had been unable to serve was drawn up, by inadvertence, to cover only the summoning of petit jurymen:—*Held: the order as pronounced by the judge may be regarded as the order made by him rather than the order in***

**SECT. 6.—MAKING UP THE NUMBERS.**

**SUB-SECT. 1.—BY NEW OR PANELS.**

*See 1825 Act, s. 20.*

**245. New panel ordered—List exhausted by challenges.]—Where the panel is exhausted by challenges the ct. may *ore tenus* order a new panel without writ or precept.**

The King has power to challenge without showing cause till the panel be gone through; but if there be a default of jurors when the King challenges, the King's Counsel must show cause (**TREBY, L.C.J.**).—**COOK'S CASE** (1696), as reported in 13 State Tr. 311, 317; Fost. 63; 168 E. R. 32.

*Annotations:—Reid. R. v. Edmonds* (1821), 4 B. & Ald. 471; Ramadge v. Ryan (1832), 9 Bing. 333; Mansell v. R. (1857), 8 E. & B. 54; Mulcahy v. R. (1867), 15 W. R. 446.

**246. ————]—R. v. HORNE TOOKE (1794), 25 State Tr. 1.**

*Annotations:—Reid. R. v. Frost* (1840), 4 State Tr. N. S. 85; Mansell v. R. (1857), 8 E. & B. 54. **Mentd. R. v. Stone** (1796), 25 State Tr. 1155; Eagleton & Coventry v. Kingston (1803), 8 Ves. 438; R. v. Lambert (1810), 31 State Tr. 335; R. v. Watson (1817), 32 State Tr. 1; Redford v. Birley (1822), 3 Stark. 76; It. v. Smith (1828), 8 D. & C. 341; R. v. Parry (1837), 7 C. & P. 836; R. v. Zulueta (1843), 1 Car. & Kir. 215; R. v. Meany (1867), 15 W. R. 1082.

**247. ——— Special jury—Panel reduced to less than twenty-four.]—Where it is shown to the satisfaction of the ct. on a statement of facts by affidavit that in the reduced list of special jurymen there are persons non-resident or exempt, or that from other causes it is clear that there are less than twenty-four effective jurymen remaining on the panel, & that it is probable that a sufficient number cannot be had to attend at the trial of a pending information, they will, on motion, order a new jury to be impanelled.—**A.-G. v. GOODMAN** (1820), 8 Price, 220; 146 E. R. 1184.**

**SUB-SECT. 2.—BY TALES DE CIRCUMSTANTIBUS.**

*See 1825 Act, s. 37.*

**248. Jurisdiction of court to award—Corporation.]—A corpn. cannot grant a tales (*per CUR.*).—**BASELY v. BASELEY** (1647), Sty. 16; 82 E. R. 494.**

**249. ——— Inferior court—By custom.]—It is not a good custom for an inferior ct. to award a tales de circumstantibus.—**BALL v. KNIGHT** (1732), 2 Barn. K. B. 194; 2 Stra. 941; 94 E. R. 424.**

**250. When awarded—Insufficient jurors appearing.]—**DENBAWD'S CASE, No. 105, ante.****

**251. ——— Special jury.]—Practice as to praying a tales upon the trial of an issue directed by the Ct. of Ch.**

I have inquired into the practice & have been informed, that liberty to pray a tales has only been given, in case it happens that a certain number of special jurymen do not attend (**LORD LANGDALE, M.R.**).—**ELLIS v. BOWMAN** (1851), 13 Beav. 318; 51 E. R. 122.

**252. Who may pray a tales—Plaintiff or defendant.]—Pltf. is not bound to pray a tales, but**

the mistaken form in which it was drawn up, & there had been no illegality in the constitution of the grand jury.—**R. v. BOAK**, [1925] 3 D. L. R. 867; [1925] S. C. R. 525; 44 Can. Crim. Cas. 218; *revers.*, [1925] 2 D. L. R. 803; 2 W. W. R. 40; 43 Can. Crim. Cas. 402; 35 B. C. R. 256.—**CAN.**

**PART VII. SECT. 6, SUB-SECT. 2.**

**e. When awarded—Insufficient jurors appearing.]—Where the jury panel has been exhausted by reason of some of the jurors being out in**

only to bring in the record for trial; if he do not pray a *tales*, *deft.* may (HOLT, C.J.).—ANON (1898), 12 Mod. Rep. 204; 88 E. R. 1264.

253. How many may be called.—Sufficient to complete jury.]—A trial by more of the *tales* than are necessary, is erroneous.—HUTTON v. HUN (1801), Cro. Eliz. 849; 78 E. R. 1075.

254. Procedure to obtain.—Whether warrant of Attorney-General necessary—Palatine Court.]—*Tales* in a County Palatine. The A.-G. to grant the warrant.—R. v. LAMBE (1768), 4 Burr. 2171 98 E. R. 133.

255. ——— Information by Attorney-General.]—*Semhle*: in an information at the suit of the A.-G., a *tales* may be prayed for the Crown without his warrant, though he be not present; but not for *deft.*—A.-G. v. PARSONS (1836), as reported in 2 M. & W. 23; 2 Gale, 227; 150 E. R. 652.

Annotations:—*Mentd.* A.-G. v. Churchill (1841), 9 Dowl 772; Hilton v. Granville (1847), 2 New Pract. Cas. 262.

256. ——— How selected.—Whether from persons summoned by sheriff or coroner.]—Upon an award of *tales* at *Nisi Prius*, it is not necessary that the *tales* should be selected out of persons accidentally present; they may be selected out of persons whose presence the sheriff or coroner has taken previous means to obtain.—R. v. DOLBY (1823), 2 B. & C. 104; 2 State Tr. N. S. App. 939; 3 Dow. & Ry. K. B. 311; 2 Dow. & Ry. M. C. 71; 1 L. J. O. K. B. 241; 107 E. R. 322.

257. In special jury cause.—Whether consent of defendant necessary.]—In a special jury cause *pltf.* may have a *tales* without the consent of *deft.*—GATLIFF v. BOURNE (1838), 2 Mood. & R. 100.

258. ——— Prosecuted by Crown.]—In cases prosecuted by the Crown, a *tales* cannot be had in a special jury—without the consent of the A.-G. Where a sufficient number of special jurymen are not present, a *tales* can be had only by virtue of a warrant of *tales*, not by common jury process, as on the plea side of the ct.—R. v. EDWARDS (1850), 14 L. T. O. S. 471.

259. In trial at bar.]—For defect of jurors on a trial at bar, a rule absolute granted for a writ of *octo vel decem tales*.—BURN v. DENMAN (1848), 1 Exch. 769; 10 L. T. O. S. 349; 12 Jur. 82; 154 E. R. 327; subsequent proceedings, 2 Exch. 167.

#### SECT. 7.—SWEARING AND GIVING IN CHARGE.

See 1825 Act. s. 26; Oaths Acts, 1888 (c. 46); Oaths Act, 1909 (c. 39).

260. Whether necessary.—Defendant consenting to judgment.]—An action in which *deft.* had summoned a special jury having been called on, *deft.* wished to consent to judgment for the amount claimed without swearing the jury. The judge, however, had the jury sworn & directed them by consent to return a verdict for the amount claimed. In such cases it is in the discretion of the judge to try the case out or not.—SAMWAY v. WINCH (1893), 9 T. L. R. 552.

261. Mode of swearing.—Prisoner charged with

felony & being habitual criminal.—Plea of guilty to charge of felony.]—Where an indictment charges a person with having committed an offence, & also, under Prevention of Crime Act, 1908 (c. 59), s. 10, with being a habitual criminal, & the accused pleads guilty to the main charge, but pleads not guilty to the charge of being a habitual criminal, it is sufficient that the jury should be sworn to try the latter question as if on a trial for a misdemeanour, although the main charge to which prisoner has pleaded guilty is a felony. It is no objection, however, to the trial that the jury has been sworn as on a trial for felony.—R. v. TURNER, [1910] 1 K. B. 346; 79 L. J. K. B. 176; 102 L. T. 367; 74 J. P. 81; 26 T. L. R. 112; 54 Sol. Jo. 164; 22 Cox, C. C. 310; 3 Cr. App. Rep. 103, C. C. A.

Annotations:—*Mentd.* R. v. Johnson (1909), 3 Cr. App. Rep. 168; R. v. Condon (1910), 4 Cr. App. Rep. 109; R. v. Fawcett (1910), 74 J. P. 444; R. v. Marshall (1910), 74 J. P. 381; R. v. Moran (1910), 5 Cr. App. Rep. 219; R. v. Walker (1910), 27 T. L. R. 51; R. v. Waller, [1910] 1 K. B. 364; Browne v. Black, [1911] 1 K. B. 975; R. v. Westwood (1913), 8 Cr. App. Rep. 273; R. v. Summers (1914), 10 Cr. App. Rep. 11; R. v. Harris, [1922] 2 K. B. 543; R. v. Coney (1923), 92 L. J. K. B. 915; R. v. Dean (1924), 18 Cr. App. Rep. 21.

262. Whether jury must be resworn.—Issue of previous conviction.]—Where a prisoner is indicted for felony, & there is a count in the indictment stating a previous conviction, he is first to be arraigned on the whole indictment. Afterwards he is to be given in charge to the jury on the subsequent felony only; & if they find a verdict of guilty on that charge, then they are to inquire respecting the previous conviction; & where the jury were sworn afresh to try the question of previous conviction, & prisoner's counsel then claimed the right of challenge:—*Held*: prisoner had no right of challenge then, & the jury were resworn unnecessarily.—R. v. KEY (1851), 3 Car. & Kir. 371; 2 Den. 347; T. & M. 623; 21 L. J. M. C. 35; 18 L. T. O. S. 173; 15 J. P. 801; 15 Jur. 1065; 5 Cox, C. C. 369; 169 E. R. 533, C. C. R.

263. ———.]—Prevention of Offences Act, 1851 (c. 10), s. 9, makes no alteration in the mode of arraigning prisoners, & it is the opinion of all the judges that it is unnecessary for the jury to be resworn when trying the question of previous conviction.—R. v. SHUTTLEWORTH (1851), 3 Car. & Kir. 375; 2 Den. 351; T. & M. 626; 21 L. J. M. C. 36; 18 L. T. O. S. 173; 15 J. P. 801; 15 Jur. 1066; 5 Cox, C. C. 369; 169 E. R. 534, C. C. R.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 496 et seq.

On substitution of juror.]—See CRIMINAL LAW, Vol. XIV., p. 308, Nos. 3236 et seq.

264. ——— In civil cases.—Actions by same plaintiff.—On own behalf & as next friend of children.]—PIKE v. POLYTECHNIC INSTITUTION (1859), 1 F. & F. 712, N. P.

Annotations:—*Mentd.* Readhead v. Mid. Ry. (1869), L. R. 4 Q. B. 379; Francis v. Cockroft (1870), L. R. 5 Q. B. 601.

265. Charging the jury.—What issues may be given in charge together.—Pleas of *autrefois acquit* & *not guilty*.]—The jury cannot be charged at the same time to try the two issues of *autrefois acquit*

another case, the presiding judge may direct talesmen to be summoned.—NADEAU v. THERIAULT (1906), 2 E. L. R. 135; 37 N. B. R. 498.—CAN.

#### PART VII. SECT. 7.

1. Whether necessary.—No injustice resulting from omission.]—The ct. will not grant a new trial because one of

the jurors has not been sworn, where no injustice is done thereby.—GOOSE v. GRAND TRUNK RY. CO. (1889), 17 O. L. 721.—CAN.

2. Mode of swearing.]—A seceder, who refused to kiss the book, rejected as a juror in a capital case.—R. v. MCCABRON (1832), 1 Craw. & D. 186.—IR.

h. ———.]—R. v. WOODS (1841), 2 Craw. & D. 268; Ir. Cr. Rep. 276; Jebb & B. App. VII.—IR.

k. ———.]—R. v. HUGHES (1842), 2 Craw. & D. 396.—IR.

1. Whether jury must be resworn.—Disqualified jurymen sworn.—But not called.]—R. v. COULTER (1863), 12 C. P. 299.—CAN.





N. S. 214; 6 W. R. 322; 7 Cox, C. C. 454; 169 E. R. 1084, C. C. R.

*Annotations*.—*Consd.* R. v. Wakefield, [1918] 1 K. B. 216; Crane v. Public Prosecutor, [1921] 2 A. C. 299. *Refd.* R. v. Martin (1872), L. R. 1 C. C. R. 378; R. v. Bottomley (1922), 87 J. P. 26.

**281.** — *Discretion of court.*—It is in the discretion of the ct. to grant a new trial in a case where a person not impanelled has served upon the jury, & the ct. will not grant such new trial unless substantial injustice has been done by a wrong juror having served.

An action came on to be tried before a common jury, & the name of Thomas Fox, being on the common jury panel, was called amongst others by the associate, whereupon one Thomas Cox, who was on the special jury panel, went into the box by mistake, served upon the jury, & took part in the verdict, which was given for pltf. Deft alleged afterwards that Cox was a friend of pltf., & had purposely, & in the interest of pltf., tendered himself as a juror, but this was denied by Cox in a letter written in answer to inquiries by the attorney of pltf. :—*Held* : it was in the discretion of the ct. to grant a new trial, & a rule for a new trial discharged.—WELLS v. COOPER (1874), 30 L. T. 721.

*See, also*, No. 290, *post*.

**282.** *Discovery before verdict.*—Where a person, not summoned on the jury, was sworn on a jury at *Nisi Prius* in the name of a person for whom a summons to serve on that jury was delivered, & to whose house he had succeeded; the irregularity being noticed before verdict, the ct. awarded a *venire de novo*.—DOVEY v. HOBSON (1816), 6 Taunt. 400; 2 Marsh. 154; 128 E. R. 1113.

*Annotations*.—*Distd.* Torbock v. Lalny (1841), 5 Jur. 318. *Consd.* R. v. Mellor (1858), Dears. & B. 468. *Refd.* R. v. Hunt (1821), 4 B. & Ald. 430; Gee v. Swann (1842), 9 M. & W. 685; Doe d. Ashburnham v. Michael (1851), 15 Jur. 677.

**283.** — *On return of jury to court.*—After a jury retired to consider their verdict, the associate on their return called over the names from his list, & it was discovered that one of the persons on the list was not on the jury but another person, duly summoned, had been sworn :—*Held* : not sufficient to entitle the unsuccessful party to a *venire de novo*.—TORBOCK v. LALNY (1841), 16 Q. B. 623, n.; Woll. 208; 5 J. P. 467; 5 Jur. 318; 117 E. R. 1018.

*Annotation*.—*Refd.* Doe d. Ashburnham v. Michael (1851), 16 Q. B. 620.

**284.** — *Trial allowed to proceed—Ground for new trial.*—On the trial of a special jury cause, when the names of the special jurymen who had retired to consider their verdict, were called over on their return into ct., it was discovered that, a person on the impanelling of the jury, summoned as a special jurymen on another cause, had answered by mistake to the name of a jurymen summoned for the cause on trial; & had served in his stead :—Deft. then objected to take the verdict of the jury so impanelled; pltf. insisted on taking it; & they gave their verdict for pltf. :—*Held* : a mistrial, as the objection was taken before verdict; & there must be a *venire de novo*.—DOE d. ASHBURNHAM (EARL) v. MICHAEL (1851), 16 Q. B. 620; 20 L. J. Q. B. 276; 16 L. T. O. S. 485; 15 Jur. 677; 117 E. R. 1017.

*Annotations*.—*Distd.* Wells v. Cooper (1874), 30 L. T. 721. *Refd.* Irwin v. Grey (1865), 19 C. B. N. S. 585; Montreal Street Ry. v. Normandin, [1917] A. C. 170.

**285.** — *Jury discharged & resworn with sub-*

*stituted juror.*—A juror was summoned in error, but not returned in the panel, & in mistake was sworn to try a case, during the progress of which these facts were discovered. The jury were discharged, & a fresh jury constituted by taking another jurymen in the place of the one who had served in error.—R. v. PHILLIPS (1868), 32 J. P. 328; 11 Cox, C. C. 142.

**286.** *Person serving not qualified.*—RUSSEL v. BALL (1745), Barnes, 455; 94 E. R. 1001.

**287.** — *Where, on the trial of an indictment for perjury, it being necessary to swear talesmen from the common jury panel to serve on the jury, & one J. Williams being called, his son, R. H. Williams, at the request of his father, & without collusion with the prosecutor or deft., appeared for him, & was sworn & served on the jury, he not being of age, nor having a qualification by estate, nor being on any panel :—Held* : there was a mistrial, & a rule obtained for a new trial must be made absolute.—R. v. TREMEARNE (1826), 5 B. & C. 254; 7 Dow. & Ry. K. B. 684; 3 Dow. & Ry. M. C. 528; 4 L. J. O. S. K. B. 157; 108 E. R. 95.

*Annotations*.—*Distd.* R. v. Despard (1828), 2 Man. & Ry. K. B. 406. *Consd.* R. v. Mellor (1858), Dears. & B. 468. *Refd.* R. v. Marsh (1837), 6 Ad. & El. 236; Torbock v. Lalny (1841), 5 Jur. 318.

**288.** — *Applt. was tried for, & convicted of, rape. Shortly afterwards it was discovered that one of the jurors summoned to serve on the jury which tried applt. was personated by his bailiff, who served on the jury although not in fact qualified to do so :—Held* : there had been a mistrial & a *venire de novo* should be awarded.—R. v. WAKEFIELD, [1918] 1 K. B. 216; 87 L. J. K. B. 319; 118 L. T. 576; 82 J. P. 136; 34 T. L. R. 210; 62 Sol. Jo. 309; 26 Cox, C. C. 222; 13 Cr. App. Rep. 56, C. C. A.

*Annotations*.—*Consd.* R. v. Bottomley (1922), 87 J. P. 26. *Refd.* Crane v. Public Prosecutor, [1921] 2 A. C. 299. *Mentd.* Bannister v. Clarke, [1920] 3 K. B. 598.

**289.** *Person serving qualified.*—DOE d. ASHBURNHAM (EARL) v. MICHAEL, No. 284, *ante*.

**290.** *Knowledge of defendant's attorney.*—Where A. B., the elder, being summoned on a special jury, A. B., the younger, of the same place by mistake answered to the name, was sworn & sat as a special juror on the trial of a cause, the ct. in its discretion refused a new trial after verdict for pltf., it appearing that deft.'s attorney's clerk was aware of the mistake at the time of the trial, & made no objection, & the attorney himself not negating his knowledge of the mistake.—FALMOUTH (EARL) v. ROBERTS (1842), 9 M. & W. 469; 1 Dowl. N. S. 633; 11 L. J. Ex. 180; 152 E. R. 198.

*Annotations*.—*Refd.* R. v. Mellor (1858), Dears. & B. 468; Wells v. Cooper (1874), 30 L. T. 721. *Mentd.* Davidson v. Cooper (1843), 11 M. & W. 778; Pattinson v. Luckley (1875), L. R. 10 Exch. 330.

**291.** — *R. v. ROTHWELL (1895), cited in 72 J. P. 5, D. C.*

*Annotation*.—*Refd.* *Ex p. Morris* (1907), 72 J. P. 5.

**Personation of juror—As an offence.**—*See* Nos. 753, 754, *post*; CONTEMPT OF COURT, Vol. XVI., p. 18.

## SECT. 10.—PROCEDURE DURING THE HEARING.

### SUB-SECT. 1.—IN GENERAL

**Retirement of jury.**—*Sec, generally*, Sect. 11, *post*.

**292.** — *Pending discussion of admissibility*

## PART VII. SECT. 10, SUB-SECT. 1.

**2921.** *Retirement of jury—Pending*

*Grounds for ordering.*—The jury should not be excluded during the preliminary certain evidence

is admissible as a dying declaration.—R. v. AHO (1904), 11 B. C. R. 114.—CAN.



**Sect. 10.—Procedure during the hearing: Sub-sects. 1, 2 & 3, A., B. & C.]**

**of evidence—Grounds for ordering.]—**When objection is taken to the admissibility of evidence & the discussion of the object in the presence of the jury may, in the opinion of the judge, be prejudicial to prisoner, the proper course is to send the jury to their room & then to hear arguments in ct.—*R. v. THOMPSON*, [1917] 2 K. B. 630; 86 L. J. K. B. 1321; 117 L. T. 575; 81 J. P. 266, 33 T. L. R. 506; 26 Cox, C. C. 31; 12 Cr. App. Rep. 261, C. C. A.; *on appeal, sub nom. THOMPSON v. R.*, [1918] A. C. 221, H. L.

**Annotations.]—***Mentd. R. v. Twiss*, [1918] 2 K. B. 853; *R. v. Armstrong*, [1922] 2 K. B. 555; *R. v. Manning* (1923), 17 Cr. App. Rep. 85.

**293. Questions of law—Matter for judge.]—**The jury should take the law from the judge; & therefore, where cases had been cited to the judge on a legal argument, & he had given an opinion on them, they were not allowed to be read to the jury in the address of prisoner's counsel to them.—*R. v. PARISH* (1837), 8 C. & P. 94.

*See, generally*, EVIDENCE, Vol. XXII., pp. 22 *et seq.*

**294. Undeclared prisoner—Offer by juror to provide counsel.]—***R. v. M'GREGOR & LAMBERT* (1844), as reported in 2 L. T. O. S. 501; 1 Cox, C. C. 346.

**295. Duty to maintain secrecy.]—**After verdict, there appeared in some newspapers an account of what the writer said was said to him about the evidence, with a complete lack of reserve, by a member of the jury. Whether what was published was, in fact, said, is not certain. But it is at least certain that it was published. In the opinion of this ct. nothing could be more improper, deplorable & dangerous. It may be that some jurymen are not aware that the inestimable value of their verdict is created only by its unanimity, & does not depend upon the process by which they believe that they arrived at it. It follows that every jurymen ought to observe the obligation of secrecy which is comprised in & imposed by the oath of the grand juror. If one jurymen might communicate with the public upon the evidence & the verdict so might his colleagues also, & if they all took this dangerous course differences of individual opinion might be made manifest which, at the least, could not fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts (*LORD HEWART, C.J.*).—*R. v. ARMSTRONG*, [1922] 2 K. B. 555; 91 L. J. K. B. 904; 127 L. T. 221; 86 J. P. 209; 38 T. L. R. 631; 27 Cox, C. C. 232; 16 Cr. App. Rep. 149, C. C. A.

**SUB-SECT. 2.—ILLNESS OF JUROR.**

**In civil actions.]—***See* Sub-sect. 8, B., *post*.

**In criminal trials.]—***See* CRIMINAL LAW, Vol.

**PART VII. SECT. 10, SUB-SECT. 3.—A.**

**q. Absence of juror for short period.]—**One of the jurors, without permission, absented himself beyond the precincts of the ct. for one hour & a half, during which the trial was suspended; but it did not appear that he otherwise misconducted himself, or that prisoner was prejudiced by his misconduct.—*Held*: not a mistrial.—*R. v. O'NEILL* (1843), 3 Caw. & D. 146.—*IR.*

**r. Inspection of locus of incident by juror—Unofficially.]—**During an action of damages for injury in a colliery, evidence was led on Jan. 21

& 24. On Jan. 23 one of the jury went by himself to inspect the locus of the accident, & the method of working at the colliery. The jury returned a verdict for pursuer. The ct. granted a new trial on the ground that the conduct of the jurymen had rendered it impossible for the jury to return a verdict according to the evidence led before them. The ct. granted a new trial.—*SUTHERLAND v. PRESTONGRANGE COAL & FIREBRICK CO.* (1888), 15 R. (Ct. of Sess.) 494; 25 Sc. L. R. 359.—*SCOT.*

**PART VII. SECT. 10, SUB-SECT. 3.—B.**

**1. After evidence—Before addresses**

XIV., pp. 308, 326, Nos. 3235–3243, 3416; Criminal Justice Act, 1925 (c. 86), s. 15.

**Substitution of jurors—Recall of witnesses.]—***See* CRIMINAL LAW, Vol. XIV., p. 308, Nos. 3238–3240, 3243.

**SUB-SECT. 3.—CONDUCT OF JURY.**

**A. In General.**

**296. Misconduct—Whether ground for new trial.]—***HUGHES v. BUDD*, No. 346, *post*.

**—Punishable misconduct.]—***See* Part XI., Sect. 1, *post*.

**297. Some of jury returning to court—Inability to agree.]—***ST. JOHN (LORD) v. ABBOT* (1735), Barnes, 441; 94 E. R. 994.

**Annotation.]—***Consd. Fanshaw v. Knowles*, [1916] 2 K. B. 538.

**298. Demand for money by jury—From litigant.]—**The foreman of the jury had at the end of the trial, called out to deft. by his surname without adding the usual title, saying "Price, you must stand two guineas for this job," & Price said he would, the jurymen adding, "If you have not the money, I will lend it to you, & you can pay me to-morrow." The money was paid to the jurymen. This statement being brought before the ct., requires some further examination. A verdict, if obtained from a jury that acted in this manner, ought not to stand (*LORD DENMAN, C.J.*).—*TOPHAM v. PRICE* (1846), 6 L. T. O. S. 367.

**299. ———.]—**The jury on a trial gave a verdict, after an hour's deliberation, which was a satisfactory one. The next day the foreman of the jury wrote to the party (deft.) in whose favour it was given, asking for 10s. postage stamps, & enclosing one of his trade circulars. Deft. was no party to any collusion, & disclosed the letter:—*Held*: the ct. would not disturb the verdict on this ground.—*SABEY v. STEPHENS* (1862), 1 New Rep. 23; 7 L. T. 274; 11 W. R. 20.

**Evidence of misconduct—Whether admissible—On appeal to Court of Criminal Appeal.]—***See* CRIMINAL LAW, Vol. XIV., p. 515, Nos. 5780, 5781.

**B. Expressions of Opinion by Jury.**

**300. Before verdict—Inconsistent with verdict—Whether ground for altering verdict.]—***NAPIER v. DANIEL*, No. 570, *post*.

**301. Before all evidence adduced—Whether ground for discharging jury.]—***ALLUM v. BOULT-BEE*, No. 309, *post*.

**302. ——— Case abandoned—Whether ground for new trial.]—***DRUMMOND v. DRUMMOND* (1893), 9 T. L. R. 403; 37 Sol. Jo. 439, C. A.

**303. ——— Whether abandonment of case justified.]—**The mere communication by the jury who are trying an action of an opinion in favour of pltf. during or at the close of pltf.'s case before deft.'s

*of counsel.]—*During a recess which occurred in the progress of a trial, after all the evidence had been put in, but the closing addresses of the counsel not yet delivered, one of the jurors was heard to say aloud: "Pltf. has got to get his pay & he well get it." The verdict being in favour of pltf., it was sought to be set aside for misconduct on the part of the juror:—*Held*: looking at the circumstances under which the remarks were made, there was no ground for disturbing the verdict.—*THEDIBEAU v. EVERETT* (1873), 9 N. S. R. (3 G. & O.) 318.—*CAN.*

**a. Before trial.]—**An application

evidence is heard is not of itself such misconduct on the part of the jury as will justify counsel for deft. in refusing to go on with the case before that jury & entitle deft. to a new trial.—*CAMPBELL v. HACKNEY FURNISHING CO., LTD.* (1906), 22 T. L. R. 318, D. C.

**304. — Counsel misled — Remaining witnesses not called — Whether ground for new trial.]**—An action was brought by pltf., who was the tenant to defts. of certain premises, for interfering with his water supply. The defence was that the shortage of water was not due to any defect in the supply, but to the waste of the water by pltf. Pltf.'s case having been closed, three witnesses were called for defts. to prove the defence alleged. The jury then interposed & said that they had heard enough evidence of that class, & asked that defts.' expert might be called. Thereupon defts.' counsel, thinking that the jury were in his favour, although he had six other witnesses to the facts in dispute in ct., called his expert & closed his case. The jury returned a verdict for pltf. The learned judge, upon the application of defts., granted a new trial upon the ground of misconduct on the part of the jury:—*Held*: the intimation of the jury having misled defts.' counsel & also the learned judge as to the view which they took of the case, there were materials upon which he was entitled to order a new trial upon the ground that the jury had misconducted themselves & had procured a miscarriage of justice, & as the exercise of his discretion in ordering a new trial was based upon proper materials, no appeal lay from his decision.—*BIGGS v. EVANS* (1912), 106 L. T. 796, D. C.

#### C. Partiality.

**305. Expressed intention to give verdict one way.]**—*DENT v. HERTFORD HUNDRED* (1696), 2 Salk. 645; 91 E. R. 546.

*Annotation*:—*Distd. Ramadge v. Ryan* (1832), 9 Bing. 333.

**306. —**It is a ground for new trial, if a juror before being sworn expresses a determination to give the verdict one way.—*RAMADGE v. RYAN* (1832), 9 Bing. 333; 2 Moo. & S. 421; 2 L. J. C. P. 7; 131 E. R. 640.

**307. — Statement that jury were friendly with police.]**—On an appeal against a conviction applt. applied for leave to call evidence that one of the jury had stated on the evening of the first day of the trial that all the jury were friendly with the police & it made no difference what applt. said. In the grounds of appeal there was nothing as to the misconduct of a juror:—*Held*: the ct. ought not to accede to the application.—*R. v. SYME* (1914), 112 L. T. 136; 79 J. P. 40; 30 T. L. R. 691; 24 Cox, C. C. 502; 10 Cr. App. Rep. 284, C. C. A.

**308. Expressions of partiality & prejudice.]**—The ct. will not grant a rule for setting aside a

verdict on the affidavit of the failing party, stating that one of the jury was a relation of the successful party, & that they were in habits of friendship & intimacy together, & particularising the various instances & expressions on the part of the juror of partiality & prejudice—which are detailed in the body of the case.—*ONIONS v. NAISH* (1819), 7 Price, 203; 146 E. R. 948.

**309. — Before trial concluded.]**—In an action for seizing & impounding pltf.'s cow, the evidence at the trial was conflicting, & a verdict was returned for pltf., with £10 damages. The judge was dissatisfied with the verdict, & the ct. granted a new trial, on affidavits, one of which stated, that deponent, at a public-house, before the trial was concluded, heard the jurymen discoursing among themselves on the subject of the cause, & that one of them said to one of his fellows, "The parson (meaning deft.) will get served out"; & another of the jurymen said to one of his fellows, "You will be for the parson." Two persons, one of whom had been examined at the trial, also deposed, that they would not believe pltf.'s principal witness on his oath.

*Qu.*: if a judge by whom a cause is being tried can discharge the jury on discovering that they have misconducted themselves by expressing opinions during the progress of the cause & before they heard all the evidence.—*ALLUM v. BOULTBEE* (1854), 9 Exch. 738; 2 C. L. R. 1072; 23 L. J. Ex. 208; 18 Jur. 406; 2 W. R. 459; 156 E. R. 316.

**310. Applause by jury — Not grounds for altering venue for new trial.]**—A party in a cause in equity to establish the trusts of a will under which he claimed estates of great value, stated & adduced evidence that he was the eldest legitimate son of a marriage of his parents in Jan. 1801, & an issue having thereafter been sent to trial at law, the evidence at which trial adduced by the same party went to show that the marriage had taken place in Jan. 1802, & the party having got a verdict; & the Ct. of Equity having, upon motion by the adverse parties, ordered a new trial, & allowed the former verdict to be used in evidence at the new trial:—*Held*: (1) a new trial ought to be granted, in respect that the issue sent had not been satisfactorily tried, the case made at the trial being different from that made in equity; (2) manifestations of applause by one or more of the jury at the close of the speech to evidence of the counsel for the successful party at the trial, was no sufficient reason for altering the venue, or for directing the new trial to be had in one of the counties where the estates in question were situated.—*O'CONNOR v. MALONE* (1839), 6 Cl. & Fin. 572; Macl. & Rob. 468; 7 E. R. 814, 11 L.

*Annotation*:—*Mentd. Butler v. Butler*, [1894] P. 25.

**311. Evidence of partiality — Jurors seen in plaintiff's carriage.]**—*DIXON v. DIXON* (1844), 3 L. T. O. S. 58, 78.

for a new trial was supported by affidavits that a juror had said before the trial that the two defts. were "the two greatest rascals in M." & that another juror had used nearly similar expressions of both defts.:—*Held*: a much stronger case was required & rule refused.—*R. v. NATHAN* (1862), 1 W. & W. 317.—AUS.

**b. —**The fact that one of the jurors, before the trial, had expressed an opinion against deft., which deft. was aware of, is no ground for a new trial.—*BROWN v. SHEPHERD* (1856), 13 U. C. R. 178.—CAN.

PART VII. SECT. 10, SUB-SECT. 3.—C.

**305 I. Expressed intention to give**

verdict one way.]—Where a party, against whom a verdict is rendered, is aware before the trial of a juror expressing a determination to give a verdict against him, & does not object to such juror on his being sworn, the ct. will not disturb the verdict.—*SCRIBNER v. M'LAUGHLIN* (1849), 6 N. B. R. (1 All.) 379.—CAN.

**a. Bet on result — Acceptance by juror.]**—An offer to a juror to bet a treat upon the result of a trial, which he accepted, but swore he never afterwards thought of, & did not consider as a bet, is not a ground for setting aside the verdict.—*OLIVE v. BELYEA* (1849), 6 N. B. R. (1 All.) 462.—CAN.

**d. Attempting to dissuade witness from giving evidence.]**—Attempting to dissuade a witness from giving evidence is such misconduct on the part of a juror as would justify the granting of a new trial.—*LAUGHLIN v. HARVEY* (1897), 24 A. R. 438.—CAN.

**e. Admission of partiality by juror — After trial commenced.]**—Where, on the second day of a trial, the foreman of the jury informed the judge that one of the jury stated that he was prejudiced, the judge was right in refusing to take any action & in directing that the trial should proceed.—*R. v. MAH HUNG* (1912), 17 B. C. R. 56.—CAN.

**Sect. 10.—Procedure during the hearing: Sub-sect.****D. Improper Communications.**

**312. Receiving evidence after retirement—Evidence given before.]**—If one of the witnesses, after the jury are deported from the bar, repeat to the jury the same evidence which he gave before & no more, that makes the verdict void (*per cur.*).—*ELMES & MELDCALES CASE* (1590), 1 Leon. 305; 74 E. R. 278; *sub nom.* METCALF'S CASE, 2 Roll. Rep. at p. 261; *sub nom.* METCALFE v. DEANE, Cro. Eliz. 189; *sub nom.* LANDY v. METCALF, Moore, K. B. at p. 452.

**Annotations:—***Refd.* Vicary v. Farthing (1597), Moore, K. B. 451; Goodman v. Cotherington (1684), 1 Sid. 235; R. v. Martin (1872), 41 L. J. M. C. 113.

**313. —.]—RICHMOND (DUKE) v. WISE** (1671), 1 Vent. 124; 86 E. R. 86.

**Annotation:—***Consd.* Vickery v. L. B. & S. C. Ry. (1870), L. R. 6 C. P. 165.

**314. — What amounts to—Expression by one of parties.]**—If *pltf.* or any one on his behalf say to a jurymen after his departure from the bar & before verdict given, "the case is clear for the *pltf.*," & the verdict be given for *pltf.*:—*Held*: sufficient to justify a *venire de novo* for it is new evidence.—*ATHIL v. BULWER* (1625), 2 Hale P. C. 308.

**315. — Copies of depositions given by party—Depositions already read in court.]**—In an action for wrongful ejectment the jury found for *pltf.* Now, in arrest of judgment, it was objected that the jury had at first been divided in opinion but afterwards on the strength of evidence taken by them out of *ct.* had all found for *pltf.* It was said that all the evidence must be taken in *ct.* where the *ct.* can direct the jury & counsel on both sides can debate the matter. If depositions are read in *ct.* to the jury & after the jury sworn & going from the bar the *solt.* or prosecutor for the *ing* or party without consent of parties or order of *ct.* deliver the copies of the depositions to the jury if they find against him on whose part the copies were delivered, the verdict is good, but if they find for him on whose part they were delivered, & this appear by examination & be indorsed upon the record, the verdict shall be quashed & a new *venire facias*, or award for a new jury shall be returned.—*HILLORD v. HALL* (1622), 2 Roll. Rep. 261; 2 Hale P. C. 308; 81 E. R. 787.

**Annotations:—***Consd.* R. v. Murphy (1869), 6 Moo. P. C. C. N. S. 177. *Refd.* R. v. Mellor (1858), Dears. & B. 468.

**316. — Copy of court roll.]—GOODMAN v. COTHERINGTON** (1684), 1 Sid. 235; 82 E. R. 1078.

**317. — Receipt of papers from party.]**—Where, after the jurors have retired, one of them leaves the room, speaks to the opposite attorney, & without the consent of the other side, receives a bundle of papers from such attorney, the verdict will be set aside.—*JENNINGS v. WARNE* (1735), Lee temp. Hard. 116; 95 E. R. 72.

**PART VII. SECT. 10, SUB-SECT. 3.—D.**

**312 i. Receiving evidence after retirement—Evidence given before.]**—Where a commission, issued on the application of *pltf.* & exhibits put in evidence by *pltf.*, were taken into the jury-room, without the consent of counsel, to be used by the jury in considering their verdict:—*Held*: in the absence of anything to show prejudice, this would not entitle *pltf.* to a new trial.—*MILES BROTHERS INC. v. BELL* (1910), 40 N. B. R. 156.—*CAN.*

**320 i. Communication with parties or their attorneys.]—M'ROBERTS v. CARTER** (1888), 11 N. S. W. L. R. 458; 5 N. S. W. W. N. 32.—*AUS.*

**320 ii. —.]—Where *pltf.* accosted**

a jurymen during the progress of the trial, but the jurymen refused to speak with him:—*Held*: this was not sufficient to disturb until the verdict but *pltf.* should be punished with costs.—*TABRETT v. WAKELY* (1889), 10 N. S. W. L. R. 77; 5 N. S. W. W. N. 125.—*AUS.*

**320 iii. —.]—A casual conversation between a juror & a party during the hearing of an action on matters entirely foreign to the action:—*Held*: not grounds for a new trial.—*BUTT v. McDONALD* (1896), 7 Q. L. J. 68.—*AUS.***

**320 iv. —.]—PONTING v. HUDDART, PARKER & CO., LTD.** (1897), 23 V. L. R. 644.—*AUS.*

**Right to take documentary evidence on retirement.]—See Nos. 332, 440, *post*.**

**318. Receiving evidence at a view.]—DALSTON & NICHOLS v. ALL SOULS COLLEGE, OXFORD (MASTER & FELLOWS), No. 83, *ante*.**

**319. —.]—One of the showers at a view gave evidence to such of the jurors as were upon the view.—WYNN v. BANGOR (BP.)** (1738), 2 Com. 601; 92 E. R. 1229.

**Annotation:—***Refd.* Ramadge v. Ryan (1832), 2 Moo. & S. 421.

**320. Communication with parties or their attorneys.]—RICHMOND (DUKE) v. WISE** (1671), 1 Vent. 124; 86 E. R. 86.

**Annotation:—***Mentd.* Vickery v. L. B. & S. C. Ry. (1870), L. R. 5 C. P. 165.

**321. —.]—JENNINGS v. WARNE, No. 317, *ante*.**

**322. Communication with member of public during trial.]—The record, in a case of felony at the quarter sessions, after stating the indictment, plea of not guilty, & verdict of guilty thereon, added, that because it appeared to the justices, that after the jury had retired, one of them had separated from his fellows, & conversed respecting his verdict with a stranger; it was considered that the verdict was bad, & it was therefore quashed, & a *venire de novo* awarded to the next sessions. It then proceeded to set out the appearance of the parties at the next sessions, & the trial & conviction by the second jury; whereupon all & singular the premises being seen & considered, judgment was given, etc. Upon a writ of error brought:—*Held*: the judgment was right.—*R. v. FOWLER* (1821), 4 B. & Ald. 273; 106 E. R. 937.**

**Annotations:—***Consd.* R. v. Charlesworth (1861), 1 B. & S. 460; R. v. Ketteridge, (1915) 1 K. B. 467. *Refd.* R. v. O'Neill & Henderson (1843), 2 L. T. O. S. 77; Winsor v. R. (1866), L. R. 1 Q. B. 289; R. v. Murphy (1869), L. R. 2 P. C. 535; R. v. Berger (1894), 63 L. J. Q. B. 529; Crane v. Public Prosecutor, [1921] 2 A. C. 299. *Mentd.* Campbell v. R. (1847), 11 Q. B. 814.

**323. —.]—R. v. SHEPHERD** (1910), 74 J. P. Jo. 605.

**324. — As ground for special leave to appeal to Judicial Committee—From conviction for murder.]**—The Judicial Committee of the Privy Council is not in the position of a Ct. of Criminal Appeal & does not advise the Crown to interfere in a criminal case unless there has been a violation of the principles of natural justice or a gross violation of the rules of procedure.

Special leave to appeal from a conviction for murder refused on the above ground, where it was alleged that the jury had been in communication during the trial with persons who were not their custodians.—*ARMSTRONG v. R.* (1913), 30 T. L. R. 215, P. C.

*See, generally,* DEPENDENCIES, Vol. XVII., pp. 489 *et seq.*

**325. Communication with witness—Discussion of facts.]—A jurymen during the trial in which he is engaged ought not to talk about the facts,**

**320 v. —.]—SYME (DAVID) & CO. v. SWINBURNE** (1909), 10 C. L. R. 43.—*AUS.*

**320 vi. —.]—Deft., in conversation with one of the jury panel, but not one of the jury called to try the case, said he hoped the jury would give *deft.* the benefit of any doubt:—*Held*: not sufficient to justify the *ct.* in interfering with the verdict.—*VANMERE v. FARRWELL* (1886), 12 O. R. 285.—*CAN.***

**325 i. Communication with witness—Discussion of facts.]—Where it is shown that one of the jurors trying a collision case improperly conversed during an adjournment of the *ct.* with one of the witnesses near the scene of the**

especially to a witness.—*R. v. Twiss*, [1918] 2 K. B. 853; 88 L. J. K. B. 20; 119 L. T. 680; 83 J. P. 23; 35 T. L. R. 3; 62 Sol. Jo. 752; 26 Cox, C. C. 325; 13 Cr. App. Rep. 177, C. C. A.

**326. Communication with clerk of assize.]**—On the trial of a prisoner at assizes, some time after the jury had retired to consider their verdict, the clerk of assize went to their room & asked if they had agreed or were likely to agree. The jury then put some questions to him, & he answered them and a discussion took place. Later on he visited the jury again, & a further discussion took place. Eventually the jury found the prisoner guilty:—*Held*: evidence from the jurymen to prove the above facts was inadmissible, but the ct. could act upon a report made by the clerk of assize, & as it was impossible to say that but for the discussions & the advice given by him the jury would have come to a unanimous conclusion, the conviction must be quashed.—*R. v. Willmont* (1914), 78 J. P. 352; 30 T. L. R. 499; 10 Cr. App. Rep. 173, C. C. A.

*Annotations*:—*Expld.* *Goby v. Wetherill* (1915), 113 L. T. 502. *Consd.* *Illis v. Deheer* (1922), 127 L. T. 431.

**327. Presence of stranger in jury room.]**—The presence of a stranger in the room with a jury for a substantial time while they are considering their verdict is of itself sufficient to invalidate their verdict.—*GOBY v. WETHERILL*, [1915] 2 K. B. 674; 84 L. J. K. B. 1455; 113 L. T. 502; 79 J. P. 346; 31 T. L. R. 402, D. C.

*Annotation*:—*Expld. & Distd.* *Fanshaw v. Knowles*, [1916] 2 K. B. 538.

**Perusal of newspaper reports.]**—*See CRIMINAL LAW*, Vol. XIV., p. 307, No. 3234.

#### *E. Receiving Refreshment or Accommodation.*

*See* 1870 Act, s. 23.

**328. Refreshment at own expense—Without leave of court.]**—Jurors after evidence given without leave of the ct. went & ate & drank & before their return certain persons spoke to them that they ought to find for deft. Nevertheless they found for pltf.; this is a good verdict. Had they eaten & drunk at pltf.'s cost & given a verdict for him, it would be bad; & in any case if they eat & drink without leave of the ct. it is fineable.—*ANON.* (1499), *Jenk.* 187; 145 E. R. 125, Ex. Ch.

**329. —.**—Where jurors, who had agreed upon their verdict had a drink before returning to ct., the verdict was not vitiated by their conduct, but the jurors were each fined 40d.—*ANON.* (1537), 1 *Dyer*, 37 b; 73 E. R. 82.

**330. —.**—Jurors having eaten at their own expense before verdict:—*Held*: they might be fined but notwithstanding the misdemeanour the verdict was good enough.—*MOUNSON & WEST'S CASE* (1588), 1 *Leon.* 132; 74 E. R. 123.

**331. —.**—*CALTON'S CASE* (1588), *Owen*, 38; 74 E. R. 883.

**332. —.**—(1) If the jury eat & drink at the charge of the party for whom the verdict is found, it avoids it; but if at their own charge, they are only fineable.

(2) It is a contempt in the jury to take any evidence with them upon retiring from the bar without either the leave of the ct. or consent of the parties. But their verdict shall not on that account be set aside unless the evidence made for that party only for whom they found.—*R. v. BURDETT* (1697), 1 *Id.* *Raym.* 148; 12 *Mod. Rep.* 111; 2 *Salk.* 645; 91 E. R. 996.

*Annotations*:—*As to* (1) *Reid.* *Gratwick v. Shelley* (1733), *Kel. W.* 235. *Generally, Mentd.* *Northampton Corpn. v. Ward* (1745), 2 *Str.* 1238; *R. v. Gillham* (1795), 6 *Term Rep.* 265; *Draper v. Sperring* (1861), 10 C. B. N. S. 113; *A.-G. v. Tynemouth Corpn.* (1900), 17 T. L. R. 77.

**333. —.**—The ct. will not order a new trial merely because the jury had some refreshment before they gave their verdict, unless such refreshment were at the expense of one of the parties to the action.—*GRATWICK v. SHELLEY* (1733), *Kel. W.* 235; 25 E. R. 588.

**334. —.**—If the jury had eaten & drunk at their own expense, that is a misbehaviour, for which they are finable, but their verdict must stand; though it is otherwise if they had eaten & drunk at the expense of either party (*per Cur.*).—*ST. JOHN (LORD) v. ABBOT* (1735), *Barnes*, 441; 91 E. R. 994.

*Annotation*:—*Consd.* *Fanshaw v. Knowles*, [1916] 2 K. B. 538.

**335. —.**—(1) Upon a difference of opinion, no misdirection to tell the jury that they ought to yield to conviction & to conversion by their fellows.

(2) The delivery of food to a jurymen after the jury were shut up to consider of their verdict, is no ground for setting the verdict aside if it do not appear that such refreshment was supplied by a party to the cause, or that it was delivered to a jurymen whose holding out decided the event.

(3) Affidavits of jurymen are admissible as to matters which pass openly in ct. but where there is a judge's report on the same points, that is conclusive.—*EVERETT v. YOUNG* (1833), 4 B. & Ad. 681; 1 *Nev. & M. K. B.* 530; 110 E. R. 612.

*Annotation*:—*Generally, Mentd.* *Giles v. Tooth* (1840), 3 C. B. 665.

**336. —.**—Where the jury on a writ of inquiry, after having retired, covertly procured victuals & liquor, the ct. ordered a new trial, on the ground of misconduct on the part of the jury.—*COOKSEY v. HAYNES* (1858), 27 L. J. Ex. 371.

**337. — By leave of court.]**—*Semble*: that a judge has the power, in his discretion, to give refreshments to a jury, either before or after they have retired to consider their verdict.—*WINSON v. R.* (1866), as reported in 35 L. J. M. C. 161; 14 L. T. 567; 30 J. P. 374, Ex. Ch.

*Annotations*:—*Mentd.* *Droege v. Stuart*, *The Karnak* (1869), 1 L. R. 2 P. C. 505; *R. v. Murphy* (1869), 1 L. R. 2 P. C. 535; *R. v. Littlechild*, *R. v. Heslop* (1871), 40 L. J. M. C. 137; *R. v. Payne* (1872), 41 L. J. M. C. 65; *R. v. Bradlaugh* (1883), 15 Cox, C. C. 217; *R. v. Lewis* (1909), 78 L. J. K. B. 722; *R. v. Richardson*, [1913] 1 K. B. 395; *Crane v. Public Prosecutions Director*, [1921] 2 A. C. 299.

**As an offence.]**—*See* Part XI., *post*.

**338. Refreshment at cost of parties.]**—*ANON.* (1499), No. 328, *ante*.

**339. — Or their solicitors—Before verdict.]**—

collision as to the causes which had led thereto, a new trial was granted.—*PERDRIAU v. MOORE* (1888), 9 N. S. W. L. R. 145; 4 N. S. W. W. N. 172.—*AUS.*

**325 II. —.**—*TREWARTHA v. CONFIDENCE EXTENDED CO. (NO LIABILITY)*, [1906] V. L. R. 285.—*AUS.*

**325 III. —.**—*OUTLON v. BOWSER* (1873), N. B. Dig. 547.—*CAN.*

**I. Perusal of newspaper reports.]**—*FILEY v. ST. JOHN CORPN.* (1864), 11

N. B. R. (6 All.) 78.—*CAN.*

**5. —.**—During an action for libel defts. published in their newspaper a sensational article with reference thereto. Pltf.'s solr. was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the ct., or take any action with respect to it, & proceeded with the trial to its close, when the jury brought in a verdict for defts. Upon a motion

for a new trial upon the ground of improper conduct towards & undue influence upon the jury:—*Held*: the objection was too late.—*TIFFANY v. MCNEE* (1892), 24 O. R. 551.—*CAN.*

#### PART VII. SECT. 10, SUB-SECT. 3.—E.

**339 I. Refreshment at cost of parties—Or their solicitors—Before verdict.]**—Where pltf. during the trial had conversation with members of the jury upon the subject of his case & his

*Sect. 10.—Procedure during the hearing: Sub-sect. 3, E., F. & G.]*

**RICHMOND (DUKE) v. WISE** (1671), 1 Vent. 124; 86 E. R. 86.

*Annotation:—Reid. Vickery v. L. B. & S. C. Ry.* (1870), L. R. 5 C. P. 165.

**340. —**—*After verdict.*—**RICHMOND (DUKE) v. WISE** (1671), 1 Vent. 124; 86 E. R. 86.

*Annotation:—Reid. Vickery v. L. B. & S. C. Ry.* (1870), L. R. 5 C. P. 165.

**341. —**—*R. v. BURDETT*, No. 332, *ante*.

**342. —**—*A jury may have refreshment, but not at the expense of either of the parties.—ANON.* (1698), 12 Mod. Rep. 250; 88 E. R. 1299.

**343. —**—*GRATWICK v. SHELLEY*, No. 333, *ante*.

**344. —**—*ST. JOHN (LORD) v. ABBOT*, No. 334, *ante*.

**345. —**—*EVERETT v. YOELES*, No. 335, *ante*.

**346. Drinking & smoking.—With plaintiff's solicitor.**—Where a jury have misconducted themselves in their demeanour during the trial in such a way as to lead to the presumption that justice has not been properly administered, the ct. will grant a new trial.

The absence of the jury at intervals, & their drinking ale & smoking in the same room with the attorney for plff., for whom they returned a verdict, is such a misconduct as will entitle deft. to a new trial.—**HUGHES v. BUDD** (1840), 8 Dowl. 315; 4 Jur. 150.

*Annotation:—Mentd. Rawlins v. West Derby Overseers* (1840), 2 C. B. 72.

**347. Accommodation.—At defendant's house.—Before summing up.**—Where two of the jury, during the progress of a trial which lasted two days, dined & slept at the house of deft. on the evening of the first day, & consequently before the summing up:—*Held*: (1) this did not avoid a verdict found for deft.; (2) it was discretionary with the ct. whether they would set aside the verdict & grant a new trial in such a case; & where the party making the application declared that he did not entertain any belief that the jurors in giving their verdict, were influenced by their visit, & there were no grounds for suspicion of unfairness, the ct. refused to set aside the verdict.—**MORRIS v. VIVIAN** (1842), 10 M. & W. 137; 2 Dowl. N. S. 235; 11 L. J. Ex. 367; 152 E. R. 414.

**348. — Supplied by under-sheriff.—In civil case.**—A special jury at assizes having retired to consider their verdict, & being unable to agree, the judge was obliged to leave the assize town. In the course of the evening the under-sheriff supplied them with a handsome dinner, in a room at the town hall, & furnished them with beds for the

night. The following morning they went to meet the judge at the confines of the county, & after asking him some questions upon the law of the case, returned their verdict. No objection was then made to the proceedings of the previous night:—*Held*: the irregularity was cured by such tacit consent, & it afforded no ground for a new trial.—**ROBERTS v. WILLIAMS** (1846), 8 L. T. O. S. 138.

**349. — Staying at same hotel as plaintiff.—Dining at same table.**—It is no ground for setting aside a verdict on the ground of misconduct in the jury that two of them have stayed at the same hotel, & dined at the same table, with plff. & his witnesses, during an adjournment of the trial.—**WEGENER v. SMITH** (1854), as reported in 3 C. L. R. 47.

*Annotations:—Mentd. Moeller v. Young* (1855), 5 E. & B. 7; *Smith v. Sleeking* (1855), 4 E. & B. 945; *Chappel v. Comfort* (1861), 10 C. B. N. S. 802; *Shadforth v. Cory* (1863), 11 W. R. 340; *The Norway* (1864), Brown. & Lush. 226; *Fry v. Chartered Mercantile Bank of India, etc.* (1866), Har. & Ruth. 858; *Gray v. Carr* (1871), L. R. 6 Q. B. 522; *Porteus v. Watney* (1878), 3 Q. B. D. 534; *Allen v. Coltart* (1883), 11 Q. B. D. 782; *Sewell v. Burdick* (1884), 54 L. J. Q. B. 156; 88. County of Lancaster v. Sharp (1889), 24 Q. B. D. 158; *Serrano v. Campbell*, [1891] 1 Q. B. 283; *Rederact. Superior v. Dewar & Webb*, [1909] 2 K. B. 998.

**350. Statutory provision for.—Under private Act.—Construction.**—Where a private Act of Parliament provides for the expense of maintaining the jury summoned to assess the value of property, taken under the Act, this does not extend to a dinner at a tavern given to the jury after delivering in their verdict.—**FORSTER v. TAYLOR** (1811), 3 Camp. 49, N. P.

#### F. Verdict Improperly Arrived at.

**351. By lot.**—**PRIOR v. POWERS** (1664), 1 Keb. 811; 83 E. R. 1257.

**352. —**—*New trial granted, where the jury determined their verdict by throwing dice.—FITZWATER'S (LORD) CASE* (1675), Freem. K. B. 414; 89 E. R. 308; *sub nom. R. v. FITZWALTER (LORD)*, 3 Keb. 555; 2 Lev. 139.

*Annotations:—Distd. R. v. Mellling* (1696), 5 Mod. Rep. 348. *Fold. Phillips v. Fowler* (1736), 2 Com. 525. *Consd. Fanshaw v. Knowles*, [1916] 2 K. B. 538.

**353. —**—**FOSTER v. HAWDEN** (1677), 2 Lev. 205; 83 E. R. 520; *sub nom. FRY v. HORDY*, T. Jo. 83; *sub nom. FOY v. HARDER*, 3 Keb. 805.

**354. —**—**MELLISH v. ARNOLD** (1719), Bunb. 51; 145 E. R. 592.

**355. —**—*Where the jury drew lots, the ct. set aside the verdict though it was according to evidence. But costs to abide the event.*—**HALE v. COVE** (1725), 1 Stra. 642; 93 E. R. 753.

**356. —**—*A verdict was set aside where the jury cast lots, how they should give it.—*

*solr. had treated some of them to drinks during the recesses of the ct., the verdict in plff.'s favour was set aside, & a new trial ordered.*—**STEWART v. WOOLMAN** (1895), 26 O. R. 714.—**CAN.**

**339 ii. —**—*Treating one of the jurors during the progress of the trial by the attorney of one of the parties is ground for a new trial.*—**NADRAU v. THERIAULT** (1906), 2 E. L. R. 135; 37 N. B. R. 498.—**CAN.**

**341 i. —**—*Where, after the jury retired from the bar, deft. conversed with them respecting the cause, & supplied them with victuals & drink, the verdict was set aside.*—**TREFFETHEN v. CARMAN** (1831), N. B. Dig. 546.—**CAN.**

**341 ii. —**—**WIDDER v. BUFFALO**

**& LAKE HURON RY. CO.** (1865), 24 U. C. R. 520.—**CAN.**

**341 iii. —**—*The jury after viewing the land in dispute went to the house of one of defts. & had refreshments. No explanation of the charge was given by the jurors or the officer in charge of them:—Held: a verdict for deft. ought to be set aside.*—**MCCNEILL v. MOORE** (1873), 14 N. B. R. (1 Pug.) 234.—**CAN.**

**341 iv. —**—**FERGUSON v. TROOP** (1874), 15 N. B. R. (2 Pug.) 183.—**CAN.**

**341 v. —**—*Where, during the progress of a trial, deft. treated one of the jurors to a drink of temperance beer, a new trial was granted.*—**KEATE v. DOYLE** (1921), 48 N. B. R. 224; 58 D. L. R. 570.—**CAN.**

**h. Refreshment supplied by friends of party.—Jury informed during consideration of verdict.**—Where, after a verdict for plff., it was shown that after the jury retired to consider their verdict communications had been made to them, by persons out of the jury room, that they had been furnished with provisions & spirituous liquors by persons who were known to be friendly to plff., & that there was reason to believe that they had received an improper bias, a new trial was granted, with costs to abide the event.—**ARMOUR v. BOSWELL** (1842), 6 O. S. 352.—**CAN.**

**347 i. Accommodation.—At defendant's house.—Before summing up.**—**GOULD v. GOULD** (1842), 3 N. S. R. (2 Thom.) 87.—**CAN.**



**PHILIPS v. FOWLER** (1735), 2 Com. 525; **Barnes**, 441; **Cooke**, Pr. Cas. 124; 92 E. R. 1190.

*Annotations*.—**Expld.** **Bush v. Railing** (1756), Say. 289. **Refd.** **Norman v. Beaumont** (1744), Willes, 484. **Mentd.** **Mead v. Robinson** (1743), Willes, 422; **Sulston v. Norton** (1761), 1 Wm. Bl. 317; **Heward v. Shipley** (1803), 4 East, 180; **R. v. Williams** (1829), 9 B. & C. 549.

357. —.]—**VAISE v. DELAVAL**, No. 370, *post*.

358. —.]—**OWEN v. WARBURTON**, No. 371, *ist*.

359. —.]—(1) A verdict decided by lot is a bad verdict, & the ct. will, where such verdict has been given, grant a new trial.

(2) Though the affidavits of individual jurors are not, on grounds of public policy, receivable to impugn their own verdict, yet the affidavits of persons within hearing, are admissible to give the ct. that information which cannot be derived from a party implicated.—**HARVEY v. HEWITT** (1840), 8 Dowl. 598; *sub nom.* **HARDING v. HEWITT**, 4 Jur. 292.

360. **By vote.**—A verdict for the finding of which the jurors voted ought not to be set aside.—**LAURENCE v. BOSWELL** (1753), Say. 100; 96 E. R. 817.

361. **By compromise.**—**DARBON v. POTTER** (1857), 30 L. T. O. S. 102.

—.]—*See, further*, **CRIMINAL LAW**, Vol. XIV., p. 310, Nos. 3264, 3265; **DAMAGES**, Vol. XVII., p. 178, Nos. 821–823.

#### G. Admissibility of Evidence.

362. **As to what took place in jury room or box—Evidence derived from jurors.**—**PRIOR v. POWERS** (1664), 1 Keb. 811; 83 E. R. 1257.

363. —.]—(1) An affidavit stating facts to have been related by one of the jury respecting their improper conduct in finding a verdict cannot be received in order to impugn the verdict.

(2) It would be improper to receive the affidavit of a jurymen . . . if however I had the evidence of any person who had seen the jurymen toss up, or put dice into a box, I should think it right to set the verdict aside (**LORD ABINGER, C.B.**).—**STRAKER v. GRAHAM** (1839), 4 M. & W. 721; 7 Dowl. 223; 1 Horn. & H. 449; 8 L. J. Ex. 86; 150 E. R. 1612.

*Annotations*.—*As to* (1) **Distd.** **Harding v. Hewitt** (1840), 4 Jur. 292. **Fold.** **Burgess v. Langley** (1843), 5 Man. & G. 722. **Refd.** **Raphael v. Bank of England** (1855), 17 C. B. 161. *Generally*, **Mentd.** **Mullock v. Hadakissen** (1854), 23 L. T. O. S. 25.

364. —.]—The ct. will not receive the affidavit of a person who was informed by a jurymen of misconduct on the part of the jury, as evidence of such misconduct.—**DAVIS v. ROPER** (1855), 4 W. R. 9.

365. —.]—**Stranger overhearing discussions of jurors.**—**MELLISH v. ARNOLD** (1719), Bunb. 51; 145 E. R. 592.

—.]—Affidavits of what a jurymen has been overheard to say out of ct. relative to the misconduct of himself & others in the jury box, are receivable on a motion for a new trial; as is also an affidavit by the jurymen denying the expressions imputed to him.—**ADDISON v. WILLIAMSON** (1841), 5 Jur. 466.

367. —.]—**Statement in open court.**—

The ct. refused to grant a rule nisi for a new trial, upon an affidavit stating that one of the jury declared in open ct. in the presence & hearing of the others that the verdict had been decided by lot.—**BURGESS v. LANGLEY** (1843), 5 Man. & G. 722; 1 Dow. & L. 21; 6 Scott, N. R. 518; 12 L. J. C. P. 257; 1 L. T. O. S. 79; 134 E. R. 750. *Annotation*.—**Refd.** **Raphael v. Bank of England** (1855), 17 C. B. 161.

368. —.]—**Statement to attorney of party.**—

A subsequent confession of a jurymen to deft.'s attorney, that the jury drew lots which six of them should determine the verdict, & not otherwise proved to the ct., no ground for a new trial.—**AYLETT v. JEWELL** (1779), 2 Wm. Bl. 1299; 96 E. R. 761.

369. —.]—**Evidence of jurors.**—**PHILIPS v. FOWLER** (1735), 2 Com. 525; **Barnes**, 441; **Cooke**, Pr. Cas. 124; 92 E. R. 1190.

*Annotations*.—**Refd.** **Norman v. Beaumont** (1744), Willes, 484; **Bush v. Railing** (1756), Say. 289. **Mentd.** **Mead v. Robinson** (1743), Willes, 422; **Sulston v. Norton** (1761), 1 Wm. Bl. 317; **Heward v. Shipley** (1803), 4 East, 180; **R. v. Williams** (1829), 9 B. & C. 549.

370. —.]—Affidavit of a juror that the jury, having been divided, tossed up, & that ptlf. had won, rejected.—**VAISE v. DELAVAL** (1785), 1 Term Rep. 11; 99 E. R. 944.

*Annotation*.—**Consd.** **Cornish v. Daykin** (1845), 1 New Pract. Cas. 223.

371. —.]—The ct. will not set aside a verdict upon the affidavit of a jurymen that it was decided by lot.—**OWEN v. WARBURTON** (1805), 1 Bos. & P. N. R. 326; 127 E. R. 489.

372. —.]—Where ptlf. sought to set aside a verdict for deft., on an affidavit, stating that handbills, reflecting on his character, had been circulated in ct., & seen by several of the jury at the trial; the ct. refused to admit affidavits from the jurors, that they had not seen such handbills, but granted a new trial, although deft. swore that he had no knowledge of their having been printed or circulated.—**COSTER v. MERENT** (1822), 3 Brod. & Bing. 272; 7 Moore, C. P. 87; 120 E. R. 1289.

373. —.]—**SAVILLE v. FARNHAM** (LORD), No. 636, *post*.

374. —.]—**STRAKER v. GRAHAM**, No. 363, *ante*.

375. —.]—**HARVEY v. HEWITT**, No. 359, *ante*.

376. —.]—**ROBERTS v. HUGHES**, No. 638, *post*.

377. —.]—(1) In case for an infringement of a patent, the judge left three questions to the jury; & on their retiring to consider their verdict he handed to the associate an abstract of the pleadings, desiring him to take their finding separately on the three questions so submitted to them. The jury returned into ct., stating that they found a verdict for ptlf. generally. The counsel for deft. requested the associate to put the questions separately: this he declined to do, notwithstanding one of the jurymen intimated that three points had been distinctly put to them by the judge; ptlf.'s counsel objecting to that course. The ct. directed a new trial, without costs.

#### PART VII. SECT. 10, SUB-SECT. 3.—G.

362 i. **As to what took place in jury room—Evidence derived from jurors.**—

After a verdict had been delivered in open ct., statements made by some of the jurors in the hearing of their fellow jurors, & before their separation, are not receivable as evidence of misconduct in the jury room.—**BREMAN v. RUSSELL** (1862), 1 N. S. W. S. C. R. 300.—**AUS.**

369 i. —.]—**Evidence of jurors.**—**O'MALLEY v. ELDER** (1876), 2 V. L. R. 117.—**AUS.**

369 ii. —.]—**Misconduct of jurymen cannot be proved by affidavits of other jurors.**—**R. v. BROWN** (1907), 7 S. R. N. S. W. 290; 24 N. S. W. W. N. 93.—**AUS.**

369 iii. —.]—**Affidavits of jurors, as to what passed in the jury**

room, will not be heard.—**DOE d. HAGERMAN v. STRONG** (1850), 8 U. C. R. 291.—**CAN.**

369 iv. —.]—**The sworn statements of jurors, & evidence of admissions by them as to the modes in which their verdict had been arrived at, are inadmissible. But the evidence of other persons as to the same is receivable.**—**R. v. HARKUMAR BARMAN ROY** (1913), 1 L. R. 40 Calc. 693.—**IND.**



**Sect. 10.—Procedure during the hearing: Sub-sect. 3, G.; sub-sects. 4 & 5, A., B., C., D., E. & F.; sub-sect. 6.]**

(2) Affidavits of jurymen as to what passes among themselves with reference to a verdict, are not admissible.—*BENTLEY v. FLEMING* (1845), 1 C. B. 479; 3 Dow. & L. 23; 14 L. J. C. P. 174 5 L. T. O. S. 73; 9 Jur. 402; 135 E. R. 627.

*Annotation:—As to (2) Consd. Norburn v. Hilliam* (1870), 11 R. 5 C. P. 129.

**378. ———.]—BAILEY v. MACAULAY, BAILEY v. PEARSON, BAILEY v. HAINES, BAILEY v. BRACEBRIDGE, DAWSON v. HAY, WILSON v. HOLDEN, No. 205, ante.**

**379. —Evidence of stranger.]—HARVEY v. HEWITT, No. 359, ante.**

*See, also, CRIMINAL LAW, Vol. XIV., p. 515, Nos. 5779–5781.*

**380. Where misconduct imputed—Evidence in rebuttal—Affidavit by juror.]—ADDISON v. WILLIAMSON, No. 366, ante.**

**381. ———.]—Where a rule for a new trial is drawn up on reading affidavits imputing personal misconduct & partiality to some of the jurymen, affidavits of such jurymen denying & explaining the conduct attributed to them may be read on showing cause against the rule.—STANDEWICK v. HOPKINS (1844), 2 Dow. & L. 502; 14 L. J. Q. B. 16; 4 L. T. O. S. 160; 9 Jur. 161.**

*Annotation:—Apprvd. Cornish v. Daykin* (1845), 1 New Pract. Cas. 223.

**382. ———.]—The affidavits of jurymen are not in general receivable to impugn or support a verdict, or even to explain the circumstances in which it was given; but when a rule has been obtained for a new trial, upon affidavits imputing misconduct to the jury, their affidavits may be received, so far as they go to exculpate them & explain or deny the charges.—CORNISH v. DAYKIN (1845), 1 New Pract. Cas. 223; 5 L. T. O. S. 130.**

**383. ———.]—The affidavit of a jurymen is receivable to explain away an imputation of misconduct.—JONES v. POWELL (1856), 4 W. R. 252.**

**384. Allegation of partiality—Statement by juror—Hearsay evidence.]—After trial, an affidavit, tending to impeach a verdict by stating corrupt motives in one of the jurors, cannot be received.**

I know of no instance in which the loose declaration of a jurymen, made after trial, has been received to draw into question a verdict, to which he has been a party (*DALLAS, J.*)—*HINDLE v. BIRCH* (1817), 8 Taunt. 26; 1 Moore, C. P. 455; 129 E. R. 291.

**385. Juror alleged to be drunk—Affidavit by other juror—Affidavit by solicitor to party.]—On an application for a rule nisi for certiorari or alternatively for a venire de novo a solr. swore an affidavit that his client, M., was tried for indecent assault at quarter sessions, & being convicted of a common assault was sentenced to one month's imprisonment with hard labour; that during the trial he noticed one of the jurymen was sitting in a huddled position in the back row of the jury box; that he was informed by one of the other eleven jurymen, who was sitting next but one to the jurymen aforesaid, that the latter appeared during the trial to be very tired & sleepy, gave some indication of having taken drink earlier in the**

day, took no part whatever in the deliberation of the jury, & did not join in the verdict. His informant also stated that in the next case it was found impossible to proceed, the aforesaid jurymen having fallen fast asleep, & only being roused by repeated shakings. The jury did not leave the box between the two cases.—*Held: on these materials the ct. would not grant a rule, but that they would give leave to renew the application on further & better materials.* The ct. was of opinion that if the application was to succeed, there should be an affidavit as to the circumstances from one of the other eleven jurymen.—*Ex p. MORRIS* (1907), 72 J. P. 5, D. C.

**On application to set aside verdict.]—See Sect. 19, sub-sect. 2, post.**

#### SUB-SECT. 4.—DISAGREEMENT OF JURY.

**386. Difference of opinion—Direction of judge—To tell jury to yield to conversion by their fellows.]—EVERETT v. YOVUELLS, No. 335, ante.**

**In civil actions—As a ground for discharge.]—See No. 425, post.**

**In criminal matters.]—See CRIMINAL LAW, Vol. XIV., pp. 328, 329, Nos. 3438–3444.**

#### SUB-SECT. 5.—EVIDENCE.

**387. Jury not permitted to see law treatise—Directions to be taken from judge.]—After the jury have had the case summed up to them, & have retired, the ct. will not permit them to see a treatise on the law of the subject even with consent of parties, as they should state their difficulty to the judge, & receive his direction as to the law.—BURROWS v. UNWIN (1828), 3 C. & P. 310, N. P.**

**388. Cases not to be cited to jury—After ruling by judge on point of law.]—R. v. PARISH, No. 293, ante.**

**389. Jury influenced by matters not received in evidence.]—When, upon the trial of a cause, evidence is improperly rejected, which, if admitted, must have been decisive of the case, & the jury, notwithstanding this, find a verdict for the party tendering it, there being no other evidence produced by him, the ct. will not disturb such verdict if it is satisfied that substantial justice has been done & that the result must be the same if a new trial were granted.—BOULTON v. PRITCHARD (1846) 1 Saund. & C. 173; 15 L. J. Q. B. 356; 7 L. T. O. S. 265.**

**Evidence as to conduct of jury.]—See Sub-sect. 3, G., ante.**

**390. Right to draw inferences.]—A jury is at liberty to make & act upon the same inferences from collateral facts as any reasonable man would make in the conduct of his own affairs. A plea that a bill of exchange was given to secure a sum of money, of which more than £100 was lost at one sitting at vingt-un, & more than £100 at one sitting at hazard, is not supported by evidence of hazard only, but such a plea may be amended to suit the facts.—COOKE v. STRATFORD (1844), 13 M. & W. 379; 2 Dow. & L. 399; 14 L. J. Ex. 66; 4 L. T. O. S. 138a; 153 E. R. 157.**

*Annotation:—Mentd. Grizewood v. Blane* (1851), 11 C. B. 526.

**sent before such recording rendered the verdict informal.—DONALDSON v. HALEY (1863), 13 C. P. 87.—CAN.**

**1. Whether judge may decide.]—When in an action tried with a jury the judge holds that there is evidence**

**390 I. Where misconduct imputed—Evidence in rebuttal—Affidavit by juror.]**

**—The ct. will hear an affidavit made by the jurymen who is charged with misconduct.—PERDRIAU v. MOORE (1888), N. S. W. L. R. 143; 4 N. S. W. W. N.**

**172.—AUS.**

#### PART VII. SECT. 10, SUB-SECT. 4.

**k. Effect of.]—Held: as the verdict must unanimously be delivered & recorded in open ct., the juror dis-**

*B. Whether any Evidence to go to Jury.*

**391. Ruling by judge as to—Power of judge to change.]—**(1) In an action tried with a jury the judge was asked at the conclusion of pltf.'s case to withdraw the case from the jury on the ground that pltf. had failed to make any case against defts. The judge refused to do so. Witnesses were then called for the defence. The jury disagreed. Subsequently an application was made to the judge to enter judgment for defts. upon the above ground & also upon the ground that upon all the evidence in the case the jury could not reasonably have found a verdict for pltf. The judge refused to enter judgment for defts. On appeal from his refusal to do so:—*Held*: the Ct. of Appeal has power under R. S. C., Ord. 58, r. 4, & (BUCKLEY, L.J.) a judge at the trial also has power under Ord. 30, r. 39, to enter judgment for deft if upon the case as a whole the evidence for pltf. was so weak that a verdict in his favour would have been set aside as unreasonable.

The Ct. of Appeal ought to enter judgment only in a case where on the evidence the jury should have been directed to find a verdict one way, there being no evidence to support a verdict the other way, & ought not to do so in a case in which there is some evidence for the jury, even though the case is such that if the verdict is one way a new trial might be ordered on the ground that the verdict was unreasonable (PHILLIMORE, L.J.).

(2) A judge who at the conclusion of pltf.'s case has ruled that there is some evidence for the jury is entitled at the conclusion of the whole case to reconsider is ruling & to enter judgment for deft. if he is then of opinion that pltf.'s evidence fails to disclose any cause of action against deft. —*SKATE v. SLATERS, LTD.*, [1914] 2 K. B. 429; 83 L. J. K. B. 676; 110 L. T. 604; 30 T. L. R. 290, C. A.

*Annotations*:—*As to* (1) *Consd.* *Cooke v. Wilson* (1915), 85 L. J. K. B. 888. *Fold.* *Winterbottom, Gurney v. Sibthorp & Cox*, [1918] 1 K. B. 625. *Refd.* *Everett v. Griffiths*, [1921] 1 A. C. 631. *As to* (2) *Refd.* *Gascolgne v. Gascolgne* (1917), 87 L. J. K. B. 333.

**In criminal matters.]—***See* CRIMINAL LAW, Vol. XIV., pp. 286, 287.

**In civil matters.]—***See* EVIDENCE, Vol. XXII., pp. 25 *et seq.*

*C. Direction of Jury.*

**In criminal matters.]—***See* CRIMINAL LAW, Vol. XIV., pp. 296 *et seq.*

**In civil matters.]—***See* EVIDENCE, Vol. XXII., p. 33.

*D. Misdirection—Grounds for New Trial.*

*See* CRIMINAL LAW, Vol. XIV., pp. 526 *et seq.*; PRACTICE.

*E. Functions of Judge and Jury—Questions of Law and Fact.*

**In criminal matters.]—***See* CRIMINAL LAW, Vol. XIV., pp. 295, 296.

**In civil matters.]—***See* EVIDENCE, Vol. XXII., pp. 22 *et seq.*

—“Reasonable or probable cause.”—*See* MALICIOUS PROSECUTION; TRESPASS.

—In libel actions.]—*See* LIBEL & SLANDER.

*F. By Juror.*

**392. Duty to inform court of knowledge.]—**Verdict on a juror's knowledge.

If a jury give a verdict upon their own knowledge, they ought to tell the ct. so, but the fair

way had been, for such of the jury as had knowledge of the matter, before they are sworn, to tell the thing to the ct. & be sworn as a witness (HOLT, C.J.).—*WRIGHT v. CRUMP* (1702), 7 Mod. Rep. 1; 87 E. R. 1055; *sub nom.* ANON., 1 Salk. 405.

**393. How given—Upon oath in open court.]—**Evidence by one of the jury to the rest evidence.

If either of the parties to a trial desire that a juror may give evidence of something of his own knowledge, to the rest of the jurors, the ct. will examine him openly in ct. upon his oath & he ought not to be examined in private by his companions.—*BENNETT v. HARTFORD HUNDRED* (1650), Sty. 233; 82 E. R. 671.

**394. ———.]—***FITZ-JAMES v. MOYS* (1663), 1 Sid. 133; 82 E. R. 1014.

*Annotations*:—*Mentd.* *Doe d. Bayerstock v. Rolfe* (1838), 8 Ad. & El. 650; *Tarkenton v. Liddell* (1851), 17 Q. B. 390.

**395. ———.]—***R. v. HEATH* (1744), 18 State Tr. 1.

**396. ———.]—**Whether oath as juror sufficient.—*DUKE v. VENTRIS* (1656), Duncomb, Trials per Pais C. 12.

*See, also*, No. 399, *post*.

**397. ———.]—***WRIGHT v. CRUMP*, No. 392, *ante*.

**398. ———.]—**Juror with technical knowledge.—Where, in a criminal prosecution, it is essential to prove the particular value of an article, the jury may use that general knowledge which any man can bring to the subject; but if any of the jurors has a particular knowledge on the subject, arising from his being in the trade, he ought to be sworn & examined as a witness.—*R. v. ROSSER* (1836), 7 C. & P. 648.

**399. ———.]—**On the trial of an action of *assumpsit* on a bill of exchange, where the cause was undefended, one of the jury said that the stamp was forged, & called the attention of the judge to the fact:—*Held*: the juror must be sworn as a witness to give evidence to his brother jurors, before they can act upon his opinion; & on his declining to be sworn as a witness, the judge told the jury that they must find for pltf.—*MANLEY v. SHAW* (1840), Car. & M. 361, N. P.

*See, also*, No. 396, *ante*.

**Right to use documentary evidence—In own possession.]—***See* No. 439, *post*.

## SUB-SECT. 6. JUROR UTILISING OWN KNOWLEDGE.

**400. General rule—Matters of common knowledge.]—**There may be matters so universally known that a jury may act on their own knowledge, but on a matter so varying as the proper measure & periods of inspection of particular premises—a matter on which probably few, if any, of a county ct. jury have any experience—I think they cannot (PICKFORD, L.J.).—*COLE v. DE TRAFFORD* (No. 2), [1918] 2 K. B. 523; 87 L. J. K. B. 1254; 119 L. T. 476; 62 Sol. Jo. 635, C. A. *Annotation*:—*Mentd.* *Baker v. James*, [1921] 2 K. B. 671.

**401. ———.]—**Meaning of English language.—A person was indicted for uttering a counterfeit coin intended to resemble & pass for “a groat.” All the witnesses for the prosecution, except the inspector of coin for the Mint, called it a fourpenny piece. The inspector called it a groat, & said he believed that it had had that name from the earliest period:—*Held*: if the jury, from their own knowledge of the English language, without considering any evidence at all, were of opinion

**Sect. 10.—Procedure during the hearing: Sub-sects. 6, 7 & 8, A. & B. (a), (b).]**

that a groat & fourpenny-piece were the same, prisoner was rightly indicted & might be convicted.

"A groat" is a common word belonging to our own mother tongue, such as "uttering," "public-house," "half-pint," & many other expressions: and you [the jury] are here as Englishmen to use your knowledge of your own language (MAULE, J.).—*R. v. CONNELL* (1842), 1 Car. & Kir. 190.

**402. — Disposition of animals.]**—In an action for knowingly keeping a fierce & mischievous dog, which has bitten or wounded pltf., it is necessary to prove that he has injured pltf., & is used to injure people; & a mere habit of bounding upon & seizing persons, not so as to hurt or injure them, though causing some annoyance & trivial accidental damage to clothes, would not sustain the action; & the dog may be brought into ct. & shown to the jury to assist them in judging of his temper & disposition.

The jury might judge partly from their knowledge of dogs & their own observance of the animal in question (ERLE, C.J.).—*LINE v. TAYLOR* (1862), 3 F. & F. 731.

**403. To test the truth of evidence.]**—*BUSHELL'S CASE* (1670), Freem. K. B. 1; 6 State Tr. 909; Vaugh. 185; T. Jo. 13; 89 E. R. 2.

**Annotations:—***Conad. H. v. Shipley* (1784), 4 Doug. K. B. 73. *Redd. Grenville v. College of Physicians* (1700), 12 Mod. Rep. 386; *Smith d. Dormer v. Parkhurst* (1738), Andr. 315; *Ex p. Pator* (1864), 5 B. & S. 299. **Mentd.** *Bothell's Case* (1695), 1 Salk. 348; *R. v. Chandler* (1700), 1 Ld. Raym. 645; *R. v. Wyndham* (1716), 1 Stra. 2; *R. v. Cambridge University* (1723), 8 Mod. Rep. 148; *Wood's Case* (1771), 2 Wm. Bl. 745; *Miller v. Searle* (1777), 2 Wm. Bl. 1141; *Burdett v. Abbot* (1811), 14 East. 1; *Crowley's Case* (1818), 2 Swan. 1; *Middlesex Sheriff's Case* (1840), 11 Ad. & El. 273; *R. v. Evans* (1840), 9 L. J. Q. B. 82; *Stockdale v. Hansard* (1840), 3 State Tr. N. S. 723; *Conway & Lynch v. R.* (1845), 5 L. T. O. S. 458; *Watson v. Bodell* (1845), 14 M. & W. 57; *Re Hammond* (1846), 15 L. J. M. C. 136; *Ex p. Newton* (1849), 13 Jur. 606; *Re Fernandes* (1861), 6 H. & N. 717; *Ex p. Fernandez* (1861), 10 C. B. N. S. 3; *R. v. McMahon* (1875), 13 Cox, C. C. 275; *Scott v. Scott* (1912), 107 L. T. 211.

**404. In mercantile matters—Meaning of phrases.]**—A. consigned goods for sale to a house in Hamburg, in which deft. was partner, & deft. made advances of money in London to A., to be repaid out of the proceeds of the sales. The house at Hamburg purchased with the proceeds bills on London; they specially indorsed & remitted them to deft. here, & advised A. that they were bought for his account, & debited him therewith. The bills being dishonoured, a jury found that the consignees were not authorised to purchase bills for the account & risk of A.; & the ct. held the verdict to be right.

The jury may properly judge of the meaning of mercantile phrases in the letters of merchants.—*LUCAS v. GRONING* (1816), 7 Taunt. 164; 1 Stark. 391; 2 Marsh. 460; 129 E. R. 66.

**405. — Deft. contracted for the purchase of a large quantity of Danubian maize "fair average quality of the season & port of shipment when shipped. To be shipped from Danube, etc., by three or more first class vessels. For shipment in June &/or July, 1869 (old style), seller's option," etc. In fulfilment of the contract on the part of the seller two cargoes of maize were tendered to deft., the bills of lading for which were dated respectively June 4 & 6, 1869. The loading of these two cargoes was commenced respectively on May 12 & 16, & completed on June 4 & 6; somewhat more than the half of each cargo having been put on board in May. There was evidence that grain shipped in May was more likely to damage by heating than grain shipped**

in June. It was left to the jury to say whether in their opinion the cargoes in question were "June shipments" in the ordinary business sense of the term; & they found that they were. The judge was of the same opinion, & directed a verdict for pltf.:—**Held:** the conclusion was right, & the question was one for the jury.—*ALEXANDER v. VANDERZEE* (1872), L. R. 7 C. P. 530; 20 W. R. 871, Ex. Ch.

**Annotations:—***Fold. Ashforth v. Redford* (1873), L. R. 9 C. P. 20. *Const. Bowes v. Shand* (1877), 2 App. Cas. 455. *Redd. Sutro v. Hellbut, Symons* (1916), 86 L. J. K. B. 330.

**406. — On a sale of goods, the invoice expressed that they should be paid for in "from six to eight weeks." The sale took place on May 1, & the action for the price was commenced on June 18. At the trial the judge left it to the jury to say what was the mercantile meaning of the expression "from six to eight weeks"; & they found that the action had not been brought prematurely. The judge, being of the same opinion, directed a verdict for pltf.:—**Held:** the question was properly left to the jury, & the verdict right.—*ASHFORTH v. REDFORD* (1873), L. R. 9 C. P. 20; *sub nom. ASHWORTH v. REDFORD*, 43 L. J. C. P. 57.**

**407. — Mercantile usage.]**—When a ship is by the charter to be addressed, at the port of discharge, to the charterer's agents, the charterer is entitled to recover from the shipowner excess of freight received by other agents, to whom he has addressed the ship; & if it appear that the charterer's broker, if allowed to have the ship, would have sent to the consignees to come & take their goods, & thus have prevented delay, the shipowner cannot claim demurrage for delay caused by the absence of such notice to consignees: & this, turning partly on the duties of the broker, that was left to the jury upon their own knowledge of business.

Many things which come within the knowledge of a jury are important when the inquiry is whether due diligence has been used (ERLE, C.J.).—*BRADLEY v. GODDARD* (1863), 3 F. & F. 638.

**408. — In an action against a colonial broker on a bill of exchange, on a question as to authority to accept:—Held:** the jury might be asked, of their own knowledge as commercial men, whether colonial brokers did business by means of bills of exchange: & evidence being given to show that they did not, but the witnesses admitting that they did so, sometimes, though it was not usual; the question left to the jury was, whether it was not one mode by which they carried on business.—*SCHWEITZER v. LONG* (1863), 3 F. & F. 687.

*See, generally, CUSTOM & USAGES, Vol. XVII., pp. 35 et seq.*

**409. Frequency & measure of inspection of buildings—County court jury.]**—*COLE v. DE TRAFORD* (No. 2), No. 400, ante.

**SUB-SECT. 7.—SEPARATION AND DETENTION OF JURY.**

**In criminal matters—Separation.]**—*See, generally, CRIMINAL LAW, Vol. XIV., pp. 306, 307, 326, Nos. 3215–3217, 3230, 3233, 3411, 3412.*

**410. — After summing up—Whether allowed.]**—(1) The rule that any separation of the jury after the judge's summing up in a criminal case invalidates their verdict does not apply to civil cases.

In a civil action a jury stated to the associate, after the judge had left the ct. one evening, that they had agreed to a verdict on two points, but could not agree on the third, & then separated for the night. Coming before the judge the next morning they gave a verdict on all three points. To this verdict they attempted to attach a condition, but the judge directed them that they could not do so, & they then withdrew the condition:—*Held*: the verdict was valid.

(2) It is the duty of the judge to stay to assist the jury so long as they are deliberating on their verdict (*SCRUTTON, J.*).—*FANSHAW v. KNOWLES*, [1916] 2 K. B. 538; 85 L. J. K. B. 1735; 115 L. T. 339, C. A.

**411. — Detention.**—Where, in a case of murder, which had occupied the whole of the day, the judge, after he had commenced his summing up, adjourned the ct., in consequence of the noise made by the crowd in the hall, he ordered that two bailiffs should be sworn to keep the jury together till the next day, & that the jury should be supplied with suitable refreshments & accommodation by the high sheriff, & next day the judge recommenced his summing up the evidence.—*R. v. CLAY* (1836), 7 C. & P. 276.

**412. In civil cases—Separation after summing up—Whether allowed.**—*FANSHAW v. KNOWLES*, No. 410, *ante*.

**Refreshment & accommodation.**—*See Sect. 10, sub-sect. 3, E., ante.*

#### SUB-SECT. 8.—DISCHARGE IN COURSE OF TRIAL.

##### A. In Criminal Trials.

*See, generally, CRIMINAL LAW, Vol. XIV., pp. 306 et seq.; Criminal Justice Act, 1925 (c. 86), s. 15.*

**On disagreement.**—*See CRIMINAL LAW, Vol. XIV., pp. 328, 329.*

##### B. In Civil Actions.

###### (a) Single Juror.

**413. Discharge for illness—Another sworn by consent.**—*JEFFREYS v. TYNDALL* (1626), *Palm.* 411; 81 E. R. 1147.

**414. — Whether verdict invalidated.**—Debt for an amount of compensation assessed by a jury before the sheriff. Defts. pleaded, amongst several other pleas, two pleas alleging in substance

that a jury was duly sworn to assess the compensation alleged in the declaration, without this, that J., one of the jurors named in the declaration, was so chosen & sworn. The facts were that a jury having been duly sworn, the holding of the inquisition was adjourned; & on the adjournment day, one of the jury being absent from illness, the sheriff with the assent of the parties, swore J., another of the jurymen who had been regularly summoned, in his stead, & the jury so constituted assessed the compensation:—*Held*: such pleas were vexatious in their nature, & beside the merits, & defts. therefore bound to elect between them & the others pleaded.—*COOLING v. GREAT NORTHERN RY. CO.* (1850), 15 Q. B. 486; 19 L. J. Q. B. 529; 15 L. T. O. S. 226; 14 Jur. 875; 117 E. R. 544.

**415. Discharge for incapacity—Physical or moral.**—*MANSELL v. R.*, No. 233, *ante*.

###### (b) The Whole Jury.

**416. Upon non-appearance of parties.**—The jury will be discharged where on cause being called on neither party appears.—*SMITH v. WHISTLER* (1738), *Lee temp. Hard.* 305; 95 E. R. 197.

**417. —**—When a jury has been sworn to try issues in a matrimonial suit, & neither of the parties appear, the ct. will discharge the jury.—*HAYDON v. HAYDON & COOKE* (1860), 30 L. J. P. M. & A. 112.

**418. Where no issue joined.**—If it appears no issue is joined, the jury must be dismissed.—*HEATH v. WALKER* (1739), 2 Stra. 1117; 93 E. R. 1069.

*Annotations:—Mentd. Reader v. Bloom* (1824), 9 Moore, C. P. 741; *Williams v. Gibbs* (1836), 2 Har. & W. 211.

**419. — Faulty pleadings—Unless parties consent to amendment.**—If, after the jury are sworn, it be discovered, that, to a declaration in trover, deft. has pleaded *non assumpsit*, the judge will discharge the jury, unless both parties consent to an amendment.—*BENT v. BENYON* (1834), 6 C. & P. 217, N. P.

*Annotations:—Reid. Rowlinson v. Roantre* (1834), 6 C. & P. 551. *Mentd. Clark v. Nicholson* (1834), 6 C. & P. 712.

**420. Discretion of judge—Immaterial issues—Whether consent of parties necessary.**—The record stated a verdict for plffs. on twelve counts, & that the jury were discharged on eight others. The issues on these latter counts being immaterial, the ct. refused to reverse, on error, the judgment for pltf., on the ground that the discharge of the

#### PART VII. SECT. 10, SUB SECT. 7.

**412 i. In civil cases—Separation after summing up—Whether allowed.**—The jury separating after the judge's charge, & before verdict, will not invalidate the verdict, if there has been no tampering with them.—*LYMBURN v. DEVEBER* (1828), N. B. Dig. 553.—*CAN.*

**412 ii. — — — — —**—*O'MULLIN v. BISHOP & MURPHY* (1860), 20 U. C. R. 275.—*CAN.*

**412 iii. — — — — —**—*STILLWELL v. RENNIE* (1885), 11 A. R. 724.—*CAN.*

#### PART VII. SECT. 10, SUB-SECT. 8.—B. (a).

**413 i. Discharge for illness—Another sworn by consent.**—If one of the jury is taken ill during a trial, the judge cannot, without consent of the parties, swear another juror in his place, & continue the trial.—*NOBLE v. BRILLINGS* (1854), 8 N. B. R. (3 All.) 85.—*CAN.*

**m. — Effect of.**—Where in the

course of a criminal trial a member of the jury becomes through illness incapable of further attendance at the trial, it is incompetent, even with prosecutor's consent & the consent also of the accused & his legal advisers, to continue the trial before the remaining fourteen members of the jury.—*LAIRD & HOSK v. H.M. ADVOCATE*, [1922] S. C. (J) 17; 59 Sc. L. R. 284; [1922] S. L. T. 133.—*SCOT.*

**n. Discharge for incapacity—Drunkenness.**—Drunkenness may be of such a degree as to be an "illness" warranting a Judge in causing a juror suffering under it to be removed from the jury-box after the trial has begun, & in proceeding to try prisoner with eleven jurors.—*R. v. ALLEN* (1886), 12 V. L. R. 341.—*AUS.*

#### PART VII. SECT. 10, SUB-SECT. 8.—B. (b).

**o. Effect of.**—When no verdict has been given, in consequence of the discharge of the jury, a nonsuit will not be granted on a point reserved at

the trial.—*DOR d. DUNCAN v. CHRYSTOPHER* (1832), 2 N. B. R. (Ber.) 157.—*CAN.*

**p. —.**—An order for the trial of an issue by a jury is not exhausted by the disagreement & discharge of the jury upon a first trial, & there is no jurisdiction in a judge to enter up judgment for either party upon the evidence, but the action can only be determined by a trial by jury as directed, unless by consent.—*LOO CHU FAN v. LOO CHOCK FAN* (1885), 1 B. C. R. pt. 2, 172.—*CAN.*

**418 i. Where no issue joined.**—If, after the jury are sworn in an action of ejectment, it be discovered that there is no issue, the proper course is to discharge the jury, & amend the record at chambers.—*DOR d. ANDREWS v. SKELVE* (1846), 5 N. B. R. (3 Kerr) 134.—*CAN.*

**q. Discretion of judge.**—The judge at the trial of an action has the power to dispense with the jury after all the evidence has been taken, but

**Sect. 10.—Procedure during the hearing: Sub-sect. 8, B. (b.); sub-sect. 9. Sects. 11 & 12.]**

jury was not stated on the record to be with the consent of the parties.—**POWELL v. SONNETT** (1827), 1 Bli. N. S. 545; 1 Dow. & Cl. 56; 4 E. R. 976, H. L.

**Annotations:—****Folld.** R. v. Johnson (1836), 5 Ad. & El. 488. **Consd.** Tinkler v. Rowland (1836), 6 Nev. & M. K. B. 848; R. v. Johnson (1839), Macl. & Rob. 1; Scott v. Bennett (1871), L. R. 5 H. L. 234. **Refd.** Dibben v. Anglesea (1834), 4 Tyr. 926; Seally v. Powis (1835), 1 Har. & W. 118; Duckworth v. Harrison (1838), 2 Jur. 1090.

**421. ————**—Where the jury have found their verdict on all the material issues, the judge who tries the cause, may without the consent of the parties, discharge the jury from returning any verdict on issues that in his opinion are immaterial.—**R. v. JOHNSON** (1839), Macl. & Rob. 1; 6 Cl. & Fin. 41; 9 E. R. 1, H. L.

**Annotations:—****Refd.** Duckworth v. Harrison (1838), 4 M. & W. 432; Narracott v. Narracott & Hesketh (1864), 3 Sw. & Tr. 408; Yeo v. Tatem, The Orient (1871), L. It. 3 P. C. 696. **Mentd.** Humphrey v. R. (1839), 2 Per. & Dav. 691; Scales v. Key (1840), 11 Ad. & El. 819.

**422. ————**—A ct. has power to discharge, by consent, a jury from giving a verdict upon any of the issues in a case; & where the jury has been discharged, & the record does not show that it was done without consent, the discharge must be taken to be regular, & cannot be made the ground of error.—**SCOTT v. BENNETT** (1871), L. R. 5 H. L. 234; 20 W. R. 686, H. L.

**423. — Issue on which jury cannot agree—Whether consent of parties necessary.]—MARSH v. ISAACS**, No. 490, *post*.

**424. Verdict taken on some issues only.]—**Where deft. in trespass, confessing the alleged acts of trespass, justifies them in several pleas, each answering the whole of the trespasses confessed, the judge cannot receive a verdict upon some of the issues & discharge the jury as to the remainder, except by consent of both parties.—**TINKLER v. ROWLAND** (1836), 4 Ad. & El. 808; 6 Nev. & M. K. B. 848; 6 L. J. K. B. 269; 111 E. R. 1010.

**Annotation:—****Distd.** Marsh v. Isaacs (1876), 45 L. J. Q. B. 505.

**425. On disagreement of jury.]—**If after the trial of an issue out of Chancery, the jury are locked up for many hours & are not likely to agree when the judge is about to leave the town, the judge will discharge them of his own authority, if the parties decline consenting to their discharge, but if a jury be under such circumstances, in a cause depending between party & party, *semble* the judge would order that the jury should follow him in a cart.—**MORIUS v. DAVIES** (1828), 3 C. & P. 427.

**Annotations:—****Mentd.** Cope v. Cope (1833), 1 Mood. & R. 269; *Re* Turner, Glendon v. Harding (1885), 29 Ch. D. 985.

**426. ————**—If the jury cannot agree, the judge at *Nisi Prius* has authority to discharge

the power should be sparingly exercised.—**MARKS v. WINDSOR CORPN.** (1889), 17 O. R. 719.—**CAN.**

**425 i. On disagreement of jury.]—**If the jury summoned on a writ of inquiry are unable to agree & are discharged, a new writ may be issued without applying to the ct.—**WARD v. DOW** (1832), 2 N. B. R. (Ber.) 32.—**CAN.**

**425 ii. ————**—**GALBRAITH & SONS v. HUDSON'S BAY CO.** (1900), 7 B. C. R. 431.—**CAN.**

**r. — Power of justices to discharge.]—***Held:* there was no authority for the magistrates dismissing the jury for the reason that they would not

agree, nor was there authority enabling them to summon another jury.—**CREELMAN v. STEWART** (1896), 28 N. S. R. (16 R. & G.) 185.—**CAN.**

**t. Non-payment of jury fees.]—****SYME (DAVID) & CO. v. SWINBURNE** (1909), 10 C. L. R. 43.—**AUS.**

**a. Discovery that juror is influenced by improper motives.]—**Whenever & as soon as it becomes known to a trial judge that a juror is actuated by improper motives, it is the duty of the judge of his own motion to protect the litigants from the results of such a scandal by then & there discharging the jury & summoning another, as would have to be done in the case where a juror is discovered to be insane or to

them.—**COOK v. CALDECOT** (1830), 4 C. & P. 315; **Mood. & M. 522**, N. P.

**Annotations:—****Mentd.** Barter v. Pritchard (1834), 1 Ad. & El. 456; Harwood v. Bartlett (1839), 6 Bing. N. C. 61; *Lee v. Hart* (1856), 11 Exch. 880.

**427. ————**—Where a jury cannot agree in their verdict, they may be discharged. If circumstances render it improper that they should continue to deliberate.—**DEWAR v. PURDAY** (1835), 3 Ad. & El. 166; 1 Har. & W. 227; 4 Nev. & M. K. B. 633; 4 L. J. K. B. 164; 111 E. R. 376.

**428. — Whether consent of parties necessary.]—**A mandamus had been issued, directing the trustees of a turnpike road to hold an inquisition & ascertain the damage occasioned to a landowner by a new road cut through his land. The jury summoned for that purpose, after being locked up a whole night, & not being likely to agree on the following morning, were then discharged without the consent of the party. The ct. refused to quash a return stating these facts, without further discussion.—**R. v. HARHAM ROADS TRUSTEES** (1840), 4 Jur. 50.

**429. Effect of—Discharge by consent.]—****EVERETT v. YOEUELS**, No. 433, *post*.

**SUB-SECT. 9.—WITHDRAWAL OF JUROR.**

**430. By consent only.]—**A juror cannot be withdrawn except by consent.—**MOULIN v. DALLISON** (1837), Cro. Car. 484; 79 E. R. 1018.

**431. — Of juror & parties.]—****LINDSAY v. LEATHLEY** (1863), as reported in 3 F. & F. 902, N. P.

**432. Effect of—Juror eligible in subsequent proceedings.]—**If a juror be withdrawn from the panel by consent of both parties, in order that the trial may go off *pro defectu juratorum*, he may be of the jury when the cause comes on again.—**HEWETT v. BAINARD** (1717), 10 Mod. Rep. 390; 88 E. R. 777

**433. — As bar to subsequent proceedings.]—**Discharging a jury by consent, does not terminate the suit, but is the same, in this respect, as withdrawing a juror; & where pltf., instead of going on with such suit, brought a new action for a cause admitted to be the same, the ct. stayed the proceedings, but would not grant deft. his costs of the latter suit.—**EVERETT v. YOEUELS** (1832), 3 B. & Ad. 349; 110 E. R. 131.

**Annotation:—****Mentd.** Gilles v. Tooth (1846), 3 C. B. 665.

**434. ————**—Withdrawing a juror at the trial does not put an end to a cause, unless it was clearly the intention of the parties at the time that it should have that effect.—**HARRIES v. THOMAS** (1836), 2 M. & W. 32; 2 Gale, 197; 6 L. J. Ex. 58; 150 E. R. 657.

**Annotations:—****Refd.** Bentley v. Dawes (1854), 10 Exch. 347. **Mentd.** Jones v. James, Jones v. Harris (1837), 6 L. J. Ch. 293; R. v. Hardey (1859), 14 Q. B. 529; Maples v. Pepper (1856), 18 C. B. 177.

have accepted a bribe. Where such course is not taken there should be a new trial.—**HOWARD & HOWARD v. BRITISH COLUMBIA ELECTRIC RY. CO., LTD.**, [1918] 3 W. W. R. 409.—**CAN.**

**b. Juror objecting to serve—Friend of prisoner.]—****R. v. CADLEY**, [1918] V. L. R. 162.—**AUS.**

**PART VII. SECT. 10, SUB-SECT. 9.**

**433 i. Effect of—As bar to subsequent proceedings.]—**The withdrawal of a juror at a trial has the effect of concluding the suit, & with it, of determining the whole cause of action.—**FLAKE v. CLAPP** (1879), 8 P. R. 62.—**CAN.**



**435.** ———.] — The withdrawing a juror does not necessarily put an end to the suit; whether it does so or not depends on the arrangement between the parties in the particular instance.—*BENTLEY v. DAWES* (1854), 10 Exch. 347; 2 C. L. R. 1262; 23 L. J. Ex. 279; 23 L. T. O. S. 269; 18 Jur. 837; 156 E. R. 478.

*Annotations*.—*Mentd.* Dunston v. Paterson (1859), 5 C. B. N. S. 267; *Holmes v. Pemberton* (1859), 5 Jur. N. S. 727.

*See, generally*, *ESTOPPEL*, Vol. XXI., p. 150.

**436.** ——— On costs—Money paid into court not accepted.]—If deft. pay money into ct., & plff. proceed to trial when a juror is withdrawn, plff. is not entitled to the costs up to the time of paying money into ct.—*STODHART v. JOHNSON* (1790), 3 Term Rep. 657; 100 E. R. 788.

**437.** ——— Case reheard.]—Where a juror is withdrawn & the cause referred, but no award made, & the cause being taken down again, plff. succeeds, he is not entitled to the costs of the first attempt at trial.—*THOMAS v. LEWIS* (1836), 5 Dowl. 395; *Will. Woll. & Dav.* 67.

**438.** Withdrawal suggested by judge—Whether likely to influence jury.]—On the trial of an action of slander, before plff.'s counsel stated his case, the judge, in the hearing of the jury, suggested to the parties that it would be better to withdraw a juror. This was declined, & the jury found a verdict for deft.:—*Held*: this observation of the judge was not calculated improperly to sway the jury to give their verdict for either of the parties.—*LYDDY v. JONES* (1866), 7 B. & S. 475.

*Authority of counsel to consent to withdrawal.*—*See BARRISTERS*, Vol. III., p. 342, No. 324.

#### SECT. 11.—RETIREMENT OF JURY.

**439.** Right to use documentary evidence—In own possession.]—A juror may show to his brethren, after departure from the bar, any evidence which he has of himself; & although he received it not through the regular channel of proof, yet it cannot be assigned for error; for it is not returned upon the *postea*; & it cannot be surmised.—*GRAVES v. SHORT* (1598), *Cro. Eliz.* 616; 2 Hale, P. C. 307; 78 E. R. 857.

*Annotations*.—*Refd.* Goodman v. Cotherington (1864), 1 Sid. 235; *Rushell's Case* (1670), *Vaugh.* 136; *R. v. Martin* (1872), L. R. 1 C. C. R. 378. *Mentd.* Dublin (Archbp.) v. Dublin (Dean) (1719), 1 Stra. 262; *R. v. Mellor* (1858), *Dears. & B.* 468.

**440.** Right to take documentary evidence out of court.]—Parish books & registers are good evidences to prove births & marriages; & when produced, the jury may have them out of ct. while they are conferring on their verdict.—*VICARY v. FARTHING* (1595), *Cro. Eliz.* 411; 78 E. R. 653.

*Annotations*.—*Refd.* Goodman v. Cotherington (1864), 1 Sid. 235; *R. v. Martin* (1872), L. R. 1 C. C. R. 378.

**441.** ———.]—*R. v. BURDETT*, No. 332, *ante*.

**442.** Duty of judge.]—*FANSHAW v. KNOWLES*, No. 410, *ante*.

In criminal matters—Pending argument on admissibility of evidence—Whether ordered.]—*See No. 292, ante*.

—.]—*See, generally*, *CRIMINAL LAW*, Vol. XIV., p. 326.

#### PART VII. SECT. 11.

*e. While facts proved with which judge alone concerned.*—On a trial by jury after plff.'s case has commenced, the judge may, in his discretion permit the jury to retire while proof is being given of facts with which the judge

alone is concerned.—*BANK OF BRITISH COLUMBIA v. OPPENHEIMER* (1900), 7 B. C. R. 448.—*CAN.*

#### PART VII. SECT. 12.

**443.** *Effect of verdict on costs.*—*FARQUHAR v. ROBERTSON* (1889), 13

*Refreshment.*—*See Sect. 10, sub-sect. 3, E., ante*.

*Receipt of evidence during retirement.*—*See Nos. 312–317, ante*.

#### SECT. 12.—WHAT JURY MAY CONSIDER.

**443.** Effect of verdict on costs.]—Deft. published some doggerel lines describing the failure of plff., Levi, a bound bailiff, to arrest a party of whom he was in search; the lines were headed by a wood cut, & plff. was styled "Levy the Bum." Plff. brought his action; the jury before whom the cause was tried, inquired whether a shilling would carry costs, & being answered in the affirmative, found a verdict for deft. The ct. granted a new trial.—*LEVI v. MILNE* (1827), 4 Bing. 195; 130 E. R. 743; *sub nom.* *LEVY v. MILNE*, 12 Moore, C. P. 418; 5 L. J. O. S. C. P. 153.

*Annotations*.—*Refd.* Poole v. Whitcomb (1862), 12 C. B. N. S. 770. *Mentd.* Hakewell v. Ingram (1854), 2 C. L. R. 1397.

**444.** ———.]—It is no ground for setting aside a verdict, that the jury have given only a shilling damages, under a mistaken impression that it would carry costs.—*MEARS v. GRIFFIN* (1840), 1 Man. & G. 796; *Drinkwater* 2; 2 Scott, N. R. 15; 4 Jur. 1016; 133 E. R. 553.

**445.** ———.]—The ct. refused to set aside a verdict as perverse, on the ground that the jury had, contrary to the direction of the judge, given more than nominal damages, for the avowed purpose of enabling plff. to obtain the costs of the action.—*CHILVERS v. GREAVES* (1843), 5 Man. & G. 578; 6 Scott, N. R. 539; 134 E. R. 691.

**446.** ———.]—*WEAVER v. SMITH* (1851), 16 L. T. O. S. 512.

**447.** ———.]—Although if a jury ask what amount of damages will carry costs, there is no reason why the judge should not inform them, yet their having given a verdict in ignorance that it will not carry costs is no reason why, after an application for a certificate, which implies that the verdict is recorded, the verdict should be disturbed.—*KILMORE v. ABDOLAH* (1858), 27 L. J. Ex. 307.

**448.** ———.]—*WILSON v. REED* (1860), 2 F. & F. 149.

**449.** ———.]—In an action of slander, where there is no real injury the jury may find for nominal damages, & *semble*, may consider the question of costs. Thus, in an action by a master of a workhouse, for words imputing to himself that he dishonestly got honest men turned out of employment there, in order to get in creatures of his own, for his own purposes, held actionable; but, being spoken in angry altercation, & without malice, the jury were directed that they might, if they thought there was no real injury, give nominal damages, so as not to carry costs; & deft.'s counsel allowed to ask, on cross-examination, what would be the probable amount of costs to deft. if a verdict for more than a nominal amount were given.—*WAKELIN v. MORRIS* (1860), 2 F. & F. 26.

**450.** ———.]—The jury having found a verdict for £5 5s. in an action for a trifling assault, evidently acting upon information given to them by

P. R. 156.—*CAN.*

—.]—Where the jury in assessing the damages in an action took into consideration the question of costs:—*Held*: this was sufficient ground for ordering a new trial.—*RUSSELL v. WENIWSER* (1868), 16 W. R. 710.—*IR.*



*Sect. 12.—What jury may consider. Sect. 13: Sub-sect. 1.]*

pltf.'s counsel that a verdict for less would not give pltf. her costs, the ct. granted a new trial without imposing any terms.

The question is whether in performing the function of awarding damages it is apparent that the jury have misconducted themselves. I think it is apparent they have (WILLIAMS, J.).—*POOLE v. WHITCOMB* (1862), 12 C. B. N. S. 770; 3 F. & F. 72, n.; 6 L. T. 783; 10 W. R. 732; 142 E. R. 1345.

**451. Fact of payment into court.]**—Where in an action for a libel contained in a newspaper deft. pleads an apology & payment of money into ct. under Libel Act, 1843 (c. 96), s. 2, as amended by Libel Act, 1845 (c. 75), s. 2, & pltf. leaves the money in ct. & proceeds to trial, if the jury find the plea to be proved pltf. is entitled as of right to the whole sum paid into ct., notwithstanding that the jury may have awarded him a less sum as damages. R. S. C. Ord. 22, r. 22, which provides that neither the fact that money has been paid into ct., nor the amount paid in, shall be communicated to the jury, does not in any way affect the issues upon a plea under the above sections.—*DUNN v. DEVON & EXETER CONSTITUTIONAL NEWSPAPER CO.*, [1895] 1 Q. B. 211, n.; 63 L. J. Q. B. 342; 70 L. T. 593; 10 T. L. R. 335; 38 Sol. Jo. 351; 10 R. 167.

*Annotations:—*Reid, *Gray v. Bartholomew*, [1895] 1 Q. B. 209; Maxwell v. Wolsley (1906), 76 L. J. K. B. 163.

**452.**—[—*KLAMBOROWSKI v. COOKE* (1897), 14 T. L. R. 88.

**453.**—*Rule not ultra vires.*—R. S. C., Ord. 22, r. 22, provides that, where a cause or matter is tried by a judge with a jury, no communication to the jury shall be made, until after the verdict is given, either of the fact that money has been paid into ct., or of the amount paid in; & that the jury shall be required to find the amount of the debt or damages, as the case may be, without reference to any payment into ct.:—*Held*: the rule was not *ultra vires*.—WILLIAMS v. GOOSE, [1897] 1 Q. B. 471; 66 L. J. Q. B. 345; 78 L. T. 143; 45 W. R. 308; 13 T. L. R. 248; 41 Sol. Jo. 311, C. A.

*See* R. S. C. Ord. 22, r. 22.

**454. Amount paid into court — Verdict for sum less than amount paid in.]**—*DUNN v. DEVON & EXETER CONSTITUTIONAL NEWSPAPER CO.*, No. 451, *ante*.

**455.**—*Rule not ultra vires.*—WILLIAMS v. GOOSE, No. 453, *ante*.

*See* R. S. C., Ord. 22, r. 22.

**456.**—*Application of rule—Liability admitted.*—*JAQUES v. SOUTH ESSEX WATERWORKS CO.* (1904), 20 T. L. R. 563.

*See, also*, No. 452, *ante*.

*In action for libel or slander—Plea of justification.]—See* LIBEL & SLANDER.

*Improper communications to jury.]—See* Sect. 10, sub-sect. 3, D., *ante*.

*Verdict improperly arrived at.]—See* Sect. 10, sub-sect. 3, F., *ante*.

*Evidence—Juror utilising own knowledge.]—See* Sect. 10, sub-sect. 6, *ante*.

*During retirement of jury.]—See* Sect. 11, *ante*.

**SECT. 13.—GIVING A VERDICT.**

**SUB-SECT. 1.—IN GENERAL.**

**457. Must be by twelve jurors.]**—*RUSSEL v. BALL* (1745), Barnes, 455; 94 E. R. 1001.

**458. Whether verdict may be changed.]**—*SAUNDERS v. FREEMAN* (1561), 2 Dyer, 209 a; 1 Plowd. 209; 75 E. R. 321; *sub nom.* ANON., Moore, K. B. 33.

*Annotation:—*Mentd. *Fanshaw v. Knowles*, [1916] 2 K. B. 538.

**459.**—*Representation of dissent by majority of jury.]*—Jurors cannot express their disapprobation of a verdict after given.—*R. v. THIRKELL* (1765), 3 Burr. 1696; 97 E. R. 1052.

**460.**—*Finding of fact.—Dissent from direction of judge.]*—*DOE d. LEWIS v. BASTER*, No. 630, *post*.

**461. Verdict must be unanimous.]**—*ROOKES' CASE* (1773), Lofft, 244; 98 E. R. 632.

**462.**—[—(1) On the trial of a magistrate for neglect of duty, he ought not to be found guilty, unless all the jury are satisfied that he has been guilty of the same act of neglect; & if four jurors think him guilty of one act of neglect, & eight think him guilty of another act of neglect, that is not sufficient.

(2) On the trial at bar of an information, the special jury were summoned from a distant county, in which the offence was not charged to have been committed:—*Held*: the ct. had no power to order their expenses to be paid. The jurors who tried this information were only paid one guinea each, & other jurors, who had come from the same county, & had been summoned to try another information, which was not tried, were not paid anything.—*R. v. PINNEY* (1832), 3 B. & Ad. 947; 5 C. & P. 254; 3 State Tr. N. S. 11; 1 Nev. & M. M. C. 307; 110 E. R. 349.

*Annotations:—*As to (2) *Reid*, *It. v. Holden* (1833), 5 B. & Ad. 347. *Generally*, *Mentd.* *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *R. v. Glamorgan County Council*, [1899] 2 Q. B. 536.

—*In criminal matters.]—See* CRIMINAL LAW, Vol. XIV., p. 310, Nos. 3264, 3265.

**463.**—*Unless majority verdict allowed by law.]*—Where the law permits the verdict of the majority of a jury to be accepted, a majority verdict should be regarded by the appellate ct. as equal in weight & value to a verdict that is unanimous.—*WEST INDIA ELECTRIC CO. v. ROBERTS*, [1920] A. C. 1025; 90 L. J. P. C. 47; 124 L. T. 165, P. C.

**464.**—*Except in civil cause by consent.]*—*ELLIS v. DEHEER*, No. 563, *post*.

**465. Presumption of unanimity.]**—In general the assent of all the jury to the verdict pronounced by the foreman in their presence & hearing, is to be conclusively inferred; & no affidavit can in any case be admitted to the contrary. But if all the jury were not present when a verdict of guilty was delivered, & it is therefore uncertain whether they all heard the verdict pronounced by the foreman, the ct. will with the consent of deft. grant a new trial.—*R. v. WOOLER* (1817), 6 M. & S. 366; 2 Stark. 111; 105 E. R. 1280.

*Annotation:—*Consd. *Ellis v. Deheer*, [1922] 2 K. B. 113.

**466. Effect of majority verdict.]**—On the trial of an action in the county ct., there being a disagreement of the jury, the parties were asked by the judge if they would accept the verdict of the majority, & they consented to do so, but afterwards

**PART VII. SECT. 13, SUB-SECT. 1.**

*d. Whether verdict may be*  
—*McKAY v. WOODILL* (1882),  
1 S. R. (4 R. & G.) 55.—CAN.

**466 i. Effect of majority verdict.]**—*Trial of issue of fact under Divorce Act is a civil trial, & verdict by majority of jury taken by consent is a*

*valid verdict.*—*SMITH v. SMITH & DAVIDSON* (1878), 1 N. S. W. S. C. R. N. S. (D.) 1, 5.—AUS.

the unsuccessful party applied for, & obtained from the judge, a new trial, on the ground that the finding of the jury was against the weight of evidence & unreasonable:—*Held*: the judge had power to entertain the application for a new trial, notwithstanding the consent of the parties to accept the verdict of the majority of the jury, the judge being within his jurisdiction in holding that the consent of the parties to accept the verdict of the majority meant no more than that they agreed to treat that as equivalent to a unanimous verdict.—*GROOM v. SHUKER* (1893), 69 L. T. 293; 37 Sol. Jo. 584, D. C.

**467. Findings of fact—Whether conclusive.]**—On the question of fact, if distinct, the finding is not to be disturbed, except, & it is an exception founded on good sense, that the ct. will interfere with the finding of a jury, which is either unsupported by evidence or contrary to it. Facts are for the jury; yet it has now become the inveterate practice of the ct. to interfere in such cases; & I hope that it always will be so (COLERIDGE, J.).—*R. v. WOOLPIT (INHABITANTS)* (1835), 4 Ad. & El. 205; 1 Har. & W. 483; 5 Nev. & M. K. B. 526; 3 Nev. & M. M. C. 353; 5 L. J. M. C. 14; 111 E. R. 761.

*Annotations*.—**Consd.** *R. v. Great Walsford* (1835), 4 Ad. & El. 216. **Mentd.** *R. v. Mashiter* (1837), 1 Nev. & P. K. B. 314; *R. v. West Riding of Yorkshire JJ., Tollerton v. Idle* (1842), 12 L. J. M. C. 15; *R. v. Barnsley* (1849), 12 Q. B. 193; *R. v. St. Marylebone* (1850), 4 New Sess. Cas. 444.

**468. ——— Disputed account.]**—*VAN NEUVEL v. HUNTER* (1835), 1 Har. & W. 273; *sub nom. VAN NIEUWVEL v. HUNTER*, 5 Nev. & M. K. B. 376.

**469. ———]**—Where a question is one of fact, & there is evidence on both sides properly submitted to a jury, & the jury have found a verdict warranted by the evidence, & not in itself unreasonable or unfair, the Judicial Committee will not set such verdict aside, except under very rare & exceptional circumstances.—*RAILWAYS COMR. v. BROWN* (1887), 13 App. Cas. 133; 57 L. J. P. C. 72; 57 L. T. 895, P. C.

*Annotations*.—**Refd.** *Murtagh v. Barry* (1890), 59 L. J. Q. B. 388; *Alcock v. Hall*, [1891] 1 Q. B. 444.

**710. ——— Majority verdict taken by consent.]**—*GROOM v. SHUKER*, No. 466, *ante*.

*Compare ESTOPPEL*, Vol. XXI., p. 150, Nos. 126–132.

**467 i. Findings of fact—Whether conclusive.]**—The ct. will not review the verdict of a jury upon matters of fact.—*HILL (JOHN) & CO. (TRUSTEES) v. SHEA* (1818), 1 Nfld. L. R. 94.—**NFLD.**

**467 ii. ———.]**—*HAMMOND v. JOHNSON* (1846), 5 N. B. R. (3 Kerr) 161.—**CAN.**

**467 iii. ———.]**—Jury having found on all the facts the ct. refused to disturb verdict.—*LEONARD v. COGSWELL* (1887), 7 N. S. R. (1 G. & O.) 121.—**CAN.**

**467 iv. ———.]**—*WHITE v. YARMOUTH GAS LIGHT CO.* (1868), 7 N. S. R. (1 G. & O.) 204.—**CAN.**

**467 v. ———.]**—*WALKER v. BAYERS* (1873), 9 N. S. R. (3 G. & O.) 270.—**CAN.**

**467 vi. ———.]**—Where the question at issue was purely one of fact, involving no legal points whatever, & the judge left the whole charge open to the jury, who found for pltf.:—*Held*: the verdict could not be disturbed.—*LYON v. MORTON* (1874), 9 N. S. R. (3 G. & O.) 459.—**CAN.**

**467 vii. ———.]**—Where the verdict was given in favour of pltf., with the approval of the judge who tried the cause, the only questions involved being matters of fact, the ct. refused to set the verdict aside, seeing nothing

in the case that obliged them to do so.—*MOODY v. FAULKNER* (1875), 10 N. S. R. (1 It. & C.) 154.—**CAN.**

**467 viii. ———.]**—*CRIGHTON v. SPINNEY* (1886), 19 N. S. R. (7 R. & G.) 102; 7 C. L. T. 145.—**CAN.**

**467 ix. ———.]**—*GRAND TRUNK RY. CO. v. WEEGAR* (1894), 23 S. C. R. 422.—**CAN.**

**e. ——— By ten jurors.]**—*ZUFELT v. CANADIAN PACIFIC RY. CO.* (1911), 19 O. W. R. 77; 2 O. W. N. 1063; 23 O. L. R. 602.—**CAN.**

**f. ——— By nine jurors.]**—Where there is only one issue, but questions are submitted to elicit several findings of fact, then nine jurymen must concur in all the findings necessary to determine the action. It will not be sufficient if such findings are made by groups of nine differing in their composition as to some individuals.—*RISK v. C. P. R.*, [1917] 1 W. W. R. 652.—**CAN.**

**g. Whether finding may be disregarded by court.]**—The power conferred on the ct. to give judgment on the evidence before it, may be exercised though the result be to disregard the finding of a jury, but it must be used with great caution.—*CLAYTON v. PATTERSON* (1900), 32 O. R. 435.—**CAN.**

**h. Jury improperly summoned —**

**Refusal to accept verdict & reconsideration—In criminal matters.]**—*See CRIMINAL LAW*, Vol. XIV., pp. 327, 328.

**471. Verdict improperly arrived at — As ground for new trial—Verdict given on wrong grounds.]**—*O'CONNOR v. BRADSHAW* (1850), 5 Exch. 882; 20 L. J. Ex. 26; 16 L. T. O. S. 237; 155 E. R. 386.

**472. ——— Compromise.]**—A new trial will not be granted on the ground that from the small amount of damages the jury must have come to a compromise, unless, from the circumstances of the case, it is evident that there has been a total refusal on the part of the jurors to discharge their duty, & the verdict is necessarily wholly inconsistent.—*RICHARDS v. ROSE* (1853), 9 Exch. 218; 2 C. L. R. 311; 23 L. J. Ex. 3; 22 L. T. O. S. 104; 17 Jur. 1036; 156 E. R. 93.

*Annotations*.—**Mentd.** *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; *Suffield v. Brown* (1864), 4 De G. J. & Sm. 185; *Angus v. Dalton* (1878) 4 Q. B. D. 162; *Wheelton v. Burrows* (1879), 12 Ch. D. 31; *Howarth v. Armstrong* (1897), 77 L. T. 62; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557; *Jones v. Pritchard*, [1908] 1 Ch. 630; *Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634; *Sack v. Jones*, [1925] Ch. 235.

**Damages awarded excessive.]**—*See DAMAGES*, Vol. XVII., pp. 167 *et seq.*

*See, also*, No. 476, *post*.

**In criminal matters.]**—*See CRIMINAL LAW*, Vol. XIV., p. 310, No. 3267.

**473. Whether reasons may be given.]**—I have left certain questions to you, & have made such observations as I felt it my duty to make upon those questions. You have, no doubt, maturely considered the questions, & also my observations respecting them, & have drawn your own conclusions; & your having done so, I think that I ought not to hear the grounds on which you have found your verdict (GURNEY, B.).—*HORNER v. WATSON* (1834), 6 C. & P. 680.

**474. ——— Only by consent of parties.]**—If the parties consent, the jury may be asked the grounds of their verdict but not otherwise.—*WALTON v. POTTER* (1841), 3 Man. & G. 411; 1 Web. Pat. Cas. 585; 4 Scott, N. R. 91; 11 L. J. C. P. 138; 133 E. R. 1203.

*Annotations*.—**Mentd.** *Betts v. Walker* (1849), 14 Jur. 647; *Bateman v. Gray* (1853), Maor. 93; *Hill v. Evans* (1862), 4 De G. F. & J. 288; *Thorn v. Worthing Skating Rink Co.* (1876), 6 Ch. D. 415, n.; *Edison & Swan Electric Lighting Co. v. Woodhouse & Rawson* (1887), 3 T. L. R. 367.

**Whether verdict final.]**—The finding of a jury, improperly summoned, in a summary action, is not final under 12 Vict. c. 40.—*WETMORE v. LEVY* (1860), 9 N. B. R. (4 All.) 510.—**CAN.**

**k. Evidence conflicting & contradictory—Same verdict twice found—Final.]**—Where the evidence in a case is conflicting & contradictory, & a jury have twice found in favour of pltf., the ct. will not disturb the verdict.—*FOSTER v. FOWLER* (1859), 4 N. S. R. (Coch.) 70.—**CAN.**

**l. Answers to questions not verdict.]**—*MOODIE v. MACKENZIE*, [1925] 1 D. L. R. 801.—**CAN.**

**m. Effect of improper answers to questions.]**—Where it appeared on the argument before the Supreme Ct., that the jury had not properly answered some of the questions submitted to them at the trial, a new trial was ordered.—*PURSEY v. DOMINION ATLANTIC RY. CO.* (1896), 25 S. C. R. 691.—**CAN.**

**n. Summing up dispensed with.]**—At the conclusion of accused's address, & before the summing up, the foreman of the jury announced that they were prepared to give their verdict.—*Held*: the judge was entitled to dispense with the summing up, & a verdict of guilty was rightly

**Sect. 13.—Giving a verdict: Sub-sects. 1, 2 & 3, A.]**

**475.** —.]—Pltf. ordered of defts. certain trucks to be ready on a particular day to convey his cattle to market by their railway. The trucks were not ready on the day fixed, but the superintendent at the station then promised they should be ready on the day following saying the cattle would be then quite in time for the market. Pltf. sent his cattle on the following day, & signed a "forwarding note" required of him by the co., with special conditions indorsed, but the cattle were then too late for the market, damaged by delay, & sold elsewhere at a loss. In an action against the co., the question left to the jury was, "whether a contract had been made to carry the cattle and deliver them at their destination by a particular time ready for the market." On a motion for a new trial, on the ground of misdirection, alleging that the question should have been whether the cattle were carried according to the written bargain made on the day following:—*Held*: (1) the question as left to the jury was the proper one, the other point not having been made by defts. at the trial; (2) a jury cannot be asked the grounds of their verdict.—*BROWN v. BRISTOL & EXETER RY. CO.* (1801), 4 L. T. 830; 7 Jur. N. S. 950; 9 W. R. 872.

*Annotation*:—As to (2) *Reid. Arnold v. Jeffreys*, [1914] 1 K. B. 512.

**476.** —.]—When upon a trial before a judge & jury the jury have once given a general verdict, the judge is not entitled to ask any further question of the jury for the purpose of ascertaining whether the ground of their verdict was one which there was evidence to support.—*ARNOLD v. JEFFREYS*, [1914] 1 K. B. 512; 83 L. J. K. B. 329; 110 L. T. 253, D. C.

**477. Must be confined to issues.]—DOWMAN'S CASE**, No. 504, *post*.

— **Rejection of surplusage.]—See Sect. 13, sub-sect. 4, *post*.**

**Must find the whole issue.]—See Sect. 13, sub-sect. 2, *post*.**

**478. Must be consistent with pleadings—Admissions.]—A matter confessed by a party & admitted in the pleading bars a jury from a contrary finding in that action & in any other.**—*WALLOP'S CASE* (1620), *Palm.* 19; 81 E. R. 958.

*Annotation*:—*Mentd. Parker v. Kott* (1701), 12 Mod. Rep. 467.

**479.** —.]—A verdict is sufficient, if it finds the substance of the issue. The jury cannot find any thing contrary to the admission of the parties.—*WILCOCKS v. HARRIS* (1675), 1 Freem. K. B. 189; 89 E. R. 134; *sub nom. WILCOX v. SKIPWORTH'S SERVANT*, 2 Mod. Rep. 4.

**480.** —.]—The pleading of deft. admitted a libel. Throughout the trial & until the summing up there was no question but that it was a libel. It would be dangerous to allow a jury to give a finding out of their own head against an admission in pleading on a point not raised or argued during the trial (*CAVE, J.*).—*MACLAREN & SONS v. DAVIS* (1890), 6 T. L. R. 372, D. C.

received by him.—*L. v. CARLAIRS* (1925), 25 S. R. N. S. W. 515; 42 N. S. W. W. N. 102.—**AUS.**

**o. Retirement for less than three hours—Failure to agree—Whether verdict of three-fourths accepted.]—BODNAR v. STUART**, [1922] 1 W. W. R. 933.—**CAN.**

**p. Verdict importing new fact into declaration.]—A verdict cannot import into a declaration a new fact, though it may show that an essential fact, defectively stated in the declara-**

tion, was properly proved at the trial.—*CHAMBERS v. PERRY* (1847), 1 Legge, 430.—**AUS.**

**PART VII. SECT. 13, SUB-SECT. 2.**

**481 i. General rule.]—Held**: the real issue not having been passed upon there must be a new trial.—*DUNSMUIR v. LOWENBURG, HARRIS & CO.* (1903), 34 S. C. R. 228.—**CAN.**

**q. Answers to questions leaving issue in doubt.]—Answers by a jury to questions should be given the fullest**

Admissions in pleadings, generally, *see* **ESTOPPEL**, Vol. XXI., pp. 316 *et seq.*; **PLEADING.**

**Misconduct of jury.]—See Sect. 10, *ante*.**

**SUB-SECT. 2.—VERDICT MUST DECIDE THE ISSUE.**

**481. General rule.]—A verdict must comprehend the whole issue.** If it does not, a judgment entered thereon will be erroneous, & the ct. cannot amend it.—*MILLER v. TRETS* (1698), 1 Ld. Raym. 324; 91 E. R. 1112, Ex. Ch.

**482. — Sufficient if whole issue implied.]—If the words of a verdict imply the whole issue, it is sufficient.**—*BURPER v. BAKER* (1601), Cro. Eliz. 854; 78 E. R. 1080.

**483. Application of rule—Plea of delivery of goods & money.]—Upon a *sci. fa.* to obtain execution, if deft. plead that he delivered goods & money to the sheriff in satisfaction of the judgment, pltf. shall join issue on the fact; but if the jury find as to the goods, & are silent as to the money, it is a mistrial.**—*ATKINSON v. ATKINSON* (1595), Cro. Eliz. 391; 78 E. R. 636.

*Annotations*:—*Mentd. Clerk v. Withers* (1704), 3 Ld. Raym. 1072; *Morland v. Pellatt* (1828), 8 B. & C. 722; *Stimson v. Farnham* (1871), 20 W. R. 183.

**484. — Information for usury.]—On an information for usury, if the verdict find the corrupt agreement, but say nothing as to the loan, it is bad.**

If a verdict be imperfect, a *venire facias de novo* must issue.—*COOK v. LANEDAY* (1608), Cro. Jac. 210; 79 E. R. 183

*Annotation*:—*Reid. R. v. Upton* (1728), 1 Barn. K. B. 97.

**485. — Plea of a promise jointly with another.]—In *assumpsit*, deft. pleaded that the promises were made by him jointly with another, & issue was taken upon that fact. The jury, by their verdict, found that deft. promised, without stating whether he promised alone or jointly with another:—*Held*: this verdict was bad, because it did not distinctly pronounce upon the issue.**—*BISHOP v. KAYE* (1820), 3 B. & Ald. 605; 106 E. R. 782.

*Annotations*:—*Mentd. Strother v. Hutchinson* (1837), 4 Bing. N. C. 83; *Brown v. Gill* (1846), 2 C. B. 891; *Campbell v. R.* (1847), 11 Q. B. 814.

**486. — Issue of negligence or contributory negligence.]—In an action by an administratrix under Fatal Accidents Act, 1846 (c. 93), for compensation for loss sustained in consequence of the death of intestate, the questions being whether there was negligence in deft. or contributory negligence in deceased, the jury found a verdict for pltf., damages 40s., £1 for the widow, & 10s. for each of the children; the ct. granted a new trial without saying anything about costs, on the ground that the jury had shrunk from their duty of deciding the issue.**—*SPRINGETT v. BALL* (1866), 7 B. & S. 477.

*Annotation*:—*Reid. Kelly v. Sherlock* (1866), L. R. 1 Q. B. 686.

**487. Separate issues put to jury—Must decide**

possible effect, & if it is possible to support the same by any reasonable construction they should be so supported, but when the questions, answered & unanswered, leave the original question in controversy in doubt & ambiguity, the cause of justice is best promoted by a new trial.—*LE BLANC v. MONCTON TRAMWAY ELECTRICITY & GAS CO., LTD.* (1920), 47 N. B. R. 291.—**CAN.**

**r. Questions asked not pertinent to issue.]—Held**: as the questions

each issue.]—**CATTLE v. ANDREWS** (1893), 3 Salk. 372; 91 E. R. 880.

*Annotation*:—**Mentd. Street v. Hopkinson** (1736), 2 Stra. 1055.

**488.** ———.] — Where in an action of replevin the pleas to the avowries or cognisances, damage feasant, claim a right of common in respect of distinct lands, the jury must have sufficient evidence before them to enable them to say in respect of which lands the right of common exists. Thus, where in one set of pleas *pltf.* claimed a right of "common of pasture over certain unclosed strips of land in respect of 100 acres of land, for all commonable cattle levant & couchant thereon;" & in another set claimed that right as an occupier of such strips *pour cause de vicinage*, "for all cattle levant & couchant upon the strips of land he occupied," & the jury found a verdict generally for *pltf.*; that verdict was held to be imperfect, & a new trial granted.—**NEWBY v. SINGLETON** (1832), 1 L. J. K. B. 165.

**489.** ———.] — **BENTLEY v. FLEMING**, No. 377, *ante*.

In criminal matters.]—See **CRIMINAL LAW**, Vol. XIV., pp. 334, 335, Nos. 3530-3534.

**490.** — **Jury unable to agree on all.**—Where there are several distinct issues to be tried in one action, it is competent to the judge, in his discretion, & without the consent of the parties, to accept the verdict of the jury upon those issues on which they are able to agree, & discharge them upon the others without invalidating the trial, leaving the parties, if they think fit, to take down the undecided issues to a new trial; & the ct. will give judgment on the decided issues, & has power, if asked, to send down the undecided issues to a new trial.—**MARSH v. ISAACS** (1870), 45 L. J. Q. B. 505; 3 Char. Pr. Cas. 346.

### SUB-SECT. 3.—KINDS OF VERDICT.

#### A. General Verdicts.

**491. Sufficiency — On plea of justification.**—A verdict found generally against a deft. in trespass held sufficiently expressive of opinion in respect of a pleaded justification.—**HAWKS v. CROFTON** (1758), 2 Burr. 698; 2 Keny. 388; 97 E. R. 520.

**492.** ———.] — **BENTLEY v. FLEMING**, No. 377, *ante*.

**493.** ———.] — (**CLEVELAND IRON CO. v. STEPHENSON** (1865), 4 F. & F. 428, N. P.

**494. — Neglect to find on separate issues.**—In debt for several sums of money for goods sold & work done, amounting in the whole to £40, a verdict finding deft. indebted in £30 & *non debet* as to the residue, without finding in which of the particular sums he was indebted to £30 is bad.—**TRESWELL v. MIDDLETON** (1623), Cro. Jac. 653; 79 E. R. 563.

*Annotation*:—**Mentd. Morison v. Thompson** (1874), L. R. 10 Q. B. 480.

submitted did not necessarily involve findings upon the issues between the parties, & upon which deft.'s liability must depend, there should be a new trial.—**THORNE (W. H.) & CO., LTD. v. BUSTIN** (1905), 37 N. B. R. 163.—**CAN.**

### PART VII. SECT. 13, SUB-SECT. 3.—A.

**494 i. Sufficiency—Neglect to find in separate issues.**—**BALFOUR v. TORONTO RY. CO.** (1901), 5 O. L. R. 735; 23 C. L. T. 241; 2 O. W. R. 671.—**CAN.**

t. *Answers to questions submitted not unanimous—Unanimous general*

*verdict—Whether sufficient.*—(**HESEMAN v. HATHWAY** (1883), 23 N. B. R. 415.—**CAN.**

a. *Jury finding answers to questions—and returning general verdict—Effect of.*—Where a jury, besides returning answers to the questions put to them, of their own accord, stated that they were all for a verdict for *pltf.*:—*Held*: a general verdict, in addition to special findings, imports a finding in favour of the party for whom it is given on every fact in issue necessary to sustain it, besides the facts specially found.—**HARPER v. CAMERON**

**495. Verdict for part of claim—Whether good—Debt for several sums.**—**TRESWELL v. MIDDLETON**, No. 494, *ante*.

**496.** ——— **Debt of one sum.**—In debt on bond for £300 & *nil debet* pleaded, a verdict of *nil debet* for £200 & *debet* for £100 is good.—**HADLEY v. STYLES** (1710), 10 Mod. Rep. 7; 2 Salk. 664; 88 E. R. 599.

**497. Special verdict found after general verdict.**—The ct. will judge from the special matter found by a jury, although they first find a general verdict according to the issue.—**HELIER v. BENHURST HUNDRED** (1631), Cro. Car. 211; 79 E. R. 785.

*Annotations*:—**Mentd. Talbot v. Hubble** (1740), 7 Mod. Rep. 326; **Griffith v. Walker** (1752), 1 Wils. 336; **R. v. Stainforth** (1847), 11 Q. B. 63.

**498. Where several defendants—Verdict against some & in favour of others.**—In an action on the case in the K. B. against ten defts., *pltf.* declared that, before & at the time of the grievances complained of, they were proprietors of a stage coach for the conveyance of passengers for hire from A. to B., & that being so, they received *pltf.* as an outside passenger, to be safely conveyed thereon from A. to B., for hire to them in that behalf; & that by reason thereof they ought to have safely conveyed him accordingly; & assigned for breach that they conducted themselves so carelessly in this behalf, that by & through the carelessness, unskillfulness & default of themselves & their servants, the coach was upset; by means whereof *pltf.* was hurt, & sustained other injuries. A jury having found a verdict against eight of defts. only, & in favour of the other two, & judgment being entered accordingly:—*Held*: as the action was founded upon a breach of duty imposed by the custom of the realm, which was a breach of the law, & as the declaration was framed on a misfeasance, such verdict & judgment were not erroneous, & they were therefore affirmed in the Exchequer Chamber, in error.—**BRETHERTON v. WOOD** (1821), 3 Brod. & Bing. 54; 9 Price, 408; 6 Moore, C. P. 141; 129 E. R. 1203, Ex. Ch. *Annotations*:—**Folld. Pozzi v. Shipton** (1838), 8 Ad. & El. 963. **Mentd. Leslie v. Wilson** (1821), 6 Moore, C. P. 415; **Burnett v. Lynch** (1826), 5 B. & C. 589; **Wylde v. Pickford** (1841), 8 M. & W. 443; **Marshall v. York, Newcastle & Berwick Ry.** (1851), 21 L. J. C. P. 31; **Legge v. Tucker** (1856), 1 H. & N. 500; **Taitan v. G. W. Ry.** (1860), 29 L. J. Q. B. 184; **Alton v. Mid. Ry.** (1865), 19 C. B. N. S. 213; **Readhead v. Mid. Ry.** (1867), L. R. 2 Q. B. 412; **Clarke v. West Ham Corpn.**, [1909] 2 K. B. 858.

**499.** ———.] — Declaration stated that *pltf.* delivered to defts., & they accepted & received from him, goods to be taken care of & carried & conveyed by defts. from L. to B. & there delivered to P. for *pltf.*, for reasonable reward to defts. in that behalf, & thereupon it became the duty of defts. to take due care of such goods while they so had the charge thereof for the purpose aforesaid, & to take due & reasonable care in & about the conveyance & delivery thereof as aforesaid; yet defts., not regarding their duty in that behalf,

(1893), 2 B. C. R. 365.—**CAN.**

b. *What amounts to general verdict.*—Where a jury make special findings & also find damages, this is equivalent to a general verdict for *pltf.*, supplementing the special findings & importing such as are necessary to a general verdict.—**SCOTT v. BRITISH COLUMBIA MILLING CO.** (1894), 3 B. C. R. 221.—**CAN.**

c. *Right to return.*—**STEVES v. SOUTH VANCOUVER DISTRICT CORPN.** (1897), 6 B. C. R. 17.—**CAN.**

d. *Right to demand.*—If either party asks that the jury return a

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**(a) & (b).]**

but contriving, etc., did not nor would take due care, etc., but on the contrary, whilst they had the charge, etc., took such bad care, etc., that the goods were injured, to pltf.'s damage, etc. Pleas, Not Guilty, & traverse of the delivery & acceptance *modo et formâ*. On the trial, pltf. gave no proof of an express contract, but endeavoured to show that defts. were common carriers. No objection was taken to the course of evidence. The case was proved as to one deft. only, who was shown to be a common carrier, & a verdict was taken against him & for other deft. On motion to enter a nonsuit, on the ground that the action was founded in contract, & therefore a verdict could not pass against one deft. only:—**Held:** the declaration might, & therefore must after verdict, be read as a declaration against carriers on the custom of the realm, & consequently the verdict was maintainable.

**Qu.:** whether such declaration against carriers on the custom would have been sufficient on special demurrer.—**POZZI v. SHIPTON** (1838), 8 Ad. & El. 963; 1 Per. & Dav. 4; 1 Will. Woll. & H. 624; 8 L. J. Q. B. 1; 112 E. R. 1106.

**Annotations:—Mentd.** Wyld v. Pickford (1841), 8 M. & W. 443; Marshall v. York, Newcastle & Berwick Ry. (1851), 11 C. B. 655; Tattan v. G. W. Ry. (1860), 2 E. & E. 844; Foulkes v. Met. Dist. Ry. (1879), 4 C. P. D. 267.

**500. Nominal verdict.—Subject to a reference.—Judgment not entered.]**—Where a nominal verdict is taken subject to a reference, in which the verdict is ultimately to depend upon the award, the ct. cannot make use of such nominal verdict against the opposite party, by allowing judgment to be entered upon it.

I thought that it had been perfectly settled that the ct. has no power to make use of a nominal verdict, taken subject to a reference, against the opposite party, where the verdict is ultimately to depend upon the award. The cases in which pltf's. have been allowed to enter up judgment on the nominal verdict, are where such verdict is taken to secure the damages, the amount of which is the only question referred. Here the actual cause of action was to be decided by the arbitrator, & another action between the parties was included in the reference (**PARKE, B.**).—**BURLEY v. STEPHENS** (1836), 1 M. & W. 156; 4 Dowl. 770; 1 Gale, 374; Tyr. & Gr. 413; 5 L. J. Ex. 92; 150 E. R. 386.

**Annotation:—Mentd.** Newman v. Parbery, Parbery v. Newman (1841), 5 Jur. 175.

**B. Special Verdicts.**

**(a) In General.**

**In criminal matters.]—See CRIMINAL LAW, Vol. XIV., pp. 313 *et seq.***

**501. Definition.]—DAVIES v. LOWNDES, No. 547, *post*.**

**502. —.]—SCALES v. KEY, No. 505, *post*.**

**See, also, No. 510, *post*.**

**503. Whether allowed.—General rule.]—**The jury may give a special verdict upon any issue, as well general as special, & in other actions as well as in assize or trespass, so that the matter

found at large, be pertinent to the point in issue.—**PANEL v. MOOR** (1554), 1 Plowd. 91; 75 E. R. 145.

**Annotation:—Mentd.** Barnett v. Guildford (1855), 11 Exch. 19.

**504. —.]—**In all pleas, as well of the Crown, as in Common Pleas, viz. actions, real, personal, & mixed, & upon all issues joined, either between the King and the party, or between party & party, the jury may find the special matter which is pertinent, & tends only to the issue joined; & upon the law of such matter they may pray the opinion of the ct. But if jurors find matter at large which is not within their charge, & which is not pertinent to the issue joined, the ct. may disallow the verdict.—**DOWMAN'S CASE** (1586), 9 Co. Rep. 7 b; 77 E. R. 743.

**Annotations:—Refd.** R. v. Bewdley (Baillif & Burgesses) (1712), 1 P. Wms. 207. **Mentd.** R. v. Hampden (1637), 3 State, Tr. 826; Manby v. Scot (1661), 1 Keb. 80; Dixon v. Harrison (1670), Vaugh. 36; Wigon v. Garret (1675), 3 Keb. 536; Tregany v. Fletcher (1696), 1 Ld. Raym. 154; Jones v. Mosely (1697), 1 Com. 29; Bushell v. Burland (1708), Holt, K. B. 733; Altham v. Anglessea (1709), 11 Mod. Rep. 210; Martin d. Tregonwell v. Strachan (1743), 5 Term Rep. 107, n.; Hewlins v. Shippam (1826), 5 B. & C. 221.

**505. —.]—**Where the return to a *mandamus* to admit an alderman of the City of London stated an immemorial custom for the court of the mayor & aldermen to determine whether a person elected alderman was, according to their discretion & conscience, a fit & proper person duly qualified, on traverse of the custom, the jury found that the custom had existed from time immemorial down to 1689:—**Held:** (1) this finding amounted to a verdict that the custom still existed: (2) although the jury might find an issue in special terms, the parties were not entitled to have it entered as a special verdict, unless disputed questions of law were raised by the finding.

If facts are stated by the jury to raise a question of law on the record, that is a special verdict: but it does not follow, merely because a jury choose to return their verdict only in particular words, instead of saying *aye* or *no*, that the verdict is a special one (**PATTESON, J.**).—**SCALES v. KEY** (1840), 11 Ad. & El. 819; 3 Per. & Dav. 505; 113 E. R. 625.

**506. — After general verdict.]—**The indorsement of the special finding of the jury, made by the officer of the ct. on the back of the *Nisi Prius* record, will not be treated by the ct. above as the *postea*, on a motion for a new trial, no application to have the facts found specially & the finding stated on the record having been made at the trial until after the jury had delivered their verdict:—**Semble:** it is too late to apply to have the facts found specially after the jury have given their verdict.—**BAIRD v. HODGES** (1840), 18 L. J. Ex. 435.

**507. Discretion of court to advise.—When exercised.]—**The ct. will not advise a special verdict in a clear case.—**THORNTON v. LYSTER** (1638), Cro. Car. 514; 79 E. R. 1044.

**508. — Whether jury bound to comply.]—**It is the privilege of a jury to decline finding any other than a general verdict; & therefore, if the judge explains to them, & they clearly understand,

general verdict, then the jury must do so unless they are unable to agree.—**MACLEOD v. McLAUGHLIN** (1907), 13 B. C. R. 16.—**CAN.**

**c. Juries in county courts.]—****Qu.:** whether juries, in cases in the County Cts. other than those mentioned in 43 Vict. c. 2, s. 55, should be instructed to give general verdicts, & whether the proper procedure is not to obtain their findings on the con-

troverted facts which the judge deems it proper to submit to them, after which the judgment in the cause should be given by the judge irrespective of the jury.—**ANDREWS v. LANDERS** (1883), 16 N. S. R. (4 R. & G.) 236.—**CAN.**

**f. —.]—RHODES v. PATRICK** (1885), 18 N. S. R. (6 R. & G.) 233.—**CAN.**

**PART VII. SECT. 13, SUB-SECT. 3.—**  
**B. (a).**

**g. Where inconsistent with general verdict.]—**Where a jury sees fit to answer specific questions, its findings thereon cannot be ignored, & if inconsistent with the general verdict, the latter cannot be sustained, & the judgment must be set aside. — One warranted when it is taken as a whole together with specific answers.—



that, in the absence of a particular fact, *pltf.*'s right to recover will depend on a doubtful legal question, & the judge requests them to find that *pltf.* generally, & on being pressed, refuse to find the particular fact, the *ct.* will not set aside the verdict.—*DEVIZES CORPN. v. CLARK* (1835), 3 *Ad. & El.* 506; 111 *E. R.* 506.

509. ———.]—*ROUPELL v. HAWS* (1863), 3 *F. & F.* 784.

510. What amounts to.]—Where, in an action of trespass to a fishery, the jury find de<sup>ft</sup>. justified on one issue, & state the right under which they found him justified, such a finding may be treated as a special verdict.—*BENETT v. COSTAR* (1818), 8 *Taunt.* 183; 2 *Moore, C. P.* 83; 129 *E. R.* 353.

See, also, No. 505, *ante*.

511. Verdict special as to part—Must be certain.]—In ejectment if the verdict find "not guilty," as to part, & "specially" as to the residue, without stating what the residue was, it is bad.—*WOOLMER v. CASTON* (1606), *Cro. Jac.* 113; 79 *E. R.* 98.

512. Must find the facts.]—*ANON.* (1567), *Jenk.* 232; 145 *E. R.* 162; *sub nom.* *TEMPLE v. COOKE & WOTTON*, 3 *Dyer*, 265 b.

Annotations:—*Refd.* *Jones v. Tapling* (1862), 12 *C. B. N. S.* 826. *Mentd.* *Delacherois v. Delacherois* (1864), 4 *New Rep.* 501.

513. — Not leave court to infer them.]—This special verdict does not find as a fact that a copy of the bill of sale was not delivered to the proper officer: it states a circumstance of evidence from which the jury might infer it, but facts, not evidence, ought to be stated in a special verdict (*WOOD, B.*)—*HUBBARD v. JOHNSTONE* (1810), 3 *Taunt.* 177; 128 *E. R.* 71.

Annotations:—*Mentd.* *Palmer v. Moxon* (1813), 2 *M. & S.* 43; *Ritchie v. St. Barbe* (1813), 4 *Taunt.* 768; *Richardson v. Campbell* (1821), 5 *B. & Ald.* 196.

514. ———.]—Upon a special verdict, the *ct.* of error cannot draw, from other statements contained therein, any inferences of facts necessary to the determination of the case; such facts must be expressly found one way or the other, & if they be not, the *ct.* will award a *verdict de novo*.—*TANCRED v. CHRISTY* (1843), 12 *M. & W.* 316; 2 *L. T. O. S.* 190; 152 *E. R.* 1219.

Annotation:—*Refd.* *Draper v. Crofts* (1846), 15 *M. & W.* 166.

515. ———.]—Though allowance is to be made for the technical difference of the proceedings in the *cts.* of Canada & those of England, yet where trial by jury prevails, a special verdict ought to be the finding of facts, by the jury, from which the *ct.* is to pronounce its judgment on the law, & the verdict ought not to leave facts to the *ct.* to draw an inference; such as, whether negligence has or not been established; negligence being a question of fact & not of law.—*TOBIN v. MURISON* (1845), 5 *Moc. P. C. C.* 110; 9 *Jur.* 907; 13 *E. R.* 431, *P. C.*

516. ———.]—A special verdict must find the facts, & not consist of a mere statement of evidence.—*FRYER v. ROE* (1852), 12 *C. B.* 437; 138 *E. R.* 977.

See, also, Sub-sect. 3, *C.*, *post*.

517. Form.]—*SHREWSBURY'S (EARL) CASE*, No. 529, *post*.

518. Effect of—Finding as to contents of deed—Finding inaccurate.]—*ROWE v. HUNTINGTON* (1670), *VAUGH.* 66; 124 *E. R.* 973.

*BANK OF TORONTO v. HARRELL*, [1917] 2 *W. W. R.* 1149.—*CAN.*

PART VII. SECT. 13, SUB-SECT. 3.—*B. (b).*

*h. Construction to be reasonable.*—

In construing a jury's verdict, consisting of a number of answers, the whole verdict must be taken together & construed reasonably, regard being had to the course of the trial.—*MARSHALL v. CATES* (1903), 10 *B. C. R.*

519. ———.]—*SCALES v. KEY*, No. 505, *ante*.

520. — On appeal.]—We, sitting as a *ct.* of error, are, upon well recognised principles of law, strictly restrained to the facts found by the jury & stated in the special verdict (*per CUR.*)—*DOWNMAN v. WILLIAMS* (1845), as reported in 7 *Q. B.* 103; 115 *E. R.* 427, *Ex. Ch.*; *reversg. S. C. sub nom.* *JONES v. DOWNMAN* (1842), 4 *Q. B.* 235, *n.*

Annotations:—*Mentd.* *Jenkins v. Hutchinson* (1849), 13 *Q. B.* 744; *Carr v. Jackson* (1852), 7 *Exch.* 382; *Lewis v. Nicholson* (1852), 18 *Q. B.* 503; *Bull v. Chapman* (1853), 8 *Exch.* 444; *Thol v. Leask* (1855), 1 *Jur. N. S.* 117; *Cooke v. Wilson* (1856), 26 *L. J. C. P.* 15; *Collen v. Wright* (1857), 8 *E. & B.* 647; *Allaway v. Dunoon* (1867), 16 *L. T.* 264; *Cherry & McDougall v. Colonial Bank of Australasia* (1869), *L. R.* 3 *P. C.* 24; *Palce v. Walker* (1870), 22 *L. T.* 547; *Herald v. Connah* (1876), 40 *J. P.* 567.

Imperfect verdicts.]—See Sub-sect. 3, *C.*, *post*.

(b) Interpretation by Court.

521. Construction to be liberal.]—*THOMASON v. MACKWORTH* (1666), *O. Bridg.* 502; *Cart.* 75; 124 *E. R.* 713.

Annotations:—*Refd.* *Bank of England v. Morrice* (1736), *Lee temp. Hard.* 219. *Mentd.* *Re Stroud & East & West India Docks & Birmingham Junction Ry.* (1849), 19 *L. J. C. P.* 117.

522. Power of court to supply fact not expressly found—Matter not in doubt.]—*ALLEN v. HILL* (1591), *Cro. Eliz.* 238; 78 *E. R.* 493.

Annotation:—*Mentd.* *Butler v. Duckinonton* (1607), 1 *Brownl.* 207.

523. ———.]—If a special verdict on a mixed question of fact & law, find facts from which the *ct.* can draw clear conclusions it is no objection to the verdict that the jury have not themselves drawn such conclusions, & stated them as facts in the case.—*MONKHOUSE v. HAY* (1820), 2 *Brod. & Bing.* 114; 8 *Price*, 256; 4 *Moore, C. P.* 549; 146 *E. R.* 1195, *Ex. Ch.*

Annotations:—*Mentd.* *Kirkley v. Hodgson* (1823), 1 *B. & C.* 588; *Re Dantol, Ex p. Ashby* (1855), 25 *L. T. O. S.* 188.

524. — Not inconsistent with facts found.]—A. being found by special verdict to be the son of B. & none other found to be his heir:—*Held*: he may be well intended to be the son & heir of B.—*LYNCH v. SPENCER* (1596), *Cro. Eliz.* 513; 78 *E. R.* 762.

Annotation:—*Mentd.* *Miles v. Keyes* (1731), *Fitz. G.* 90, 290.

525. ———.]—A fact omitted in a special verdict supplied by implication.—*PARMAN v. HOWYER* (1598), *Cro. Eliz.* 609; 78 *E. R.* 907.

526. ———.]—I grant that a verdict may be taken by a reasonable intendment though the words be unperfect. Where a special verdict concludes their doubt upon some special point that the *ct.* shall doubt of no more, but allow all other points, though there be some defect (*HOBART, C.J.*)—*DUNCOMBE v. WINGFIELD* (1618), *Hob.* 254; 80 *E. R.* 400.

Annotations:—*Refd.* *King v. Dilliston* (1688), 1 *Show.* 83; *Witham v. Lewis* (1744), 1 *Wils.* 48. *Mentd.* *Wakeman v. Blackwell* (1676), 1 *Mod. Rep.* 218; *Symonds v. Cudmore* (1692), *Carth.* 257; *Goodright d. Roffe v. Harwood* (1773), *Lofft*, 282; *Corner v. Shew (Executor of Lewis)* (1838), 2 *Jur.* 761; *Woodroffe v. Doe d. Dantell* (1846), 15 *M. & W.* 769; *Re Airey, Airey v. Stapleton*, [1897] 1 *Ch.* 164.

527. — Necessary circumstances.]—In a special verdict, incident & necessary circumstances shall be intended.—*FARCHILD v. GAYRE* (1605), *Cro. Jac.* 63; 79 *E. R.* 53.

Annotations:—*Mentd.* *R. v. Patrick* (1667), 2 *Keb.* 164;

153.—*CAN.*

*k. Conflicting finding may be rejected—Where incoherent or unreasonable.*—An answer of a jury to a question submitted may be rejected as



**Sect. 13.—Giving a verdict: Sub-sect. 3, B. (b) & (c), & C.; sub-sect. 4.]**

Phillips v. Bury (1694), Holt, K. B. 715; R. v. London (Bp.) (1694), 1 Show. 493; Rennell v. Lincoln (Bp.) (1827), 7 B. & C. 113.

**528.** ———.]—In a special verdict, all necessary circumstances shall be intended.—**MOLINEUX v. MOLINEUX** (1607), Cro. Jac. 144; 79 E. R. 126.

**Annotations:—***Reid*. R. v. Hoare (1817), 6 M. & S. 266. *Mentd.* Bowman v. Milbanke (1864), 1 Sld. 191; Grange v. Tiving (1665), O. Bridg. 107; Fry's Case (1672), 1 Vent. 199; Williams v. Fry (1672), 3 Keb. 19; Thomas v. Sorrel (1673), 3 Keb. 233; Winsford v. Smith (1691), 1 Show. 350.

**529.** ———.]—The jury having found in a special verdict that S. was the deputy of the grantee of an office, it shall be intended that the deputy was made by deed as he ought to be. It being also found in a special verdict, that such an one came to the town of M. to the usual place of holding the ct. of the manor, it shall be intended that the town is within the manor; for in special verdicts the law does not require such precise form as it requires in pleading.—**SHREWSBURY'S (EARL) CASE** (1610), 9 Co. Rep. 46 b; 77 E. R. 798.

**Annotations:—***Reid*. Foster v. Jackson (1615), Hob. 52; Lyn v. Wyn (1665), O. Bridg. 122; Hunt v. Burne (1702), 1 Com. 124. *Mentd.* Sury v. Pigot (1626), Poph. 166; Tyffyn v. Wingfield (1633), Cro. Car. 325; Holmes' Case (1634), Cro. Car. 376; Ashley Cooper v. St. John (1648), Sty. 130; R. v. Knollys (1693), 1 Ld. Raym. 10; R. v. Larwood (1694), 1 Salk. 107; R. v. Kemp (1695), Comb. 334; Keeble v. Hickeringill (1706), Holt, K. B. 14; R. v. Ipswich Bailiffs (1706), 2 Ld. Raym. 1232; Peak v. Bourne (1732), 2 Stra. 942; R. v. Ponsonby (1755), 1 Keny. 1; R. v. Wells (1767), 4 Burr. 1998; Hambly v. Trotter (1776), 1 Cowp. 371; Rafael v. Verelst (1776), 28 Wm. Bl. 1055; Doe d. Devine v. Wilson (1855), 10 Moo. P. C. C. 502.

**530.** ———.]—In ejectment, on a special verdict, if the jury submit a particular point to the ct., the ct. will intend every thing that is necessary to their giving judgment.—**CASTLE v. HOBBS** (1625), Cro. Car. 21; 79 E. R. 623.

**(c) Guilty but Insane.**

See CRIMINAL LAW, Vol. XIV., p. 324.

**C. Imperfect Verdicts.**

**531. Omission to find a necessary fact.]**—A special verdict in which the jury have omitted to find a necessary fact, is bad.—**BATEMAN v. ALLEN** (1595), Cro. Eliz. 437; 78 E. R. 678.

**Annotation:—***Mentd.* Giles v. Wiscot (1599), 2 Co. Rep. 60.

**532. — Damages.]**—On the trial of an issue joined upon a *mandamus*, the jury find a special verdict as to the facts, but omit to find damages or costs. This verdict is imperfect, & therefore no judgment ought to be given upon it, but a *venire facias de novo* should be awarded.—**SHREWSBURY TOWN v. KYNASTON** (1737), 7 Bro. Parl. Cas. 396; 3 E. R. 258; *sub nom.* KYNASTON v. SHREWSBURY CORPN., 2 Stra. 1051, II. L.

**Annotations:—***Reid*. R. v. Liverpool Corpn. (1759), 2 Burr. 723; Harwood v. Goodright (1773), Loft. 558; Clement v. Lewis (1822), 10 Price, 181; R. v. London Corpn. (1832), 3 B. & Ad. 255; R. v. Fall (1841), 1 Q. B. 636.

**533.** ———.]—**DOE d. BIRTWHISTLE v. VARDILL** (1835), 9 Bli. N. S. 32; 5 E. R. 1207.

**Annotations:—***Mentd.* Doe d. Birtwhistle v. Vardill (1840), 1 Scott, N. R. 828; Re Wright's Trust (1856), 2 K. & J. 595; Re Don's Estate (1857), 4 Drew. 194; Fenton v. Livingstone (1859), 33 L. T. O. S. 335; Shaw v. Gould (1868), L. R. 3 H. L. 55; Skottowe v. Young (1871), 40 L. J. Ch. 366; Harvey v. Farnie (1880), 6 P. D. 35; Re

Goodman's Trusts (1881), 17 Ch. D. 266; Re Andros, Andros v. Andros (1883), 24 Ch. D. 637; Escallier v. Escallier (1885), 10 App. Cas. 312; Re Grey's Trusts, Grey v. Stamford, [1892] 3 Ch. 88.

**534.** ———.]—**BIRD v. APPLETON** (1800), 1 East, 111, n.; 102 E. R. 45.

**Annotations:—***Reid*. Worcestershire Canal Co. v. Trent Navigation Co. (1816), 2 Marsh. 475; Dadd v. Crease (1833), 2 Cr. & M. 223; Brown v. Clarke (1843), 12 M. & W. 25.

**Power of court to supply.]—**See Nos. 522–530, *ante*.

**535. Misstatement of fact—Misstatement immaterial.]**—Although a special verdict misstates a fact, yet if the misstatement does not affect the merits of the cause, & the correcting it would let in a frivolous objection, it shall not be altered. After a fact has once been judicially tried & ascertained, a party to the proceedings is estopped from denying its truth. If a *sci. fa.* is brought upon a judgment, & the issue of *nul tiel* record thereon found for the pltf., the record of the proceedings in the *sci. fa.* is conclusive evidence against deft. in the *sci. fa.* of the original judgment. In an ejectment upon an elegit if the jury find a special verdict stating a judgment, a *sci. fa.*, an issue of *nul tiel* record, a judgment thereon for the lessor of pltf., & an elegit, a variance between the judgment stated in the *sci. fa.*, & the original judgment stated in the verdict, shall not preclude the lessor of pltf. from having judgment.—**TREVIVAN v. LAWRENCE** (1704), 2 Ld. Raym. 1036, 1048; Holt, K. B. 282; 6 Mod. Rep. 256; 1 Salk. 276; 92 E. R. 188.

**Annotations:—***Reid*. Wright v. Kitchingham (1719), 1 Stra. 197; Palmer v. Ekins (1728), 2 Ld. Raym. 1550; Goodtitle v. Morse (1789), 3 Term Rep. 365; Doe d. Lushington v. Llandaff (Bp.) (1807), 2 Bos. & P. N. R. 491; Taylor v. Needham (1810), 2 Taunt. 278; Vooght v. Winch (1819), 2 B. & Ald. 662; Stafford v. Clark (1824), 9 Moore, C. P. 724; Doe d. Christmas v. Oliver (1829), 10 B. & C. 181; Right d. Jeffery v. Bucknell (1831), 2 B. & Ad. 278; Magrath v. Hardy (1838), 4 Bing. N. C. 782; Sievers v. Boswell (1841), 3 Man. & G. 524; Doe d. Downe v. Thompson, Downe v. Thompson (1847), 9 Q. B. 1037; Doe v. Wellsman (1848), 2 Exch. 368; Freeman v. Cooke (1848), 6 Dow. & L. 187; Litchfield v. Ready (1850), 5 Exch. 939; R. v. Blakenmore (1852), 5 Cox, C. C. 513; Feversham v. Emerson (1855), 11 Exch. 385; Rowbotham v. Wilson (1860), 8 H. L. Cas. 348.

**536.** ———.]—**DOE d. BIRTWHISTLE v. VARDILL** (1835), 9 Bli. N. S. 32; 5 E. R. 1207.

**Annotations:—***Mentd.* Doe d. Birtwhistle v. Vardill (1840), 1 Scott, N. R. 828; Re Wright's Trust (1856), 2 K. & J. 595; Re Don's Estate (1857), 4 Drew. 194; Fenton v. Livingstone (1859), 33 L. T. O. S. 335; Shaw v. Gould (1868), L. R. 3 H. L. 55; Skottowe v. Young (1871), 40 L. J. Ch. 366; Harvey v. Farnie (1880), 6 P. D. 35; Re Goodman's Trusts (1881), 17 Ch. D. 266; Re Andros, Andros v. Andros (1883), 24 Ch. D. 637; Escallier v. Escallier (1885), 10 App. Cas. 312; Re Grey's Trusts, Grey v. Stamford, [1892] 3 Ch. 88.

**537. Question of law referred to court.]—***Indebitatus assumpsit* for freight payable by deft. to pltf. for the carriage of certain goods on board pltf.'s vessel, at deft.'s request, & for work & labour etc. A special verdict found that by memorandum of charter party the ship was chartered for a voyage from a foreign port to London, to load at the foreign port a cargo, & to deliver the same at London on payment of a specified freight. That the ship received on board a cargo under a bill of lading, by which the goods were made deliverable to the shipper or his assigns, he or they paying freight for the same as *per* charter-party:—*Held*: the special verdict was not defective, so as to call for a *venire de novo*, as the facts were formed without ambiguity, & the question referred by the verdict was not one of fact, but a question of

insensible or at unreasonable variance with the other answers.—**NETTLETON v. PRESCOTT MUNICIPAL CORPN.** (1907), 16 O. L. R. 538; 11 O. W. R. 639.

—CAN.

**PART VII. SECT. 13, SUB-SECT. 3.—C.**  
**531.. Omission to find a necessary**

**fact.]—****LODGE v. JENNINGS** (1714–1727), Glib. Ch. 255; 25 E. R. 176.—**IR.**

law, whether upon the facts a contract was implied by law.—**SANDERS v. VANZELLER** (1843), 4 Q. B. 260; 3 Gal. & Dav. 580; 12 L. J. Ex. 497; 114 E. R. 897, Ex. Ch.

**Annotations:—Mentd.** *Thompson v. Dornay* (1845), 14 M. & W. 403; *Kemp v. Clark* (1848), 12 Q. B. 647; *Wegener v. Smith* (1854), 15 C. B. 285; *Zwischenbart v. Henderson* (1854), 9 Exch. 722; *Smith v. Sieveking* (1855), 5 E. & B. 589; *Young v. Moeller* (1855), 5 E. & B. 755; *Frickett v. Badger* (1856), 1 C. B. N. S. 296; *Chappell v. Comfort* (1861), 31 L. J. C. P. 58; *Fry v. Chartered Mercantile Bank of India* (1866), L. R. 1 C. P. 689; *Furness, Withy v. White*, [1894] 1 Q. B. 483; *White v. Furness, Withy*, [1895] A. C. 40; *Brandt v. Liverpool, Brazil & River Plate Steam Navigation Co.*, [1924] 1 K. B. 575.

**538. Effect of—Ground for new trial.]—Cook v. LANEDAY**, No. 484, ante.

**539. ———.]—A venire facias de novo can only be granted in one or other of these two cases; if it appear upon the face of the verdict that the verdict is so imperfect that no judgment can be given upon it & where it appears that the jury ought to have found other facts differently (WILES, C.J.).—WITHAM v. LEWIS d. DERBY (EARL)** (1744), 6 Bro. Parl. Cas. 327; 2 Stra. 1185; 1 Wils. 48; 2 E. R. 1111, H. L.

**Annotations:—Consd.** *Goodright d. Burton v. Rigby* (1793), 5 Term Rep. 177; *Bank of Ireland v. Evans' Charities in Ireland, Trustees* (1855), 5 H. L. Cas. 389. **Reid.** *Corner v. Shew* (1838), 1 Horn. & H. 215; *Gee v. Swann* (1842), 6 Jur. 538.

**Verdict must comprehend the whole issue.]—See Sub-sect. 2, ante.**

#### SUB-SECT. 4.—SURPLUSAGE.

**540. General rule.]—Surplusage in a verdict rejected.—ANON.** (1705), 11 Mod. Rep. 64; 88 E. R. 889.

**541. After direct verdict—Subsequent additions disregarded.]—If a direct verdict be found, a subsequent finding shall be rejected as surplusage.—HENNINGS v. PAUCHARD** (1607), Cro. Jac. 153; 79 E. R. 134.

**Annotation:—Mentd.** *Roe d. Heale v. Rashleigh* (1819), 3 B. & Ald. 156.

**542. ———.]—A verdict in replevin finding the special matter as the avowant had pleaded, is good; & subsequent matter shall be rejected as surplusage. If the jury find a direct verdict, uncertain or contradictory matter afterwards added shall be rejected as surplusage.—EVE v. WRIGHT** (1627), Cro. Car. 75; 79 E. R. 667.

**Annotation:—Reid.** *Tonkin v. Croker* (1703), 2 Ld. Raym. 860.

**543. ———.]—Subsequent declaration of the jury shall not vitiate a general verdict, given according to the merits of the case.—CLARK v. STEVENSON** (1772), 2 Wm. Bl. 803; 96 E. R. 473.

**544. Special matter—Not part of charge to jury.]—The special matter found by the jury is not parcel of their charge, & shall not be regarded.—PRIDDLE & NAPPER'S CASE** (1612), 11 Co. Rep. 8b; 77 E. R. 1155.

**Annotations:—Mentd.** *Parkins v. Hinde* (1589), Cro. Eliz. 161; *Wright v. Gerrard* (1618), Hob. 306; *Sydowne v. Holme* (1635), Cro. Car. 422; *Custodes v. Rickabye* (1653), Sty. 375; *R. v. Griep* (1696), 1 Ld. Raym. 258; *Beal v. Simpson* (1697), 1 Ld. Raym. 408; *Bury St. Edmund Corp'n. v. Evans* (1739), 2 Com. 643; *Chapman v. Gatonbe* (1836), 2 Blng. N. C. 516; *Doe d. Devine v. Wilson* (1835), 10 Moo. P. C. C. 502.

**545. ———.]—TAYLOR v. WILLES**, No. 552, post.

**546. ———.]—In trover for goods, the evidence was conflicting as to whether they came to deft.'s hands as a gift or as a loan. The jury returned a verdict for pltf., accompanying it with a statement in writing that they thought the goods ought to have been returned whether they were sent as a gift or a loan. The associate refused to receive this statement, but entered the verdict for pltf.:—Held: he did right, the statement being a mere expression of opinion as to what would have been honourable under the circumstances, & not amounting to a special finding.—WHITTETT v. BRADFORD** (1838), 5 Scott, 711.

**547. ———.]—On a trial of a writ of right, in which the mise was joined on the mere right, the ct. left three matters of fact to the grand assize; first, whether the female demandant had made out her pedigree; secondly, whether at the time of the levying of a fine, the conusor had an estate of freehold in the premises on which the fine could operate; & thirdly, whether he was then known by the name "William Selby" in which the fine was levied. The grand assize found a general verdict for the tenant, & delivered in a written statement in the following terms: "It is the unanimous verdict of the grand assize that demandant has not made out her pedigree; that the conusor had entered into, & was in the actual possession of, the estates devised by the will of T. J. Selby, before & at the time of the levying of the fine in 1784; & that he had taken & used, & was then known by, the name of William Selby":—Held: the written statement could not be introduced into a bill of exceptions, tendered on the part of demandant to the ruling of the ct. on the foregoing questions of fact, the statement being the opinion of the jury on points preliminary to their verdict, which points they were not called upon by law to find.**

A special verdict is when the jury find the special matter & therefrom pray the discretion of the ct. (**TINDAL, C.J.**).—**DAVIES v. LOWNDES** (1840), 1 Man. & G. 473; 1 Scott, N. R. 328; 133 E. R. 418.

**548. ——— Construction of written instrument.]—Where a jury add to their finding of facts a finding as to their construction of a written instrument, the latter may be treated as surplusage.—BEACON LIFE & FIRE ASSURANCE CO. v. GIBB** (1862), 1 Moo. P. C. C. N. S. 73; 7 L. T. 574; 9 Jur. N. S. 185; 11 W. R. 194; 1 Mar. L. C. 269; 15 E. R. 630, P. C.

**Annotation:—Mentd.** *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

**549. ——— Inconsistent with general verdict.]—In assumpsit the day upon which the promise is laid in the declaration is not material; & if the jury find a general verdict according to the issue, & a special matter against it, the special matter is void.—INKERSALLS v. SAMMS** (1628), Cro. Car. 130; 79 E. R. 715; *sub nom.* **INGORSHALL v. SAMMS**, W. Jo. 192.

**550. ———.]—On an information for perjury tried at bar, if the jury, believing the oath to have been falsely sworn, & not intending to find for deft., bring in a verdict, "guilty of perjury, not of wilful & corrupt perjury;" & on being told by the ct. that the verdict was repugnant, & could not be recorded, they find a verdict "guilty" generally, but saying, at the same time,**

**538 i. Effect of—Ground for new trial.]—NIGHTINGALE v. UNION COLLIERY CO.** (1901), 8 B. C. R. 134.—CAN.

**1. Inconsistent answers of jury—Answers indicating uncertainty.]—**

Where certain findings of the jury were against the weight of evidence, & where their answers to questions submitted to them were inconsistent & varying, & pointed to confusion & uncertainty in their minds indicating

a failure to understand the effect or result of the answers so given, a new trial was granted.—**FREDERICTON MOTOR SALES, LTD. v. ASHBURNHAM (EARL)** (1920), 48 N. B. R. 171; 55 D. L. R. 453.—CAN.

**Sect. 13.—Giving a verdict: Sub-sects. 4, 5, 6 & 7.**

**Sect. 14.]**

that "some of the jurors were not satisfied that the perjury was wilful & corrupt;" yet the ct. will not grant a new trial on such grounds after a trial at bar.—*R. v. MELLING* (1897), 5 Mod. Rep. 348; *Holt*, K. B. 535; 87 E. R. 698.

**Annotation:—***Reid*, *Smith d. Dormer v. Parkhurst* (1738), *Andr.* 315.

**551. — Statement of reasons.]—**A verdict certified by the judge to be entirely to his satisfaction is never suffered to be impeached, as contrary to evidence, by affidavits; & though the jury state the particular evidence on which they find the fact, yet this is only surplusage, & will not vitiate the verdict.—*PLUNKET v. KINGSLAND* (LORD) (1749), 7 Bro. Parl. Cas. 404; 3 E. R. 263, H. L.

**552. — Mode of liquidation of damages.]—**In *assumpsit* if the jury find for pltf. & assess damages "to be paid for in dyeing," these words shall be rejected as surplusage.—*TAYLOR v. WILLES* (1832), Cro. Car. 219; 79 E. R. 791.

**SUB-SECT. 5.—VERDICT OF NOT GUILTY.**

See CRIMINAL LAW, Vol. XIV., p. 325.

**SUB-SECT. 6.—ASSESSMENT OF DAMAGES.**

**Assessment of damages.]—**See, generally, DAMAGES, Vol. XVII., pp. 156 *et seq.*

**Matrimonial causes.]—**See HUSBAND & WIFE, Vol. XXVII., pp. 452–457.

**Province of jury.]—**See DAMAGES, Vol. XVII., pp. 157, 158, 179, Nos. 579–592, 829, 830.

**Grounds for review of assessment—Misconduct, misdirection or mistake of jury.]—**See DAMAGES, Vol. XVII., pp. 165, 171–174, Nos. 664–666, 722–753.

**Damages excessive.]—**See DAMAGES, Vol. XVII., p. 171, Nos. 717, 718.

**Verdict contrary to judge's direction.]—**See DAMAGES, Vol. XVII., p. 165, No. 660.

**Award such as no reasonable jury could give.]—**See DAMAGES, Vol. XVII., p. 171, Nos. 719–721.

**Damages inadequate.]—**See DAMAGES, Vol. XVII., pp. 176–178, Nos. 784–820.

**Verdict arrived at by compromise.]—**See DAMAGES, Vol. XVII., p. 178, Nos. 821–823.

**SUB-SECT. 7.—PERVERSE VERDICT.**

**553. What constitutes—Issue disregarded.]—**In an action against an infant, an Oxford student, for the hire of horses etc., the jury having, contrary to the opinion of the judge, found for pltf. upon an issue whether they were necessary or not, the ct. granted a new trial without costs.

I think it is impossible for any reasonable person to say, upon the evidence that was given at the trial, that these horses & gigs were necessary for deft. I doubt very much whether the jury thought so. I should rather think they decided upon an impression that the defence was an

ungracious one. The verdict being perverse, the rule for a new trial will be absolute without costs (*MAULE, J.*).—*HARRISON v. FANE* (1840), 1 Man. & G. 550; 1 Scott, N. R. 287; 4 Jur. 508; 133 E. R. 450.

**Annotations:—***Reid*, *Bryant v. Richardson* (1866), 14 L. T. 24; *Ryder v. Wombwell* (1868), L. R. 3 Exch. 90. **Mentd.** *Wharton v. M'Kenzie*, *Cripps v. Hills* (1844), 8 Jur. 466.

**554. — ]—**Whether or not a payment by a trader is made in contemplation of bkpcy., is so much a question of law, that, though two juries have decided it in the negative, the ct., if satisfied that their conclusion is erroneous, will send the cause down to a third trial.

Though the question in this case is one that must be presented to the jury, it is in reality a question of law. It appears to me to be quite evident that the jury upon both occasions permitted themselves to be influenced by that which they conceived to be the honesty of the case (*COLTMAN, J.*).—*GIBSON v. MUSKETT* (1842), 4 Man. & G. 160; 3 Scott, N. R. 427; 11 L. J. C. P. 225; 134 E. R. 66.

**Annotation:—***Reid*, *Aldred v. Constable* (1843), 4 Q. B. 674.

**555. — Verdict contrary to direction on point of law.]—***BUSHELL'S CASE* (1670), *Freem.* K. B. 1; 6 State Tr. 999; *Vaugh.* 135; *T. Jo.* 13; 89 E. R. 2.

**Annotations:—***Reid*, *Grenville v. College of Physicians* (1700), 12 Mod. Rep. 386; *R. v. Chandler* (1700), 1 Ld. Raym. 545; *Smith d. Dormer v. Parkhurst* (1738), *Andr.* 315; *R. v. Shipley* (1784), 4 Doug. K. B. 73; *Crowley's Case* (1818), 2 Swan. 1. **Mentd.** *R. v. Bythell* (1895), 12 Mod. Rep. 74; *R. v. Wyndham* (1716), 1 Stra. 2; *R. v. Cambridge University* (1723), 8 Mod. Rep. 148; *Wood's Case* (1771), 2 Wm. Bl. 745; *Miller v. Scare* (1777), 2 Wm. Bl. 1141; *Burdett v. Abbot* (1811), 14 East, 1; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *Middlesex Sheriff's Case* (1840), 11 Ad. & El. 273; *Watson v. Bodell* (1845), 14 M. & W. 57; *Re Hammond* (1846), 15 L. J. M. C. 136; *Ex p. Newton* (1849), 13 Jur. 606; *Re Fernandez* (1861), 6 H. & N. 717; *Ex p. Fernandez* (1861), 10 C. B. N. S. 3; *Ex p. Pator* (1864), 5 B. & S. 299; *R. v. McMahon* (1875), 13 Cox, C. C. 275; *Scott v. Scott* (1912), 107 L. T. 211.

**556. — ]—**A railway co. contracted with pltf. for the supply, at a certain price, of chalk stone for ballast, to be broken, carted, & stacked to the satisfaction of the co.'s engineer, who was to have full power to stop the work at any time, upon giving due notice. By a second contract between the same parties, the ballast was to be properly screened, also to the engineer's satisfaction, & an increased price was to be paid for it so screened. In an action brought against the co. to recover the price of the work done at increased rate, no evidence was offered by pltf. of its having been screened to the satisfaction of the engineer, who, being called by defts., proved that it was not so. The judge directed the jury, that as, by the contract, it was to be screened to his satisfaction, they should find for defts. The jury having found a verdict for pltf., the ct. granted a new trial. But inasmuch as the verdict did not appear to be so perverse, as to be deliberately, with determination, against the judge's direction, the rule was granted only on payment of the costs of the former trial.—*PARKES v. GREAT WESTERN RY. CO.* (1842), 3 Ry. & Can. Cas. 17; 6 Jur. 628.

**557. — ]—**The jury have not listened to the law, as correctly laid down to them by the under-sheriff; & this is, consequently, a perverse verdict. The rule for a new trial must therefore

the rule for a new trial made absolute.—*WHIREHEAD v. HOWARD* (1874), 9 N. S. R. (3 G. & O.) 458.—CAN.

**555 II. — ]—***McLEAN v. McISAAC* (1885), 18 N. S. R. (6 B. & G.) 304; 6 C. L. T. 453.—CAN.

**PART VII. SECT. 13. SUB-SECT. 7.**

**555 I. What constitutes—Verdict contrary to direction on point of law.]—**The legal rights of the parties were entirely dependent upon an agreement under seal, & the judge presiding at

the trial instructed the jury that under the terms of that agreement, & the facts in proof, there should be a verdict for deft. Nevertheless the jury found for pltf.:—*Held*: as the construction of the agreement was a matter for the ct., the verdict should be set aside, &

be made absolute (PARKE, B.).—**MOULD v. GRIFFITHS** (1844), 8 Jur. 1010.

**558.** ———.]—My definition of a perverse verdict is this: when a jury choose not to take the law from the judge, but will act on their own erroneous view of the law. In such cases, however honest the intentions of the jury may be, their verdict is perverse (POLLOCK, C.B.).—**SAUNDERS v. DAVIES** (1852), 16 Jur. 481.

**559.** ———.]—Distinguished from verdict against evidence.]—A verdict known as "perverse" is one in which the jury have disobeyed the directions of the judge. In that case it would be called a "perverse verdict," & it would be set aside upon grounds wholly different & dissimilar from those which would lead a ct. of review to set aside a verdict as being against evidence, or against the weight of evidence (LORD MORRIS).—**JONES v. SPENCER** (1897), 77 L. T. 536; 14 T. L. R. 41, H. L.; *reversing* S. C. *sub nom.* **SPENCER v. JONES**, 13 T. L. R. 174, C. A.

*Annotations*.—**Reid**, *Sutherland v. Stopes*, [1925] A. C. 47. **Mentd.** *Floyd v. Gibson* (1909), 100 L. T. 761; *Sanatorium*, [1916] 2 K. B. 57.

**560.** ———.]—Verdict against weight of evidence.]—In discharging the verdict of a jury, the ct. must be satisfied that there is such a preponderance of evidence against it as to make it unreasonable & almost perverse that the jury, when instructed and properly assisted by the judge, should have returned it.—**COX v. ENGLISH, SCOTTISH & AUSTRALIAN BANK**, [1905] A. C. 168; 74 L. J. P. C. 62; 92 L. T. 483, P. C.

*Annotation*.—**Reid**, *Neville v. London Express Newspaper* (1917), 33 T. L. R. 409.

As ground for new trial.]—*See* PRACTICE.

**561.** Whether jury punishable.]—Petit jurors are not finable for giving a verdict contrary to the evidence & the direction of the ct.—**BUSHELL'S CASE** (1670), *Freem.* K. B. 1; 6 State Tr. 999; *Vaugh.* 135; T. Jo. 13; 89 E. R. 2.

*Annotations*.—**Reid**, *Grenville v. College of Physicians* (1700), 12 Mod. Rep. 386; *R. v. Chandler* (1700), 1 Ld. Raym. 545; *R. v. Shipley* (1784), 4 Doug. K. B. 73; *Ex p. Pater* (1864), 5 B. & S. 299. **Mentd.** *R. v. Bythell* (1695), 12 Mod. Rep. 74; *R. v. Wyndham* (1716), 1 Stra. 2; *R. v. Cambridge University* (1723), 8 Mod. Rep. 148; *Smith d. Dormer v. Parkhurst* (1738), *Andr.* 315; *Wood's Case* (1771), 2 Wm. Bl. 745; *Miller v. Seare* (1777), 2 Wm. Bl. 1141; *Burdett v. Abbot* (1811), 14 East. 1; *Rowley's Case* (1818), 2 Swan. 1; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *Middlesex Sheriff's Case* (1840), 11 Ad. & El. 273; *Watson v. Bodell* (1845), 14 M. & W. 57; *Re Hammond* (1846), 15 L. J. M. C. 136; *Ex p. Newton* (1849), 13 Jur. 606; *Re Fernandes* (1861), 6 H. & N. 717; *Ex p. Fernandes* (1861), 10 C. B. N. S. 3; *R. v. McMahon* (1875), 13 Cox, C. C. 275; *Scott v. Scott* (1912), 107 L. T. 211.

**560 i.** ———.]—Verdict against weight of evidence.]—In an action for specific performance of an agreement, where the jury found that the agreement was not entered into, against the evidence & against the express direction of the judge that the only answer, an affirmative, could properly be given on the evidence, the Full Ct. set aside the finding as perverse.—**MAGRIPILIS v. BAIRD** (1925), S. R. Q. 279.—**AUS.**

**560 ii.** ———.]—Where there is evidence on both sides to go to the jury, & they find thereon in the exercise of their discretion the ct. will not disturb their finding, even though the ct. would have drawn a different conclusion, & considers the finding of the jury to be against the weight of evidence.—**ALSOB & Co. v. McBRIDE & KERR** (1829), 2 Ndd. L. R. 3.—**NFLD.**

**560 iii.** ———.]—Where there is no objection to a verdict, except that it is found, in the opinion of the ct., against the weight of evidence, the ct. ought to exercise not merely a cautious, but a strict & sure judgment, before they send the cause to

a second jury.—**PETERS v. SILVER** (1867), 7 N. S. R. (1 G. & O.) 75.—**CAN.**

**560 iv.** ———.]—Wherever the jury decide against or without evidence the ct. will always exercise its right to control them, in order that justice may be done.—**COX v. WITT** (1869), 8 N. S. R. (2 G. & O.) 25.—**CAN.**

**560 v.** ———.]—**DWYER v. GARNER** (1882), 15 N. S. R. (3 R. & G.) 344; 2 C. L. T. 605.—**CAN.**

**560 vi.** ———.]—The judge charged the jury that the preponderance of evidence was with plffs., but the jury having found for defts., & two previous trials having resulted in the same way the ct. refused to set the verdict aside.—**LYNDS v. HOAR** (1884), 17 N. S. R. (5 R. & G.) 148.—**CAN.**

**560 vii.** ———.]—The verdict of a jury should not be disturbed as being against evidence unless it is one which the jury, on the evidence, could not have reasonably formed.—**HARPER v. CAMERON** (1893), 2 B. C. R. 365.—**CAN.**

**m.** ———.]—*Excessive damages.*—A verdict will not be considered per-

## SECT. 14.—ANNOUNCING THE VERDICT.

**562.** Must be given in open court.]—**SAUNDERS v. FREEMAN** (1561), 2 Dyer, 209 a; 1 Plowd. 209; 75 E. R. 321; *sub nom.* **ANON.**, Moore, K. B. 33.

*Annotation*.—**Reid**, *Fanshaw v. Knowles*, [1916] 2 K. B. 538.

**563.** ———.]—The verdict of a jury must be unanimous, except in a civil cause by consent, & delivered in open ct. in the presence of all the jurymen. Where, therefore, on an application for a new trial, it appeared from affidavits of three members of the jury that, owing to their position in ct., they were unable to hear the verdict delivered by their foreman & that one of them, if he had heard it, would have protested that such verdict was not the unanimous verdict of the jury:—**Held**: (1) the statement contained in the affidavits that the verdict returned by the foreman was not the unanimous verdict of the jury was admissible; (2) evidence of what took place during the discussion by the jury & of their reasons for their verdict was not admissible; (3) a new trial must be ordered.—**ELLIS v. DEHEER**, [1922] 2 K. B. 113; 91 L. J. K. B. 937; 127 L. T. 431; 86 J. P. 169; 38 T. L. R. 605; 66 Sol. Jo. 537; 20 L. G. R. 625, C. A.

**564.** Who must be present—Whole jury.]—**R. v. WOOLER**, No. 465, *ante*.

**565.** ———.]—**ELLIS v. DEHEER**, No. 563, *ante*.

**566.** ———.]—In civil matters—Plaintiff.]—**SAUNDERS v. FREEMAN** (1561), 2 Dyer, 209 a; 1 Plowd. 209; 75 E. R. 321; *sub nom.* **ANON.**, Moore, K. B. 33.

*Annotation*.—**Reid**, *Fanshaw v. Knowles*, [1916] 2 K. B. 538.

**567.** ———.]—Solicitors of parties.]—**DAUNTLEY v. HYDE**, No. 619, *post*.

**568.** ———.]—The judge was not there when the verdict was given, a practice which is most unsatisfactory & has already once been commented on unfavourably in this ct. (**SCRUTTON, L.J.**).—**BANBURY v. BANK OF MONTREAL**, [1917] 1 K. B. 409; 86 L. J. K. B. 380; 116 L. T. 42; 33 T. L. R. 104; 61 Sol. Jo. 129, C. A.; *on appeal*, [1918] A. C. 626.

*Annotations*.—**Mentd.** *Calmenson, Pauper v. Merchants' Warehousing Co.* (1920), 125 L. T. 129; *Dey v. Mayo*, [1920] 2 K. B. 316; *Evrett v. Griffiths*, [1921] 1 A. C. 631; *Hearn v. Southern Ry.* (1925), 41 T. L. R. 305.

¶ *See, also*, No. 630, *post*.

—In criminal matters.]—*See* CRIMINAL LAW, Vol. XIV., p. 327, Nos. 3417, 3418.

verso morely where the damages are considered excessive.—**HOPKINS v. GOODERHAM** (1904), 10 B. C. R. 250.—**CAN.**

**n.** *Whether necessarily invalid.*—Although there is no absolute rule invalidating a verdict certified by the judge at the trial to be perverse, yet such certificate affords ground for setting aside the verdict when coupled with other circumstances appearing in the report suggestive of perversity, such as the award of nominal damages when not apparently warranted by the evidence, though these circumstances would not *per se*, & in the absence of such a certificate, be sufficient to disturb the verdict.—**QUINLAN v. MURNANE** (1885), 18 L. R. Ir. 53.—**IR.**

## PART VII. SECT. 14.

**564 i.** Who must be present—Whole jury.]—**CAMPBELL v. LINTON** (1868), 27 U. C. R. 563.—**CAN.**

**o.** *Decision by majority*—*Announced as unanimous.*—**MIDLAND RY. Co. v. McDOUGALL** (1906), 39 N. S. R. (27 G. & R.) 280.—**CAN.**

**Sect. 14.—Announcing the verdict. Sects. 15 & 16:**  
**Sub-sect. 1, A & B.]**

**569. Reasons for verdict — Whether jury may be asked.]—**WALTON v. POTTER, No. 474, *ante*.

#### SECT. 15.—RECONSIDERING THE VERDICT.

**570. In civil actions—Before verdict recorded.]**—On a plea in a libel cause, the issue was made up of three material facts: during the summing up of the judge, the jury expressed themselves satisfied as to one of the facts, in favour of *pltf.*; & the judge told them that, in order to find for *deft.* on that issue, they must be satisfied that all the three facts were proved in substance. The jury, after retiring for two hours, found on that issue, a verdict for *deft.* The *ct.* refused to alter the verdict.

After the verdict recorded, the jury cannot vary from it, but before it is recorded they may vary from the first offer of their verdict, & that verdict which is recorded shall stand (TINDAL, C.J.).—NAPIER v. DANIEL (1836), 3 Bing. N. C. 77; 2 Hodg. 187; 3 Scott, 417; 6 L. J. C. P. 62; 132 E. R. 339.

**571. — Jurisdiction of court.]—**A judge is not bound to receive the first verdict which the jury give. He may direct them to reconsider it. The verdict which the jury ultimately return is the true verdict to be recorded.—R. v. MEANY (1862), L. & Ca. 213; 1 New Rep. 66; 32 L. J. M. C. 24; 7 L. T. 393; 26 J. P. 822; 8 Jur. N. S. 1161; 11 W. R. 41; 9 Cox, C. C. 231; 169 E. R. 1368, C. C. R.

**In criminal matters.]—**See CRIMINAL LAW, Vol. XIV., pp. 327, 328.

#### SECT. 16.—AMENDMENT OF VERDICT.

##### SUB-SECT. 1.—BY JUDGE.

###### A. In General.

**572. Jurisdiction to amend—General rule.]—**The *ct.* directed two issues for trial; if A. was heir & if A. & J. were next of kin. A. & J. were made *pltf.s.*, & all the other claimants, who would be excluded by them, were made *defts.* at the trial. The jury gave this verdict "find *pltf.'s* case not proved":—*Held:* (1) this was an ambiguous verdict, for it might mean that one issue only was not proved; (2) such a verdict could not be amended by the judge's notes & recollection of the summing up, though he were satisfied that the jury viewed both issues as involving only one case, whether *pltf.'s* father was brother of the deceased's father. Hence a trial *de novo* was awarded.

There is no inherent power in the *cts.* in this country to amend the verdict of a jury, although it must be competent to any *ct.* to correct an erroneous entry of a verdict arising from the

mistake or misprision of a clerk. The power of amending a verdict, or, to speak more correctly, of amending the *postea*, which is the record of the verdict, is not a power possessed by the *cts.* or the judges of this country by common law, but is given to them by statutes, many of them of a very early date (LORD CHELMSFORD, C.).—MORGAN v. MORRIS (1858), 31 L. T. O. S. 350; 6 W. R. 776, H. L.

*Annotation:—*Mentd. Bruce v. Deer, Presbytery (1867), L. R. 1 Sc. & Div. 96.

**573. — — —.]—**The Ct. [of Exchequer] has no power to amend an order made at *Nisi Prius*, & the application for such a purpose should be made to the judge who tried the cause.

The application to amend the verdict according to the judge's notes must be made to the judge who tried the cause (PARKE, B.).—BENNETT v. FINNIS (1850), 14 L. T. O. S. 352.

**574. — To give legal effect—Treble damages given by statute.]—**BALDWIN & GIRRIS CASE (1614), Godb. 245; 78 E. R. 142.

**575. — — —.]—**Where the jury, in an action of debt, on 2 & 3 Edw. 6, c. 13, which gives treble value for not setting out tithes, found damages which amounted only to the single value:—*Held:* the *ct.* could not amend the *postea*, by entering the verdict for the treble value.—SANDFORD v. PORTER, SANDFORD v. CLARKE (1820), 2 Chit. 351.

**576. — To give effect to intention of jury—Only in *primâ facie* case.]—**The *ct.* will not alter a verdict, unless it appears on the face of it, that the alteration would be according to the intention of the jury.—SPENCER v. GOTER (1788), 1 Hy. Bl. 78; 126 E. R. 48.

*Annotation:—*Fold. Ernest v. Brown (1838), 4 Bing. N. C. 162.

**577. — Verdict delivered ambiguous.]—**MORGAN v. MORRIS, No. 572, *ante*.

**578. Mistake in entry of verdict—Jurisdiction to amend.]—**The misentry of a verdict may be amended by the notes of the jury after error brought.—MADOX v. DAWSON (1599), Cro. Eliz. 678; 78 E. R. 915.

**579. — — —.]—**If the judge of assize remember that the verdict was contrary to the entry on the *postea*, it may be amended.—ELLIOT v. SKYPP (1633), Cro. Car. 338; 79 E. R. 896.

*Annotations:—*Apld. Gregory v. R. (1848), 15 Q. B. 957. Arnold v. Revault (1819), 4 Moore, C. P. 66.

**580. — On appeal.]—**A misprision in the entry of a general verdict, is amendable after error brought. An original writ, although it vary in the name of the party, shall be taken as an original in the cause; & the error not aided by the verdict.—HARRISON v. FULSTOWE (1607), Cro. Jac. 185; Yelv. 109; 79 E. R. 161.

*Annotations:—*Refd. Crouther v. Oldfield (1706), 1 Salk. 364; Cork v. Baker (1717), 1 Stra. 63.

**581. — — —.]—**If the verdict as entered on the *postea*, finds neither the affirmative nor negative of the issue joined, but an irrelevant fact, if the fault appears evidently to have arisen from the

is definitely accepted by the *ct.*, & recorded, to change their mind.—CUNNINGHAM v. RYAN (1919), 27 C. L. R. 294.—AUS.

**PART VII. SECT. 16, SUB-SECT. 1.—A. r. Jurisdiction to amend—After jury discharged.]—**BANK OF NOVA SCOTIA v. FISH (1894), 39 N. B. R. 434.—CAN.

*t. — Answers to questions inconsistent with general verdict.]—*MCKINNON v. MCKEILL (1882), 16 N. S. R. (4 R. & G.) 25.—CAN.

#### PART VII. SECT. 15.

**571 i. In civil actions—Jurisdiction of court.]—**Where on a jury trial for negligence questions were submitted to the jury but the negligent act found by the jury in answer to one of the questions was not covered by the pleadings nor referred to in the charge to the jury, & the meaning of the answer was not clear.—*Held:* it was not only the right but the duty of the trial judge to send the jury back to reconsider its verdict in order that the whole matter might be cleared up &

further trials avoided.—ATAMANUK v. CANADIAN PACIFIC RY. CO., [1925] 4 D. L. R. 434; 3 W. W. R. 400; 35 Man. L. R. 292; *affg.*, [1925] 2 W. W. R. 785.—CAN.

*p. Special verdict.]—*The *ct.* will not send a special verdict back to a jury to decide upon a presumption which they would not be justified in finding.—ARCHIBALD v. LESSER v. BLOIS (1854), 2 N. S. R. (James), 307.—CAN.

*q. Right of jury to reconsider.]—*If a verdict is handed in by a jury they are at liberty, until that verdict



mistake of the officer who made the entry, the ct. will amend it.—*WALKER v. BROOK* (1696), 1 *Ld. Raym.* 133; 91 *E. R.* 986.

*Annotation*.—*Mentd.* *Gwynne v. Burnell* (1840), 6 *Bing. N. C.* 453.

582. ———.]—Where a verdict had been entered by mistake upon a certain issue, & the master taxed the costs according to the substantial merits of the cause, & as if the mistake had not been committed:—*Held*: the judge before whom the cause was tried should amend the *postea*, & enter the verdict, so as to remove any incongruity which might appear upon the record, from having the allowance of costs one way & the judgment another.—*ERNEST v. BROWN* (1838), 4 *Bing. N. C.* 162; 1 *Arn.* 2; 5 *Scott*, 491; 7 *L. J. O. P.* 145; 2 *Jur.* 34; 132 *E. R.* 750.

583. ———.]—The ct. of error, on the argument of the case suggested that application might be made to the judge who tried the cause to amend the *postea* by his notes; & a judgment was stayed to give time for such application. In the same vacation the judge made an order for such an amendment. In the same vacation, by authority of another order, the judgment roll & transcript thereof were amended so as to be conformable to the amended *postea*:—*Held*: the amendments were made in time, & rightly, as the errors amended were mere misprisions; the error in the *postea* being a misprision in relation to the verdict; & the error in the judgment becoming a misprision as soon as the *postea* had been amended, & a variance appeared between the judgment & *postea*.—*BOWERS v. NIXON* (1848), 12 *Q. B.* 546; 18 *L. J. Q. B.* 41; 13 *Jur.* 334; 116 *E. R.* 973.

*Annotation*.—*Apld.* *Gregory v. R.* (1848), 15 *Q. B.* 957.

584. ———.]—**Verdict ambiguous.**]—An issue was sent to trial, "whether A., *pltf.*, was, at the respective dates of twenty documents, of weak mind; & whether B., *deft.*, taking advantage of such weakness, procured A.'s signature to these documents, or any of them, by fraud or intimidation"; & a verdict was entered on the *postea* thus; & "the jury gave a verdict for *pltf.* on the said issue":—*Held*: this verdict was too ambiguous to be applied, but it seemed to be merely a misentry by the clerk of *nisi prius* & that the proper recourse was to the judge, to ask him to correct the verdict according to his notes.—*MARIANSKI v. CAIRNS* (1852), 19 *L. T. O. S.* 277, *H. L.*

585. ———.]—If a judge finds that he has made a mistake in ordering the verdict to be entered for the wrong party, he has power to order the mistake to be rectified, & he is at liberty to have recourse to any evidence he likes, or even to his own recollection of the circumstances, in considering whether any, & if any, what alteration is to be made.—*BAKER v. LAWRENCE* (1870), 22 *L. T.* 608; 18 *W. R.* 835.

586. **Verdict wrongly delivered by foreman—Power to amend.**]—*COGAN v. EBEN*, No. 618, *post*.

—As ground for setting aside.]—*See* Nos. 624, 625, 627, *post*.

587. **Mistake of jury as to effect of verdict.**]—The ct. will not at a distance of time after the trial amend the *postea* by increasing the damages given by the jury, although all the jurymen join in an affidavit stating their intention to have been to give *pltf.*s such increased sum, & that they conceived that the verdict they had given was calculated to give him such sum.—*JACKSON v. WILLIAMSON* (1788), 2 *Term Rep.* 281; 100 *E. R.* 153.

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588. **Mistake of fact—Date of instrument.**]—In an action for taking more than legal interest on a loan of money "from Apr. 15, to July 14, 1802," the ct. will amend the verdict by the judge's notes if the jury by mistaking the date of an instrument, create a variance for which the evidence affords no foundation.—*MANNERS v. POSTAN* (1803), 3 *Bos. & P.* 343; 127 *E. R.* 188.

589. **Special verdict—Amendment after argument.**]—The conclusion of a special verdict may be amended after argument without costs.—*CROMWELL v. GRUMSDEN* (1698), 1 *Ld. Raym.* 335; *Holt*, K. B. 502; 2 *Salk.* 462; *Comb.* 477; 12 *Mod. Rep.* 193; 91 *E. R.* 1119.

*Annotations*.—*Mentd.* *Holman v. Burrow* (1702), 2 *Ld. Raym.* 794; *Stoddart v. Palmer* (1824), 4 *Dow. & Ry. K. B.* 624.

590. ———.]—*A. G. v. WHITE* (1730), *Bunb.* 283; 145 *E. R.* 675.

591. **Refusal to amend—Whether appeal lies.**]—In an action on the case, charging *defts.*, a corporate body, with the non-repair of sea-banks, the declaration contained five counts, the two first, stating *defts.*' liability to repair, by virtue of a charter from the Crown, & the others by prescription, & *ratione tenuræ*. At the trial a verdict was taken for *pltf.* by consent, on the two first counts, & the jury were discharged as to the other three. The ct., on the application of *pltf.*, ordered the *postea* to be amended, & the verdict to be entered on the first count only, although the judge who tried the cause declined to interfere, on the grounds that the evidence was applicable to both counts, & that separate damages could not have been found or assessed.—*HENLEY v. LYME REGIS CORPN.* (1829), 6 *Bing.* 100; 3 *Moo. & P.* 310; 7 *L. J. O. S. C. P.* 243; 130 *E. R.* 1218.

*Annotation*.—*Refd.* *James v. Lynn* (1849), 18 *L. J. Q. B.* 347.

592. ———.]—The ct. has no jurisdiction to alter the entry of the verdict on the *postea*, where the judge who presided at the trial declines, on summons, so to do.—*NEWTON v. HARLAND* (1840), 1 *Man. & G.* 958; 9 *Dowl.* 65; 1 *Scott*, N. R. 503; *Woll.* 53; 133 *E. R.* 620.

593. ———.]—A judge's direction as to the amendment of a *postea* cannot be questioned in the ct. above, for there is no power to compel the production of his notes of the trial.—*SANDFORD v. ALCOCK* (1842), 10 *M. & W.* 689; 12 *L. J. Ex.* 40.

594. ———.]—A judge's direction as to the amendment of a *postea* cannot be questioned by the ct. above.—*DAINTY v. BROCKLEHURST* (1849), 3 *Exch.* 691; 18 *L. J. Ex.* 347; 13 *L. T. O. S.* 120.

*Annotation*.—*Apld.* *Bennett v. Finnis* (1850), 14 *L. T. O. S.* 352.

**Damages impossible of ascertainment—Verdict given for defendant.**]—*See* *DAMAGES*, Vol. XVII., pp. 91, 92, Nos. 92-94.

**In criminal matters.**]—*See* *CRIMINAL LAW*, Vol. XIV., p. 328, Nos. 3433-3437.

#### B. Admissibility of Evidence.

595. **Necessity for documentary evidence.**]—Perjury was assigned on the following averments in evidence given by *deft.*; that A. promised V. £0 for his vote; that A. gave V.'s wife a sovereign; & the same, substantially, as the first. Evidence was given on each assignment. The judge, in summing up, said that the case raised, in effect, two points; first, as to the bribe given; secondly, as to the promise. Dividing the case in this manner, he commented on the facts, & stated that he did not see how, on the evidence, *deft.* could be



**Sect. 16.—Amendment of verdict: Sub-sect. 1, B.; sub-sect. 2. Sects. 17 & 18.]**

convicted on the first point, but left it to the jury whether there was not a strong case on the second. The jury found a verdict of not guilty on the first assignment, for want of sufficient evidence, & guilty on the second assignment. The verdict was so entered. The judge did not, at the time, make any note of his summing up, but did so afterwards; & having a distinct remembrance of it, & no doubt of the jury's intention, he, on summons, allowed the *postea* to be amended by entering a verdict of guilty on the first & third assignments, & not guilty on the second:—*Held*: (1) the amendment ought not to have been made, there being no note of a judge, or other document to amend by. Order rescinded; (2) where there is such note or other document, the verdict may, on proper grounds, be amended in a criminal as well as in a civil case.—*R. v. VIRRIER* (1840), 12 Ad. & El. 317; 4 Per. & Dav. 161; 9 L. J. M. C. 120; 4 Jur. 628; 113 E. R. 833.

*Annotations*:—*As to* (1) *Exld. R. v. Fall* (1841), 10 L. J. Q. B. 145. *As to* (2) *Refd. Empson v. Griffin* (1839), 3 Per. & Dav. 160.

*See, also*, Nos. 579, 585, *ante*.

**596. Jury's notes.]—MADDOX v. DAWSON**, No. 518, *ante*.

**597. Judge's recollection.]—ELIOT v. SKYPP**, No. 579, *ante*.

**598. —.]—BAKER v. LAWRENCE**, No. 585, *ante*.

*See, also*, No. 595, *ante*.

**599. Judge's notes.]—NEWCOMBE v. GREEN** (1743), 2 Stra. 1197; 1 Wils. 33; 93 E. R. 1124.

*Annotation*:—*Refd. Cogan v. Ebdon* (1757), 1 Burr. 883.

**600. —.]—Where there is a general verdict on a declaration consisting of different counts, some of which are inconsistent, or bad in point of law, & evidence has only been given on the good or consistent counts, the verdict may be amended by the judge's notes.—EDDOWES v. HOPKINS** (1780), 1 Doug. K. B. 376; 99 E. R. 242.

*Annotations*:—*Consd. Richardson v. Mellish* (1825), 3 Bing. 334. *Refd. Corner v. Shaw* (1838), 4 M. & W. 163; *Marianski v. Cairns* (1852), 19 L. T. O. S. 277. *Mentd. Arnott v. Redfern* (1826), 3 Bing. 353; L. C. & D. Ry. v. S. E. Ry., [1893] A. C. 429.

**601. —.]—The *postea* may be amended by the judge's notes at any time, even after final judgment, & a writ of error brought.—DOE v. PERKINS** (1790), 3 Term Rep. 749; 100 E. R. 838.

*Annotations*:—*Distd. Jackson v. Galloway* (1845), 14 L. J. C. P. 141. *Refd. Richardson v. Mellish* (1825), 3 Bing. 334; *Bowers v. Nixon* (1848), 12 Q. B. 546. *Mentd. Burton v. Plummer* (1834), 4 Nev. & M. K. B. 315; *R. v. St. Martin's, Leicester* (1834), 2 Ad. & El. 210; *Hill v. Barry* (1842), 7 Jur. 10; *Beech v. Jones* (1848), 5 C. B. 696.

**602. —.]—Deft. pleaded the general issue & Stat. Limitations; a verdict was found for pltf. on the first issue, & no notice taken of the last: after error brought & joinder in error, which was assigned on this point, the ct. allowed it to be amended by the judge's notes on payment of costs.—PETRIE v. HANNAY** (1790), 3 Term Rep. 659; 100 E. R. 789.

*Annotations*:—*Follid. Dunbar v. Hitchcock* (1815), 3 M. & S. 591; *Richardson v. Mellish* (1825), 3 Bing. 346. *Consd. Jackson v. Galloway* (1845), 1 C. B. 289. *Mentd. Rogers v. Cook* (1891), 1 Salk. 10.

**603. —.]—Where a general verdict has been given on two counts, one of which is bad, & it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good count only, the ct. will amend the verdict by entering it on that count, though evidence was**

given applicable to the bad count also.—**WILLIAMS v. BREEDON** (1798), 1 Bos. & P. 329; 126 E. R. 932.

*Annotations*:—*Follid. Richardson v. Mellish* (1825), 3 Bing. 334. *Consd. Ernest v. Brown* (1838), 5 Scott, 491. *Distd. Empson v. Griffin* (1839), 3 Per. & Dav. 160.

**604. —.]—After verdict in ejectment for a message & tenement, the ct. will give leave to enter the verdict according to the judge's notes for the message only, pending a rule to arrest the judgment, without obliging the lessor of pltf. to release the damages.—GOODTITLE d. WRIGHT v. OTWAY** (1807), 8 East, 357; 103 E. R. 379.

**605. —.]—S. & F. pleaded severally, & entered into separate consent rules, F. as tenant for specified premises occupied by himself, S. as landlord of the same premises specifying them to be occupied by F., & as tenant of other specified premises occupied by himself. Service of notice to quit on F. was proved, but not on S. After verdict for pltf. against both defts., the ct. refused to direct a nonsuit to be entered as to the premises occupied by S. The judge who tried the cause, being asked to amend the *postea* by confining the verdict to the premises occupied by F., refused, saying that he thought the verdict properly entered. This ct. refused to amend the verdict to the same effect, by the judge's notes.—ROE d. BLAIR v. STREET** (1834), 2 Ad. & El. 329; 4 Nev. & M. K. B. 42; 111 E. R. 127.

*Annotations*:—*Consd. Doe d. Bowman v. Lewis* (1844), 13 M. & W. 241. *Refd. Doe d. Davenport v. Rhodes* (1843), 11 M. & W. 600.

**—.]—The ct. rejected an application to amend the entry of a verdict according to the notes of an arbitrator to whom the cause had been referred, on the ground that they had no power to compel such notes to be brought before them. Entry of verdict may be amended according to the notes of the judge, but application for that purpose must be made before the judge, & not to the ct.—SCOUGILL v. CAMPBELL** (1819), 1 Chit. 283.

*Annotation*:—*Refd. Padley v. Lincoln Waterworks Co.* (1850), 14 Jur. 299.

**607. —.]—Where two issues were raised by the pleadings, & the jury found upon both, but the judge, before whom the cause was tried, discharged the jury upon the second issue, upon misapprehension that the verdict upon one issue rendered the other issues immaterial, the ct. held that the proper course was not to move for a new trial, but to apply to a judge to have the verdict corrected according to his notes.—ILES v. TURNER** (1834), 3 Dowl. 211.

**608. —.]—The declaration contained counts, first, for £130, stated to be due on a judgment; & secondly for £180 rent. On the first count the pleadings led to an issue in law. To the second, deft. pleaded part payment, & issue being joined on that allegation, a jury was impanelled to try it, & to assess contingent damages on the issue in law. On the second issue there appeared to be a balance of £106 due to pltf. The jury found a general verdict for £139. Afterwards the issue in law was decided in favour of deft.:—*Held*: the Judge might amend the verdict by his notes, & direct it to be entered for pltf., on the second count only, for £106.—FERGUSON v. MAHON** (1839), 11 Ad. & El. 179; 3 Per. & Dav. 143; 9 L. J. Q. B. 146; 113 E. R. 382.

*Annotations*:—*Mentd. Robertson v. Strutt* (1844), 8 Jur. 404; *Reynolds v. Fenton* (1846), 16 L. J. C. P. 15; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Vauquelin v. Bourd* (1863), 15 C. B. N. S. 341; *Therwall v. Yelverton* (1864), 16 C. B. N. S. 813; *Thorburn v. Barnes* (1867), L. R. 2 C. P. 384; *Pemberton v. Hughes*, [1899] 1 Ch. 781.

609. —.]—*R. v. VIRRIER*, No. 595, *ante*.

610. —.]—*BENNETT v. FINNIS*, No. 573, *ante*.

611. —.]—*MARIANSKI v. CAIRNS*, No. 584, *ante*.

612. Judge's report.]—*COGAN v. EBDEN*, No. 618, *post*.

613. Clerk's notes.]—Verdict may be amended by notes of the clerk of assize in civil cases, not in criminal.—*R. v. KEAT* (1697), 1 Salk. 47; Comb. 406; 91 E. R. 47; *sub nom.* *R. v. KETTE*, 1 Ld. Raym. 138; *sub nom.* *KEAT'S CASE*, Skin. 607.

Annotations:—*Reid*, Campbell v. R. (1847), 11 Q. B. 814. *Mentd.* *R. v. Huggins* (1730), 1 Barn. K. B. 396; *R. v. Burridge* (1735), 3 P. Wms. 439; *Conway & Lynch v. R.* (1845), 5 L. T. O. S. 458; *R. v. Charlesworth* (1861), 1 B. & S. 460; *Winsor v. R.* (1866), L. R. 1 Q. B. 289.

614. —.]—Verdict general or special may be amended by the clerk's notes in civil cases, but not in criminal.—*BOLD'S CASE* (1708), 1 Salk. 53; 91 E. R. 52.

Annotation:—*Reid*, Selwood v. Methlyn (1729), 1 Barn. K. B. 254.

615. Notes of arbitrator.]—*SCOUGILL v. CAMPBELL*, No. 606, *ante*.

616. Sheriff's notes.]—The ct. will allow the *postea* to be amended by the sheriff's notes, in an action tried before him.—*WALKER v. KING* (1837), 6 L. J. Ex. 184.

617. Undersheriff's notes.]—In debt on simple contract for £10, debt. pleaded *nunquam indebitatus* as to all but £3 10s. & to that sum a tender. Pltfs., by their particulars of demand, claimed £5 15s. The verdict, as returned upon the notes of the undersheriff, was, "We find for pltfs. for the full amount." The *postea* being indorsed with a verdict for £5 15s. debt, without noticing the issue or the tender, & without deducting the £3 10s. paid into ct. with the plea, pltfs., who had proceeded to sign judgment & tax costs, with notice of the irregularity, were allowed to amend the *postea* upon payment of the costs of the writ of error & of the application.

There is sufficient upon the undersheriff's notes to enable us to direct the verdict to be entered in the manner prayed (*TINDAL, C.J.*).—*WALLIS v. GODDARD* (1841), 2 Man. & G. 912; 3 Scott, N. R. 295; 133 E. R. 1013.

618. Juror's affidavit.]—A verdict having been delivered in for debt. generally, by mistake of the foreman, when the jury had found on one issue for pltf., & on the other only for debt., on motion for a new trial, etc., leave given to move to amend the *postea*, on the affidavits of the jury, etc.

The only point is, whether we can rectify this *postea*, which must be done if we can, for the question has been tried, & a verdict found; & as to that, there are many instances of rectifying the *postea* by the judge's notes (*DENISON, J.*).—*COGAN v. EBDEN* (1757), 2 Keny. 24; 1 Burr. 383; 96 E. R. 1094.

619. —.]—Where a verdict has been erroneously entered through a mistake of the associate, affidavits of the jurymen are receivable to show the verdict delivered by them, though not as the verdict they intended to deliver. Where a jury retire to consider their verdict, the attorneys of the parties ought to remain in ct. to hear it delivered.—*DAUNTLEY v. HYDE* (1841), 6 Jur. 133.

#### SUB-SECT. 2.—BY RECALL OF JURY.

620. After verdict given & recorded — Though imperfect.]—On an information for usury, if the

verdict find the corrupt agreement, but say nothing as to the loan, it is bad. When a jury returned by force of any *venire facias* to try an issue has given a verdict, which is accepted & recorded by the ct., be it perfect or imperfect, the jurors are discharged thereof for ever, & shall never be called back in the same cause to try the same issue: but if the verdict be so imperfect that judgment cannot be given upon it, then the ct. shall award a *venire facias de novo*.—*LOVEDAY'S CASE* (1608), 8 Co. Rep. 65 b; Jenk. 283; 77 E. R. 573; *sub nom.* *COOK v. LANEDAY*, Cro. Jac. 210.

Annotations:—*Reid*, Lewis d. Derby v. Witham (1743), 2 Stra. 1185. *Mentd.* *R. v. Upton* (1728), 1 Barn. K. B. 97.

#### SECT. 17.—DISAGREEMENT OF JURY.

In civil matters.]—See Sect. 10, sub-sect. 4, *ante*.

In criminal matters.]—See CRIMINAL LAW, Vol. XIV., pp. 328, 329.

#### SECT. 18.—DISCHARGE AFTER VERDICT.

621. Effect of discharge — Not liable to recall— To reconsider case.]—*LOVEDAY'S CASE*, No. 620, *ante*.

622. — — — To give opinion on fresh evidence at new trial.]—In an action against an attorney, alleging that he was retained to conduct the defence of pltf. on a criminal charge, & that through his negligence pltf. was convicted, not alleging that he was innocent:—*Held*: (1) pltf., to recover more than nominal damages, must prove that he was convicted mainly through debt.'s negligence, & the negligence charged being, not taking the proofs of witnesses who were in ct. ready to be examined, but whom the counsel, on pltf.'s own statement, did not wish to call, & whom pltf. did not insist on calling; (2) the question for the jury was, whether debt's. had done everything which, under all the circumstances, was likely to be of any use; (3) the jurymen who had tried pltf. on the original trial cannot be called to be asked whether having heard the evidence now given as to what the witnesses could have stated, what verdict they would have returned had such evidence been given at the trial, nor to be asked as to a memorial signed by them, & the grounds of it.—*HATCH v. LEWIS* (1861), 2 F. & F. 467, N. P.; *subsequent proceedings*, 7 H. & N. 367.

623. Right to discharge — Finding of facts sufficient for court to pronounce judgment.]—The husband petitioned for dissolution of marriage, & prayed damages. Co-resp. traversed the adultery, & charged the husband generally with cruelty to his wife, which latter fact might call for the exercise of the discretion of the ct. under Matrimonial Causes Act, 1857 (c. 85), s. 31. During petitioner's case, some witnesses were asked as to the general terms on which he lived with his wife. On the part of co-resp., witnesses deposed to certain acts of violence committed on the wife by the husband, & the ct. admitted evidence in reply limited to those particular acts & occasions. The jury found a verdict for petitioner on the issue of adultery, & assessed the damages at £2,500. On stating that they could not agree on the issue

#### PART VII. SECT. 16, SUB-SECT. 1.—B.

618 f. Juror's affidavit.] *HEARD v. UNION BANK* (1877), 2 P. E. I. 237.—CAN.

*Sect. 18.—Discharge after verdict. Sect. 19: Sub-sects. 1 & 2. Sect. 20: Sub-sect. 1.]*

of cruelty, they were discharged by the judge ordinary. On motion for a new trial, the ct. held that it had rightly discharged the jury from giving a verdict on the issue of cruelty, as it was ultimately a question for the opinion of the ct. under Matrimonial Causes Act, 1857 (c. 85), s. 31. If the facts ascertained by the verdict are sufficient for the ct. to found a decree on, the function of the jury is discharged.—*NARRACOTT v. NARRACOTT & HESKETH* (1864), 3 Sw. & Tr. 408; 4 New Rep. 158; 33 L. J. P. M. & A. 132; 10 L. T. 389; 10 Jur. N. S. 640; 12 W. R. 1064.  
*Annotation:—Held. Barnes v. Barnes & Beaumont* (1868), 38 L. J. P. & M. 10.

## SECT. 19.—SETTING ASIDE A VERDICT.

### SUB-SECT. 1.—IN GENERAL.

*Grounds for.]—See, generally, PRACTICE.*

—*Misconduct of jury.]—See Sect. 10, sub-sect. 3, ante.*

*New trial.]—See, generally, PRACTICE.*

*Judgment entered in spite of verdict.]—See, generally, JUDGMENTS, PRACTICE.*

### SUB-SECT. 2.—ADMISSIBILITY OF EVIDENCE.

*See, generally, PRACTICE.*

**624.** *Affidavits of jurors—Verdict wrongly given by foreman.]—Verdict set aside, & new trial ordered, on affidavit of the jurymen.—BAKER v. MILES* (1731), Cooke, Pr. Cas. 66; 125 E. R. 961.

**625.** ———.]—*R. v. WOOLER*, No. 465, *ante*.

**626.** ———.]—*Explanation of verdict—Inconsistent with judge's certificate.]—The ct. will not read affidavits by jurors to explain their verdict, in contradiction of the certificate of the judge who tried the cause.—COWARD v. PORTER* (1734), Cunn. 128; 94 E. R. 1106.

**627.** ———.]—*Verdict given not verdict intended.]—A verdict not to be set aside on the affidavit of two of the jurors, that the jury intended to give but 7s. besides the money brought into ct., instead of the sum for which the verdict was declared entered up.*

It would be of very dangerous example to suffer jurors to come in & suggest a mistake in order to invalidate their acts upon oath, especially where their verdict is not contrary to evidence (*per CUR.*).—*PALMER v. CROWLE* (1738), Andr. 382; 95 E. R. 445.

**628.** ———.]—*On a prosecution for perjury, where, on the part of the prosecution, the depositions of a deceased person were offered in evidence, & upon the cross-examination of prosecutor's witness, certain declarations of the deceased witness, not upon oath, were proved for the purpose of corroborating the facts stated in his depositions, in a matter material to deft., it was held that evidence of such declarations was not admissible. After a conviction for perjury it is no ground for a new trial that the jury hesitated in giving their verdict; nor will the ct. receive affidavits of the jurymen stating that they did not*

*intend to find a verdict of guilty.—R. v. PARKER* (1783), 3 Doug. K. B. 242; 99 E. R. 634.

**629.** ———.]—*The ct. will not interfere to disturb a recorded verdict on the affidavit of one of the jury, that the amount of the damages taken exceeded what they had intended to have given.—MATHER v. BAILEY* (1814), 1 Price, 1; 145 E. R. 1311.

**630.** ———.]—*The judge at Nisi Prius having told the jury that, in case of their believing a particular fact, the verdict must be for pltf., the jury retired, & the judge & counsel on both sides quitted the ct., leaving the associate. The jury returned into ct., & told the associate that they found the fact; the associate then informed them that this was a verdict for pltf., & entered it so: but the jury expressed to him their dissent, & said that they were not agreed to find for pltf. The ct. discharged a rule nisi, obtained on affidavit of these facts, for setting aside the verdict & having a new trial, upon the ground, only, of the jury not having agreed to find for pltf.—DOE d. LEWIS v. BASTER* (1836), 5 Ad. & El. 129; 2 Har. & W. 264; 6 Nev. & M. K. B. 541; 111 E. R. 1115.

**631.** ———.]—*Questions of foreman not understood.]—Affidavits of jurymen to the effect that they did not understand the answers given by their foreman to certain questions put to them, to amount to a finding for pltf.:—Held: inadmissible.*

It does not lie in the mouth of a jurymen who hears what passes & says nothing, to come afterwards & say that he understood & meant something altogether different (WILLES, J.).—*RAPHAEL v. BANK OF ENGLAND* (GOVERNOR & CO.) (1855), 17 C. B. 161; 25 L. J. C. P. 33; 26 L. T. O. S. 60; 4 W. R. 10; 139 E. R. 1030.

*Annotations:—Mentd. Joseph v. Webb, Joseph v. Lyons, Joseph v. Pidcock, Joseph v. Jones* (1884), Cab. & El. 262; *London Joint Stock Bank v. Simmons*, [1892] A. C. 201; *Venables v. Baring*, [1892] 3 Ch. 527.

**632.** ———.]—*It had been laid down that a jurymen could not be heard to complain of a verdict to which he had been a party after he had left the jury-box. Here a jurymen stated that he did not agree to the verdict. If that were listened to, then in any case a jurymen might raise a difficulty which it would be impossible for the ct. to solve (MATHEW, L.J.).—NESBITT v. PARRETT* (1902), 18 T. L. R. 510, C. A.

**633.** ———.]—*ELLIS v. DEHEER*, No. 563, *ante*.

**634.** ———.]—*Mistake of fact.]—A jurymen's affidavit cannot be read on a motion for a new trial.*

A jurymen's affidavit with regard to his sentiments in point of law, at the trial, ought not to be admitted; whatever may be the case of his affidavit tending to rectify a mistake in fact (ASTON, J.).—*R. v. ALMON* (1770), 5 Burr. 2686; 98 E. R. 411.

*Annotations:—Mentd. R. v. Shipley* (1784), 4 Doug. K. B. 73; *A.-G. v. Siddon* (1830), 1 Cr. & J. 220.

**635.** ———.]—*Mistake of law.]—R. v. ALMON*, No. 634, *ante*.

**636.** ———.]—*Verdict entered not verdict intended.]—Where a judge directs the jury that they are clearly bound to find a verdict for one party, & no objection is taken at the time to the entering of the verdict for that party either by the parties or by the jury, the ct. will not grant a new trial*

## PART VII. SECT. 19, SUB-SECT. 2.

**627 l.** *Affidavits of jurors—Verdict given not verdict intended.]—Pltfs. filed affidavits of some of the jurors, stating that they would not have agreed in a verdict for deft. if they had thought*

*the result would be to throw upon pltfs. the whole costs of the action:—Held: these affidavits were not receivable in evidence.—FARQUHAR v. ROBERTSON* (1889), 13 F. R. 156.—*CAN.*

**627 ll.** ———.]—*R. v.* (1903), 5 O. L. R. 373; 23 C. L. T. 169; 2 O. W. R. 181.—*CAN.*

**636 l.** ———.]—*Verdict entered not verdict intended.]—Where the jury have given their verdict through their foreman &*

upon the affidavit of a jurymen stating that the jury had not concurred in such verdict. *Semble*: on a motion for a new trial an affidavit of the jury is inadmissible as to the conduct of the jury, but may be introduced for the special collateral purpose of showing that the jury gave no verdict at all.—*SAVILLE v. FARNHAM* (LORD) (1828), 2 Man. & Ry. K. B. 216.

637. — [What took place in court.]—*EVERETT v. YOUNG*, No. 335, *ante*.

638. — [—]—On motion for a new trial on the ground that the verdict was entered by mistake, the ct. received the affidavit of a jurymen as to what occurred in open ct. on delivery of the verdict, the ct. holding that the practice not to receive affidavits of jurymen only related to what occurred among them in their private room, or to the grounds upon which they gave their verdict.—*ROBERTS v. HUGHES* (1841), 7 M. & W. 399; 1 Dowl. N. S. 82; 10 L. J. Ex. 337; 151 E. R. 821.

*Annotations*.—*Consd.* *Ellis v. Deheer*, [1922] 2 K. B. 113. *Refd.* *Raphael v. Bank of England* (1855), 25 L. J. C. P. 33.

639. — [—]—The ct. will not receive the affidavits of jurymen, upon a motion for setting aside a verdict.—*SCULLY v. HOOPER* (1836), 5 L. J. C. P. 268.

640. — [To explain presence of intended juror.]—*BAILEY v. MACAULAY*, *BAILEY v. PEARSON*, *BAILEY v. HAINES*, *BAILEY v. BRACEBRIDGE*, *DAWSON v. HAY*, *WILSON v. HOLDEN*, No. 205, *ante*.

Of misconduct of jury.]—*See* Sect. 10, sub-sect. 3, *ante*.

On application to amend verdict.]—*See* Sect. 16, sub-sect. 1, *ante*.

## SECT. 20.—SPECIAL JURIES.

### SUB-SECT. 1.—IN GENERAL.

641. *Sheriff's expenses of summoning—Jurors residing far apart.*—The sheriff will not be allowed extra expenses of summoning special jurors on account of their residing at a distance from each other; & the ct. will make a rule absolute for the sheriff to refund money received on this account, though he has actually expended all the money.—*LANE v. SEWELL* (1819), 1 Chit. 175.

such verdict has been entered up, the judge cannot subsequently grant a new trial upon affidavits of some of the jurors stating that the verdict so given was not the verdict of the jury.—*R. v. CARROLL* (1886), 12 V. L. R. 859.—*AUS.*

a. *Explanation of verdict.*—Affidavits of jurors refused to be received stating that they found *deft.* was not in a proper state of mind to understand the deed, & intended to assign that as a reason for their verdict.—*BABBIT v. COWPERTHWAIT* (1856), 8 N. B. R. (3 All.) 373.—*CAN.*

b. *Dissenting juror.*—An affidavit of a dissenting jurymen in relation to what passed between the dissenter & his fellow-jurymen is objectionable, & should not be received on motion for a new trial.—*BENNETT v. SMITH* (1877), 17 N. B. R. (1 P. & B.) 27.—*CAN.*

c. *Opinion after trial that verdict incorrect.*—Where a verdict had been found for *pltf.*, the ct. refused a rule *nisi* for a new trial, upon the affidavit of two jurors that they had examined the premises since the trial, & were satisfied that the verdict was incorrect.—*PURDON v. PLAYFAIR* (1860), 20 U. C. R. 282.—*CAN.*

d *Affidavit of stranger*—That ver-

*dict decided by lot.*—On a motion for a new trial, an affidavit stating that one of the jurymen had informed the deponent that the verdict was decided by lot will not be received.—*HODGSON v. CARR* (1847), 5 N. B. R. (3 Kerr) 499.—*CAN.*

e. *As to grounds of verdict.*—The ct. will not act upon affidavits stating conversations with one of the jury, after the trial, respecting the grounds of their verdict.—*JONES v. DUFF* (1848), 5 U. C. R. 143.—*CAN.*

## PART VII. SECT. 20, SUB-SECT. 1.

646 i. *Special jury cause tried by common jury—Ground for new trial.*—Where, on a venire to a coroner, a special jury was struck, but the coroner neglected to summon them, & the cause was tried by a common jury, *deft.* objecting, but afterwards entering into his defence, & *pltf.* obtained a verdict.—*Held*: the verdict was irregular, & the defence made under protest did not operate as a waiver.—*McMARTIN v. POWELL* (1840), 3 Ont. Dig. 4820.—*CAN.*

646 ii. — [—]—*BRADBURY v. BAILLIE* (1849), 6 N. B. R. (1 All.) 427.—*CAN.*

1. *Special jury improperly struck.*

642. *Whether sheriff entitled to fees for.*—The sheriff is not entitled to fees from the party giving notice under C. L. P. Act, 1852 (c. 76), s. 112, that a cause is to be tried by special jury; although the alteration of the system as to special juries has deprived the sheriff of the fees by which he formerly was remunerated by the party for summoning the special jurors.—*BENNETT v. THOMPSON* (1856), 6 E. & B. 683; 27 L. T. O. S. 202; 2 Jur. N. S. 613; 4 W. R. 614; 119 E. R. 1018.

*Annotation*.—*Mentd.* *Knapman v. Pryer* (1857), 26 L. J. Ex. 143.

643. *Special jury of City of London—Exemption from serving outside the City—Waiver of privilege.*—*LOCKYER v. EAST INDIA CO.* (1761), 2 Wils. 136; 95 E. R. 728.

644. — [Practice on order for—Transfer to commercial list.]—Where a cause is to be tried with a special jury of the City of London it should be transferred to the Commercial List, & all interlocutory applications after its transfer should be made to the judge in charge of such list.—*BARNES v. LAWSON* (1911), 16 Com. Cas. 74.

645. *In what proceedings allowed—Writ of inquiry before sheriff to assess damages.*—Where it appears that a common jury is improper to assess damages on a writ of inquiry before the sheriff, the ct. will direct the sheriff to summon a jury to be taken from the special jury book.—*PRICE v. WILLIAMS* (1836), 5 Dowl. 160.

*Annotation*.—*Refd.* *Vickers v. L. B. & S. C. Ry.* (1870), L. R. 5 C. P. 165.

646. *Special jury cause tried by common jury—Ground for new trial.*—A common jury being returned instead of a special jury, is no cause for a new trial.—*ANON.* (1701), 12 Mod. Rep. 567; 88 E. R. 1525.

647. — [—]—Where a common jury panel was returned, together with a special jury panel, & no special jurymen appearing, the cause was tried by a common jury, the trial was set aside.—*HOLT v. MEDDOWCROFT* (1816), 4 M. & S. 467; 105 E. R. 907.

*Annotations*.—*Consd.* *Haldane v. Beauchamp* (1849), 3 Exch. 658; *Ringland v. Lowndes* (1863), 15 C. B. N. S. 173. *Refd.* *Irwin v. Grey* (1865), 14 W. R. 208. *Mentd.* *Lycett v. Tenant* (1838), 4 Bing. N. C. 168; *Ilderton v. Burde* (1848), 12 L. T. O. S. 126; *Kingsland v. Lowndes* (1863), 3 New Rep. 84.

648. — [—]—*DAVIS v. NEWTON* (1850), 15 L. T. O. S. 111.

—Where a special jury was improperly struck, but *deft.*'s attorney was present & made no objection:—*Held*: no ground for a new trial.—*SHIPMAN v. BIRMINGHAM* (1837), 5 O. S. 442.—*CAN.*

g. *Whether appearance of witnesses necessary—Stenographic report of evidence.*—*McLEOD v. INSURANCE CO. OF NORTH AMERICA* (1901), 34 N. S. R. 88.—*CAN.*

h. *Special jurors from contributory counties—How selected.*—*R. v. POOLK* (1883), 15 Cox, C. C. 368.—*IR.*

k. *In what proceedings allowed—Where expert evidence adduced.*—*CARMICHAEL v. JOHNSTON* (No. 2) (1899), 17 N. Z. L. R. 673.—*N.Z.*

l. — [—]—*HENDERSON v. ALLAN* (1899), 17 N. Z. L. R. 319.—*N.Z.*

m. — [—]—*MAITLAND v. HOWDEN* (1899), 17 N. Z. L. R. 727.—*N.Z.*

n. — [—]—In all cases where expert evidence on matters of a technical character is required a special jury should be given if applied for.—*MEYER v. GILMER* (1899), 17 N. Z. L. R. 771.—*N.Z.*

o. — [—]—*CHADWICK v.*

**Sect. 20.—Special juries: Sub-sects. 1, 2, 3, 4 & 5.]**

**649.** — — —.]—*Held*: before C. L. P. Act, when a special jury has been moved for by a deft., & struck & reduced, pltf. must summon the special jury, if they are not summoned by deft. Although deft.'s omission appears from circumstances to be wilful, & his conduct gives reason to suppose that he abandons his special jury. A trial by common jury in such case was set aside for irregularity.—*MONTAGUE v. SMITH* (1851), 17 Q. B. 688; 21 L. J. Q. B. 73; 18 L. T. O. S. 106; 16 Jur. 40; 117 E. R. 1446.

*Annotation*:—*Refd.* *Irwin v. Grey* (1865), 19 C. B. N. S. 585.

**650.** — — —.]—*Cause heard as undefended cause—Ground for new trial.*—Where a cause was entered as a special jury cause, but was taken in deft.'s absence & tried by a common jury, as an undefended cause, the ct. set aside the trial & verdict, with costs.—*ILAGUE v. HALL* (1843), 5 Man. & G. 693; 6 Scott, N. R. 705; 134 E. R. 739.

*Annotation*:—*Refd.* *Irwin v. Grey* (1865), 19 C. B. N. S. 585.

**651.** — — —.]—Deft. having obtained a rule for a special jury, & had the jury nominated & reduced, a day was fixed for trial. When the appointed day arrived, it was found that no special jury process had been carried in: the cause was accordingly tried by a common jury as undefended, & a verdict given for pltf. The ct. set aside the verdict as irregular.—*HALDANE v. BEAUCLERK* (1849), 3 Exch. 658; 6 Dow. & L. 642; 18 L. J. Ex. 227; 13 L. T. O. S. 164; 13 Jur. 326; 154 E. R. 1009.

*Annotations*:—*Fold.* *Montague v. Smith* (1851), 17 Q. B. 688. *Refd.* *Doe d. Ashburnham v. Michael* (1851), 16 Q. B. 620; *Irwin v. Grey* (1865), 19 C. B. N. S. 585.

**652.** — — —.]—*Through default of party—Omission to give notice.*—Where deft. obtains a rule for a special jury, in a town cause, but omits to give notice to the sheriff under C. L. P. Act, s. 112, that the cause is to be tried by a special jury, in the absence of a special jury, the cause may, under C. L. P. Act, s. 113, be tried by a common jury.—*CRAWLEY v. KNOWLES* (1864), 16 C. B. N. S. 107;

*PETONE CORPN.* (1903), 23 N. Z. L. R. 943.—N.Z.

*p.* — — —.]—*ASHCROFT v. CABLE & CO.* (1904), 23 N. Z. L. R. 623.—N.Z.

*q.* — — —.]—*R. v. CHAWORTH-MUSTERS* (1904), 24 N. Z. L. R. 223.—N.Z.

*r.* — — —.]—*AUSTRALIAN FINE ARTS STUDIO Co. v. VICTORIA INSURANCE Co.* (1905), 25 N. Z. L. R. 56.—N.Z.

*t.* — — —.]—A special jury granted in an action for wrongful dismissal by a journalist on the ground that expert knowledge was required as to the difficulty of journalists obtaining employment, they being in a peculiar position in that respect.—*JENKINSON v. NEW ZEALAND TIMES Co.* (1906), 26 N. Z. L. R. 160.—N.Z.

*a.* — — —.]—*BRADSHAW v. MASON, STRUTHERS & CO., LTD.* (1907), 26 N. Z. L. R. 1265.—N.Z.

*b.* — — —.]—An order for a special jury will be made in an action for the recovery of fees by a duly registered medical practitioner, as expert evidence must be adduced to enable the question of the reasonableness of the charges to be determined.—*MCCARTHY v. WHITE* (1912), 32 N. Z. L. R. 192.—N.Z.

*c.* — — —.]—*NEWELL v. LYTTELTON TIMES Co., LTD.* (1913), 59 N. Z. L. R. 1125.—N.Z.

*d.* — — —.]—*Employee prosecuting employer—Libel action.*—Deft.'s application for a special jury refused in an action for libel brought by an employee against his employer.—*SCOTT v. KIRK-CALDIE* (1888), 6 N. Z. L. R. 272.—N.Z.

*e.* — — —.]—The fact that an action is brought by an employee against his employer does not prevent a special jury being granted.—*OSTEN v. DUNEDIN CORPN.* (1906), 25 N. Z. L. R. 905.—N.Z.

*f.* — — —.]—*Large sums involved—One party a bank.*—A special jury will be granted in a case where the sums involved are large; & where one of the parties to the action is a bank, the objection that the special jury would be drawn from a class over which the bank might be supposed to exercise considerable influence cannot be sustained.—*STEELE v. BANK OF NEW ZEALAND* (1899), 16 N. Z. L. R. 58.—N.Z.

**PART VII. SECT. 20, SUB-SECT. 2.**

*g.* *Employee of stockholder of incorporated company—Where company party to action.*—The fact of a man being in the employment of a stockholder of an incorporated co. does not disqualify him from serving as a special jurymen in the trial of a case to which the co. is a party.—*FREDERICTON BOOM Co. v. McPHERSON* (1870), 13 B. R. (2 Han.) 8.—CAN.

143 E. R. 1065; *sub nom.* *CORLEY v. KNOWLES*, 3 New Rep. 477.

*Claudet v. Prince* (1867), L. R. 2 Q. B. 406.

*Special jury made up from common jury panel.*—*See* 1825 Act, s. 37, 1870 Act, s. 19 (2).

**SUB-SECT. 2:—QUALIFICATIONS OF SPECIAL JURORS.**

*See* 1870 Act, s. 6; *Rating & Valuation Act*, 1925 (c. 90), s. 20 (1).

**653. Merchant—Includes shopkeeper.**—*HAMOND v. JETHRO* (1811), 2 Brownl. 97; 123 E. R. 836. *Annotation*:—*Refd.* *Buckley v. Barber* (1851), 20 L. J. Ex. 114.

**654. Manufacturer distinguished.**—A merchant of or in an article is one who buys & sells it, & not the manufacturer selling (*BRAMWELL, B.*)—*JOSELYN v. PARSON* (1872), L. R. 7 Exch. 127; 41 L. J. Ex. 60; 25 L. T. 912; 36 J. P. 455; 20 W. R. 316.

*Annotation*:—*Refd.* *Lovell & Christmas v. Wall* (1910), 103 L. T. 588.

**655. Who are esquires—Whether retail tradesman may be.**—Pltf. moved to set aside the special jury panel, on the ground that twenty-six of the persons named therein were retail tradesmen, & therefore not entitled to the addition of esquire:—*Held*: as the affidavit did not negative the qualification of the jurors excepted to, the ct. could not interfere.—*FAIRMAN v. IVES* (1819), 1 Chit. 85.

**SUB-SECT. 3.—THE APPLICATION FOR SPECIAL JURY.**

*See, now*, R. S. C. Ord. 36, r. 9.

**656. Grounds for granting or refusing—Crown interested in defendant's estate.**—The subject's right to try a case by a special jury is not affected by any suggestion of the Attorney or Solicitor-General, without affidavit, that the Crown is interested in deft.'s estate, though that suggestion would be sufficient to obtain a trial at bar.—

*h. Ratepayers—Action against municipal council.*—*BIGGAR v. CITY OF VICTORIA* (1898), 6 B. C. R. 130.—CAN.

*k. Merchants interested in insurance companies—Action against insurance company.*—An objection to an order for a special jury on the ground that the special jury was alleged to consist chiefly of merchants, a majority of whom are interested in insurance cos., not sustained.—*STAUNTON v. LIVERPOOL & LONDON & GLOBE INSURANCE Co.* (1893), 12 N. Z. L. R. 370.—N.Z.

**PART VII. SECT. 20, SUB-SECT. 3.**

*l. Grounds for granting or refusing.*—It is not necessary to give any reason for requiring a special jury.—*MOLSONS BANK v. ROBERTSON* (1888), 5 Man. L. R. 343.—CAN.

*m.* — — —.]—A certificate for a special jury will not be granted unless it is shown that a common jury cannot adequately pass upon the facts in issue.—*CROSS v. ESQUIMAULT & NANAIMO RY. Co.* (1909), 14 B. C. R. 329.—CAN.

*n.* — — —.]—Except under very special circumstances, a litigant is entitled to have his case tried before a special jury.—*R. v. ALLEN* (1890), 8 N. Z. L. R. 700.—N.Z.

*o.* — — —.]—*WARD v. SMITH* (1893), 11 N. Z. L. R. 702.—N.Z.



**DUNN v. COX** (1847), 16 M. & W. 439; 153 E. R. 1261; *previous proceedings*, 8 L. T. O. S. 369.  
*Annotation*:—**Reid**, *Irwin v. Grey* (1865), 14 W. R. 208.

**Grounds for granting or refusing judge's certificate.**—See Nos. 684, 688, *post*.

**657. Time for application—Effect of delay—Special jury granted on terms.**—**Deft.**, upon certain terms favourable to **pltf.**, was allowed to have a special jury after the cause had stood for trial by a common jury during a whole sitting, & had been twice postponed at the instance of **deft.**—**THORNE v. LONDONDERRY (MARQUESS)** (1831), 8 Bing. 26; 1 Moo. & S. 62; 1 L. J. C. P. 46; 131 E. R. 310.

#### SUB-SECT. 4.—JUDGE'S DISCRETION TO AWARD.

See R. S. C. Ord. 36, r. 9.

**658. Refusal to order—Whether interfered with.**—A judge at chambers having refused to grant a special jury at the instance of **defts.**, though there had been no laches on their part, the **ct.**, in the absence of special grounds for so doing, declined to interfere with his discretion.—**SMITH v. LONDON & ST. KATHARINE'S DOCK CO.** (1867), L. R. 2 C. P. 630.

**659.** ———.]—**LINSCOTT v. JUPP** (1891), 8 T. L. R. 130, D. C.

#### SUB-SECT. 5.—INSUFFICIENT NUMBER OF JURORS.

See 1825 Act, s. 37.

**660. Jurors not summoned—Talesman sworn—Not ground for new trial.**—Upon the trial of an information for a libel only ten special jurymen appeared, & two talesmen were sworn on the jury. It is no ground for a new trial that two of the non-attending special jurymen named in the panel had not been summoned, though it appeared that this fact was unknown to **deft.** until after the trial.—**R. v. HUNT** (1821), 4 B. & Ald. 430; 1 State Tr. N. S. App. 1367; 106 E. R. 994.

*Annotations*:—**Reid**, *Falmouth v. Roberts* (1842), 1 Dowl. N. S. 633; *R. v. Mellor* (1858), *Dears. & B.* 468.

**Panel called over before appointed time.**—It is no ground of error, either in fact or in law, that all the special jurors whose names are on the panel to try the cause have not been summoned to attend. Nor is it ground of error that the jury panel was called over before ten o'clock in the morning, the hour appointed

for the sitting of the **ct.** & that ten special jurors only having appeared, the jury was made up with two talesmen. These are irregularities for the **ct.** to set right on motion, if any injustice has been suffered from their occurrence.—**IRWIN v. GREY** (1867), L. R. 2 H. L. 20; 36 L. J. C. P. 148; 16 L. T. 74; 15 W. R. 593, H. L.

*Annotation*:—**Reid**, *Mct. Ry. v. Wilson* (1871), L. R. 6 C. P. 376.

**662. Absence of jurors—Postponement of trial.**—**Pltf.** in a special jury tithe cause, being under a peremptory undertaking to try at the next assizes, the absence of eleven special jurymen was held a sufficient reason for his declining to proceed, though a tales had been prayed, & some of the talesmen sworn, & the **ct.** on a fresh peremptory undertaking to try at the next assizes, discharged a rule *nisi* for judgment as in case of a nonsuit.—**MASTER v. MILNER** (1822), 1 Bing. 70; 7 Moore, C. P. 367; 130 E. R. 29.

**6.3. Where neither party prays a tales—Verdict for defendant refused.**—Where, upon a special jury cause being called on for trial there was not a full special jury, & neither party prayed tales, **deft.** cannot afterwards take down the record by proviso.—**PHILLIPS v. DANCE** (1829), 9 B. & C. 769; 4 Man. & Ry. K. B. 581; 7 L. J. O. S. K. B. 338; 109 E. R. 286.

*Annotation*:—**Reid**, *Oakley v. Ooddeen* (1862), 11 C. R. N. S. 805.

**664.** ———.]—**Cause ordered to stand over.**—**Deft.** having obtained a special jury, the cause was called on for trial at the assizes for Somerset, when four special jurors only being in attendance, & **pltf.** & **deft.** refusing to pray a tales, the cause stood over to the following assizes. In the meantime **deft.** became a prisoner in the Fleet. The **ct.**, on his application, permitted the cause to be tried in London, at the first Sittings after the term in which the application was made.—**KEYS v. SMITH** (1833), 10 Bing. 1; 3 Moo. & S. 338; 131 E. R. 805.

**665.** ———.]—**Defts.**, a railway co., having entered into an undertaking to leave certain lands in their then state until the further order of the **ct.**, & **pltf.** having undertaken to bring an action at the then next assizes, the motion of **pltf.** for an injunction was ordered to stand over. The action was brought, & a special jury obtained; but, on the jury being called at the trial, ten special jurymen alone attended. Each party declined to pray a tales, & the cause became a *remanet*. Upon a motion by **defts.** that the action should be taken as tried with a verdict for **defts.**, & that **defts.** should be discharged from their undertaking:

**p.** ———.]—**SMITH v. OTAGO PRESBYTERIAN CHURCH BOARD OF PROPERTY** (1896), 14 N. Z. L. R. 568.—N.Z.

**q.** ———.]—**R. v. JAMESON & FORD** (1826), Batt. 243.—IR.

**r. Time for application.**—An application for a certificate for a special jury must be made immediately after the trial.—**BINKLEY v. DEJARDINE** (1824), Tay. 177.—CAN.

**t.** ———.]—**Effect of delay.**—Where **deft.** applies for a special jury he must do so in time to permit of the jurors being summoned, otherwise the common jury will not be held to be superseded.—**CLANDININ v. DICKSON** (1851), 8 U. C. R. 281.—CAN.

**u. New trial ordered—Whether second application necessary.**—Pursuant to an order therefor a trial was had with a special jury. On appeal a new trial was ordered:—**Held**: the order for a special jury was not exhausted, & a summons for a special

jury on the new trial was unnecessary.—**ALASKA PACKERS ASSOCN. v. SPENCER** (1905), 11 B. C. R. 138.—CAN.

#### PART VII. SECT. 20, SUB-SECT. 4.

**b. General rule.**—The granting of a special jury is not as of right, but is a discretion to be invoked upon special circumstances.—**CRANSTOWN v. BIRD** (1896), 5 B. C. R. 210.—CAN.

**c.** ———.]—Under *Jury Act*, 1912 (c. 108), s. 59, a party to an action is not entitled to a special jury as of right. The making of an order for a special jury is discretionary. An order by the referee granting a special jury may be reserved in the exercise of his discretion by a judge.—**NEMEROVSKY v. MCBRIDE**, [1924] 2 W. W. R. 264; 3 D. L. R. 103; 34 Man. L. R. 306.—CAN.

**d.** ———.]—The granting of a special jury is not a matter of course. When a case presents no apparent

difficulty, & there are particular reasons for thinking that a special jury would be an unsatisfactory tribunal, a special jury will be refused.—**HUTTON v. MILL** (1896), 14 N. Z. L. R. 518.—N.Z.

**e. On special grounds shown.**—The **ct.** will, under peculiar circumstances, order a special jury cause to be set down for a particular day, upon special grounds shown.—**STALKER v. WIER** (1853), 2 N. S. R. (James) 107.—CAN.

#### PART VII. SECT. 20, SUB-SECT. 5.

**f. Talesmen.**—Talesmen may be sworn on a special jury.—**RANKIN v. GODDARD** (1858), 9 N. B. R. (4 All.) 155.—CAN.

**g. Full number not summoned—Be sufficient to try cause.**—A special jury cannot be struck after the commission day of the assizes; but it is no objection to such a jury that the sheriff has not summoned sixteen



**Sect. 20.—Special juries: Sub-sects. 5, 6 & 7, A. & B.]**

—**Held:** it was not the course of the ct. to order that an action should be taken as tried; & it being the fault not of pltf. alone that the action was not tried, the ct. declined to discharge defts. from their undertaking, but peremptorily ordered pltf. to try the action at the then next assizes.—**BRADBURY v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.** (1852), 5 De G. & Sm. 624; 16 Jur. 1011; 64 E. R. 1271.

**666. — Costs of first trial to follow result of second.]**—Deft. obtained an order for a special jury, but when the trial came on sufficient special jurors were not present, & neither party prayed a tales. When the trial came on a second time, deft. obtained a verdict.

The practice of the ct. under such circumstances is to allow the costs of the first trial to the successful party on the second.—**HOLMES v. ALBRIGHT** (1871), 25 L. T. 747.

**667. When tales may be granted—To plaintiff without consent of defendant.]**—**GATLIFF v. BOURNE**, No. 257, *ante*.

**SUB-SECT. 6.—IN CRIMINAL CAUSES.**

**668. Jurisdiction to order—Indictment for nuisance.]**—*Certiorari* granted to remove an indictment for a nuisance, where it would be necessary to examine scientific persons at the trial, & to have a special jury.—**R. v. LONDON GAS CO.** (1838), 1 Will. Woll. & II. 419.

**669. — At Central Criminal Court.]**—**R. v. ASPINALL** (1875), 39 J. P. Jo. 86.

**670. — Indictment for felony.]**—There is no power in the ct. to order a special jury to be struck for the trial of a person charged with felony.—**R. v. MAYNE** (1883), 32 W. R. 95, D. C.

**671. — Or treason.]**—**R. v. WRIGHT** (1904), *Times*, Jan. 27.

**672. — Indictment for misdemeanour—In King's Bench Division—Whether at bar or Nisi Prius.]**—**R. v. WRIGHT** (1904), *Times*, Jan. 27.

*See, also*, No. 687, *post*.

**673. Grounds for granting—Evidence of scientific nature.]**—**R. v. LONDON GAS CO.**, No. 668, *ante*.

**674. Whether removal to High Court by certiorari ordered.]**—**R. v. LONDON GAS CO.**, No. 668, *ante*.

—*See, generally*, CROWN PRACTICE, Vol. XVI., p. 411.

**675. Disqualification of juror—Whether sitting on grand jury.]**—**R. v. SULLIVAN**, No. 192, *ante*.

**676. How cause heard at assizes—Whether in Crown or civil court.]**—**R. v. WRIGHT** (1904), *Times*, Jan. 27.

**SUB-SECT. 7.—COSTS OF SPECIAL JURY.**

**A. In General.**

*See* 1825 Act, s. 34 & 1922 Act, s. 8, sched.

**677. General rule—Party applying must pay.]**—Special jurors are to be paid by the party who moved for the special jury, though to ensure a

trial the other party may have summoned them.—**WILSON v. BUTLER, WILSON v. HOADLEY** (1837), 2 Mood. & R. 78, N. P.

**678. — Though other party nonsuited.]**—1825 Act enacts, that the party who shall apply for a special jury shall pay the costs occasioned thereby unless the judge before whom the cause is tried shall immediately after the verdict certify:—**Held:** deft. who had applied for a special jury was not entitled to the costs of that jury, where the judge who tried the cause nonsuited pltf. on his opening.

We must construe the term "verdict" in the Act of Parliament in its ordinary sense. Here there was no verdict, & consequently, the judge had no power by his certificate to charge pltf. with the costs of a special jury which was moved for by deft. (**LORD TENTERDEN, C.J.**).—**WOOD v. GRIMWOOD** (1830), 10 B. & C. 689; 5 Man. & Ry. K. B. 622; 109 E. R. 606.

**679. — Where other party abandons action.]**—Deft. had a special jury. Pltf. withdrew the record, & deft. paid the jury. The money paid to the special jury is not part of the costs of the day.—**TURNBULL'S CASE** (1824), 2 L. J. O. S. K. B. 93.

**680. — — —.]**—If a case be not gone into the judge will not certify that it was a fit cause to be tried by a special jury, merely because the declaration is for penalties to a very large amount, & because persons of considerable rank are called on their subornas.—**ORME v. CROCKFORD** (1824), 1 C. & P. 537, N. P.

**681. — — —.]**—24 Geo. 2, c. 18, s. 1, whereby the judge, by certifying that the cause was a proper one to be tried by a special jury, may relieve the party applying for such special jury from the expenses, does not extend to a case where the record is withdrawn.—**CLEMENTS v. GEORGE** (1826), 11 Moore, C. P. 510; 4 L. J. O. S. C. P. 192.

**682. — — —.]**—If deft. in an action of replevin which is made a special jury cause withdraws his avowries at the assizes & the judge directs him to pay "all costs" that will not include the costs of the special jury.—**BELL v. TAINTHORP** (1834), 2 Dowl. 518.

**683. — — —.]**—Where pltf., in an action for the infringement of a patent, after having given notice of trial, abandoned the action:—**Held:** deft., having obtained a rule for a special jury, was not entitled to his costs thereby incurred.—**GREAVES v. EASTERN COUNTIES RY. CO.** (1859), 1 E. & E. 961; 28 L. J. Q. B. 290; 33 L. T. O. S. 162; 5 Jur. N. S. 733; 7 W. R. 453; 120 E. R. 1171.

*Annotation:*—**Mentl. Middleton v. Bradley**, [1895] 2 Ch. 716.

**684. — — —.]**—In an action for calls, there being a special plea that the calls were to raise capital for an illegal amalgamation, deft. not appearing, the judge certified for a special jury, as the plea might have raised difficult questions of fact, fit for a special jury to try.—**LONDON BANK OF SCOTLAND v. MARSHALL** (1865), 4 F. & F. 1046, N. P.

**685. — — — Party applying successful on general plea—Unsuccessful on special pleas.]**—A declaration in trespass contained five counts,

jurors, if a sufficient number attend to try the cause.—**MORVEY v. MAYNARD** (1836), 4 O. S. 323.—**CAN.**

**PART VII. SECT. 20, SUB-SECT. 7.—A.**

**677 i. General rule—Party applying must pay.]**—**KEHOE v. GREAT**

**SOUTHERN & WESTERN RY. CO.** (1886), 20 I. L. T. 27.—**IR.**

**h. What costs allowed—Costs in cause.]**—The costs of a special jury are costs in the cause, not costs of the day.—**WHITEHEAD v. BROWN** (1832), 2 O. S. 379.—**CAN.**

—*Where* pltf. does not desire a jury, but deft. demands one, & pltf. asks that, if a jury be ordered, it shall be a special one, the costs of such special jury should be costs in the cause.—**CANADIAN FINANCERS TRUST CO. v. ASHWELL**, [1917]

to all of which deft. pleaded not guilty & not possessed. A rule for a special jury was then obtained by pltf.; but deft., before the trial, amended his pleas, & suffered judgment by default as to the last two counts. At the trial pltf. had a verdict upon the plea of not guilty, & deft. upon the plea of not possessed. The damages were assessed at 40s. as to the last two counts. The judge certified for a special jury:—*Held*: pltf. was not entitled to the costs of the special jury.—*WATERS v. HOWELLS* (1852), 8 Exch. 244; *sub nom WALTERS v. HOWELLS*, 22 L. J. Ex. 96; 20 L. T. O. S. 114.

— Unless judge certifies that cause proper for special jury.]—See Nos. 688–695, *post*.

686. Jury sworn by mistake—Verdict in default of appearance—Verdict subsequently set aside on terms.]—*LANE v. EVE* (1876), Bitt. Prac. Cas. 136; 2 Char. Cham. Cas. 65.

See, *now*, R. S. C., Ord. 28, r. 1.

687. Jurisdiction to certify—Not limited to civil cases.]—6 Geo. 4, c. 50, s. 34, says, “the judge before whom the cause is tried,” may certify for costs of a special jury, the use of this word “cause” does not limit the power to civil cases.—*R. v. PEMBRIDGE (INHABITANTS)* (1842), 3 Q. B. 901; 3 Gal. & Dav. 5; 12 L. J. Q. B. 47; 7 J. P. 131; 6 Jur. 1037; 114 E. R. 754.

*Annotations*:—*Mentd.* R. v. Clark (1844), 5 Q. B. 887; R. v. Eardisland (1854), 3 E. & B. 960.

688. Grounds for granting or refusing—Discretion of judge.]—It is entirely in the discretion of the judge to grant a certificate for a special jury, & he will do so in an action for a libel, although the general issue be the only plea on the record.—*OLDAKER v. WILSON* (1843), 1 L. T. O. S. 435, N. P. 689.

— Sole question a question of law.]—Where a case turned solely on a question of law, & there was no fact in dispute between the parties, the judge refused to certify for the special jury.—*WEMYS v. GREENWOOD* (1826), 2 C. & P. 483, N. P. 690.

690. — Action for libel—Special plea of justification.]—*Semble*: an action for a libel in a newspaper is a fit case to be tried by a special jury, if there be special pleas of justification; but not if the general issue only be pleaded.—*ROBERTS v. BROWN* (1834), 6 C. & P. 757, N. P.

*Annotations*:—*Distd.* *Irwin v. Normanby* (1839), 3 Jur. 604. *Consd.* *Oldaker v. Wilson* (1843), 1 L. T. O. S. 435.

691. — General issue pleaded.]—*OLDAKER v. WILSON*, No. 688, *ante*.

692. — ]—*DRAKE v. HARTCUP* (1853), 21 L. T. O. S. 91; 1 W. R. 352.

693. — Action for slander—General issue pleaded.]—In an action of slander, in which the general issue only was pleaded, the judge certified in behalf of deft., that it was a proper case to be tried by a special jury.—*IRWIN v. NORMANBY (MARQUIS)* (1839), 3 Jur. 604.

694. — Action for calls.]—In an action for calls, plea, never indebted, certificate for special jury refused.—*HUMBER IRON CO. v. JONES* (1865), 4 F. & F. 1047.

695. — Other party not appearing.]—*LONDON BANK OF SCOTLAND v. MARSHALL*, No. 684, *ante*.

696. What costs allowed—Amount actually paid to jury.]—Where the judge does certify that the cause was proper for a special jury, the party

is only entitled to the costs actually paid to the attending jury in ct.; it is the constant practice not to allow more costs.—*CURSUM v. DURHAM* (1816), 2 Chit. 154.

697. — Full costs.]—Where the judge who tries a cause by a special jury certifies that it was a proper case for a special jury, the master must allow the full costs of the jury, where the verdict is found for deft.—*BROADRICK v. CLARK* (1823), 12 Price, 151; 147 E. R. 684.

698. Not included under general order for costs.]—An indictment for a nuisance was referred by order of *Nisi Prius*, with power to the arbitrator, in case he should find deft. guilty of a nuisance, to direct what should be done; & in case he should be of opinion that, in point of law, the prosecutors were entitled to costs, deft. undertook to pay them. The arbitrator found deft. guilty; & stated his opinion, that, in point of law, the prosecutors were entitled to costs:—*Held*: this finding did not, according to the order, entitle the prosecutors to the costs of the reference or award; as they should have been specially provided for; nor the costs of a special jury, as they should have been applied for in court according to 24 Geo. 2, c. 18, or made the subject of a special consent in the order of reference.—*R. v. MOATE* (1832), 3 B. & Ad. 237; 1 L. J. K. B. 78; 110 E. R. 89.

699. Whether certificate necessary—Party applying unsuccessful in cause.]—Where a special jury is summoned on deft.'s process, pltf., if he succeeds is entitled to the costs of it, without a certificate from the judge.—*JONES v. TOBIN* (1837), 4 Bing. N. C. 123; 6 Dowl. 251; 5 Scott, 440; 132 E. R. 735.

700. — Agreement by parties for change of venue—Costs of change to be costs in the cause.]—*GEEVES v. GORTON*, No. 703, *post*.

Effect of certificate for special jury—On costs of good jury.]—See No. 714, *post*.

#### B. Time for Application for Certificate.

See 1825 Act, s. 34.

701. Immediately after verdict—Day after trial.]—Refusal to certify for special jury, on application made the day after the trial.—*WAGGETT v. SHAW* (1812), 3 Camp. 317, N. P.

*Annotations*:—*Apld.* *Skipper & Skipper v. Rodkin* (1860), 2 Sw. & Tr. 1. *Refd.* *Wood v. Grimwood* (1830), 10 B. & C. 689; *Geeve v. Gorton* (1846), 3 Dow. & L. 481.

702. — Within reasonable time.]—The words in 1825 Act, s. 34, requiring the judge's certificate “immediately after verdict” mean that the judge shall certify within a reasonable time after the verdict is pronounced.—*CHRISTIE v. RICHARDSON* (1842), 10 M. & W. 688; 2 Dowl. N. S. 503; 12 L. J. Ex. 86; 6 Jur. 1069; 152 E. R. 648.

*Annotations*:—*Consd.* *Leech v. Lamb* (1855), 25 L. J. Ex. 17. *Expld.* *Barker v. Lewis & Peat*, [1913] 3 K. B. 34.

703. — ]—A cause having been set down for trial in Middlesex & a rule obtained for a special jury, the parties agreed that the venue should be changed to London, & the cause tried by a special jury there, & that all costs occasioned by that arrangement should be costs in the cause. The cause came on for trial in London, & was referred to arbn., the arbitrator to have the same power to certify as a judge at *Nisi Prius*. The award was

1 W. W. R. 459; 23 B. C. R. 341.—*CAN.*

1. Judge refusing to certify—Special jury fee paid—Right of solicitor to recover from client.]—An attorney is entitled to recover from his client a sum paid for a special jury, where the cause has been so tried with the

client's knowledge, but the judge has refused to certify.—*Ex p. JAMES* (1856), 8 N. B. R. (3 All.) 286.—*CAN.*

#### PART VII. SECT. 20, SUB-SECT. 7.—B.

703 I. Immediately after verdict.]—An application for a certificate that a

case was a proper one to be tried by a special jury ought to be made immediately after the verdict has been given.—*DILLON v. CAFFREY* (1872), 6 L. R. Eq. 363.—*IR.*

m. — On motion moved after trial.]—A certificate for a special jury

**Sect. 20.—Special juries: Sub-sect. 7, B.; Sub-sect. 8. Sect. 21. Part VIII. Sects. 1, 2 & 3. Part IX.]**

made on Aug. 6, & after the first four days of the following term, the arbitrator certified for a special jury:—*Held*: (1) the certificate was too late; (2) the successful party was entitled to the additional costs of the special jury occasioned by the change of venue from Middlesex to London.—*GEEVES v. GORTON* (1846), 15 M. & W. 186; 3 Dow. & L. 481; 15 L. J. Ex. 169; 6 L. T. O. S. 324; 10 Jur. 272; 153 E. R. 815.

**704. — Three months after trial.]**—An application for a certificate for the costs of a special jury was not made until three months after trial. The ct. held that it was bound to exercise the powers conferred on it by Court of Probate Act, 1857 (c. 77), s. 36, with regard to trials by jury, subject to the same rules as the common law cts., & therefore, under 1825 Act, s. 34, refused the application as being too late.—*SKIPPER & SKIPPER v. BODKIN* (1860), 2 Sw. & Tr. 1; 2 L. T. 636; 24 J. P. 344; 8 W. R. 589; 164 E. R. 890; *sub nom.* *SKIPPER v. SKIPPER*, 29 L. J. P. M. & A. 133.

**705. — —.]**—At the trial of a probate action, in Jan. 1890, ptf. obtained a verdict on every issue, including that of forgery. The judge had left the building at the time the verdict was given, & the following morning, upon the application of ptf.'s counsel, he gave judgment in accordance with the findings of the jury, but counsel omitted to ask for a certificate for a special jury. Upon application, in Apr. 1890, for the certificate:—*Held*: the application must be refused.—*WEBSTER v. APPLETON* (1890), 62 L. T. 704.

*Annotation*:—*Reid. Barker v. Lewis & Peat*, [1913] 3 K. B. 34.

**706. — —.]**—Applications for a certificate for a special jury should be made to the judge immediately after trial.—*GRIFFITHS v. GRIFFITHS* (1898), 14 T. L. R. 184.

**707. — Unless special circumstances prevent application.]**—The certificate which may be granted under 1825 Act, s. 34, by the judge trying an action that it is "a cause proper to be tried by a special jury" can only be granted immediately in sequence of time after the verdict, unless there are some special circumstances which prevent the certificate being then applied for or granted, in which case the certificate must be obtained at the first reasonable opportunity. The judge may, however, expressly reserve his decision & grant the certificate at a later date, when he has made up his mind, *nunc pro tunc*.—*BARKER v. LEWIS & PEAT*, [1913] 3 K. B. 34; 82 L. J. K. B. 843; 108 L. T. 941; 29 T. L. R. 565; 57 Sol. Jo. 577, C. A.

**708. — Decision reserved by judge.]**—*BARKER v. LEWIS & PEAT*, No. 707, *ante*.

**709. — Effect of delay—Delay capable of explanation.]**—A certificate granted by the judge, to warrant the allowance of costs of a special jury, given by him after he had left the assize town, is unavailing against the positive words of 1825 Act, which requires it to be given "immediately after the verdict;" & the ct. cannot receive any explanation why it was not so given.—*UPTON v. LONGWORTHY* (1830), 8 L. J. O. S. K. B. 302.

**710. — Application granted verbally—Delay in signature.]**—A case was tried by a special jury, who retired, & while another cause was going on, brought in a verdict for deft. Deft.'s counsel

immediately applied for a certificate for a special jury, under 1825 Act, s. 34; & the judge verbally granted the application. The associate thereupon indorsed the certificate on the record, but, owing to the hurry occasioned by the trial of the other cause, & to the departure of the judge from the assize town very soon after, he did not obtain the judge's signature to the certificate. The judge afterwards signed the certificate in the interval between the first & second attendance for taxation of costs, which took place almost immediately after the *postea* was delivered to deft.:—*Held*: the signature was too late; & the ct. set aside the certificate.—*GRACE v. CLINCH* (1843), 4 Q. B. 606; 3 Gal. & Dav. 591; 12 L. J. Q. B. 273; 1 L. T. O. S. 144; 7 Jur. 576; 114 E. R. 1026.

*Annotations*:—*Fold. Leech v. Lamb* (1855), 11 Exch. 437. *Consd. Skipper & Skipper v. Bodkin* (1860), 2 Sw. & Tr. 1. *Reid. Barker v. Lewis & Peat*, [1913] 3 K. B. 34.

**711. — —.]**—A cause was tried by a special jury at the Spring assizes 1855, & a verdict found for deft. Deft.'s counsel then asked the judge to certify for the special jury, & he consented, but the associate omitted to indorse the certificate on the record. In the following term, a rule *nisi* was obtained for a new trial, which was not disposed of until Trinity vacation. On taxation of costs it was discovered that the certificate was not indorsed on the record, & on application to the judge on Aug. 14, he signed the certificate:—*Held*: the certificate was too late, & the ct. set it aside.

When a statute requires an act to be done immediately, I do not see how we can construe it to mean that the act may be done some weeks afterwards (*POLLOCK, C.B.*).—*LEECH v. LAMB* (1855), 11 Exch. 437; 25 L. J. Ex. 17; 26 L. T. O. S. 107; 1 Jur. N. S. 1175; 156 E. R. 902; *sub nom.* *LEACH v. LAMB*, 4 W. R. 99.

*Annotation*:—*Reid. Barker v. Lewis & Peat*, [1913] 3 K. B. 34.

**712. — — Pending trial of special case.]**—A cause came on for trial before Wilde, C.J., on Dec. 13, 1848, when a verdict was taken for ptf., subject to a special case. Upon the argument of the special case, on June 11, 1850, which was after Wilde had ceased to be a judge of this ct., the ct. directed a non-suit. On Sept. 12, the following indorsements were made upon the *Nisi Prius* record: "I certify that this was a fit & proper cause to be tried by a special jury. Thomas Wilde." "It was assented to at *Nisi Prius*, that, in the event of judgment being for deft., I should certify for the special jury; which I have accordingly done *nunc pro tunc*. 'Truro.'" The ct. refused to set aside the certificate, as being informal or too late.—*SERRELL v. DERBYSHIRE, ETC.* Ry. Co. (1851), 10 C. B. 910; 17 L. T. O. S. 78; 138 E. R. 360.

#### SUB-SECT. 8.—DISCHARGE.

**713. Same special jury to try several cases on same question—Court dissatisfied with verdict on first case.]**—If the same special jurymen are struck to try several causes on the same question, & the ct. being dissatisfied with the verdict in the first, direct it to abide the event of another cause, they will also, on motion, discharge the same special jurymen from trying the second cause.—*DONCASTER CORPN. v. COE* (1811), 3 Taunt. 404; 128 E. R. 161.

can be given after a nonsuit has been granted on a motion moved after the trial, pursuant to leave reserved at the

trial.—*O'MEARA v. WELLINGTON CORPN.* (No. 2) (1899), 18 N. Z. L. R. 110.—N.Z.

*Whether on appeal.*—*BANK OF NEW ZEALAND v. FLEMING* (1899), 18 N. Z. L. R. 1.—N.Z.

## SECT. 21.—GOOD JURIES.

**714. Whether a special jury.]**—(1) The costs of a good jury upon execution of writ of inquiry under 8 & 9 Will. 3, c. 11, not allowed, although the judge certify that it was a proper cause to be tried by a special jury.

(2) A good jury is not a special jury within the meaning of the several Acts on the subject of juries. The practice has been invariably to disallow the extra expense of a good jury upon the execution of a writ of inquiry (*per* CUR.).—*CALVERT v. GORDON* (1828), 3 Man. & Ry. K. B. 124.

**715. When ordered—On inquiry before secondary—Action against railway company for negligence.]**—A judge's order was obtained by pltf. for a "good jury," on an inquiry before the secondary, in an action against a railway co. for negligence, & the sheriff, in accordance with the uniform practice since the passing of 1825 Act, returned a jury selected from the list of special jurors. They were paid each one guinea; & the master, on taxation, allowed the payment:—*Held*: such payment was reasonable & sanctioned by practice, & it was properly allowed by the master.—*VICKERY v. LONDON, BRIGHTON, ETC. RY. CO.* (1870), L. R. 5 C. P. 165; 39 L. J. C. P. 169; 22 L. T. 270; 18 W. R. 549.

*Annotation*:—*Folld. Vickery v. L. B. & S. C. Ry.* (1870), L. R. 5 Exch. 201.

**716. ———.]**—The amount of special jury fees paid to a "good jury" at the trial before the secondary of the sheriffs of London of a writ master of this ct. on taxation of pltf.'s costs.—*VINES v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1870), L. R. 5 Exch. 201; 39 L. J. Ex. 175; 22 L. T. 448; 18 W. R. 814.

—On inquisition of lunacy.]—*See LUNATICS.*

**717. Costs of—On writ of inquiry—Effect of judge certifying for special jury.]**—*CALVERT v. GORDON*, No. 714, *ante*.

**718. ———.]**—Since Reg. Gen. Hil. 1832, No. 101, a charge for a good jury on an inquiry is allowed.—*WILKINSON v. MALIN* (1832), 1 Cr. & M. 237; 3 Tyr. 255; 149 E. R. 388.

*Annotation*:—*Folld. Vickery v. L. B. etc. Ry.* (1870), L. R. 5 C. P. 165.

**719. ———.]**—*VICKERY v. LONDON, BRIGHTON, ETC. RY. CO.*, No. 715, *ante*.

**720. ———.]**—*VINES v. LONDON, BRIGHTON & SOUTH COAST RY. CO.*, No. 716, *ante*.

**721. ——— On what scale.]**—*VICKERY v. LONDON, BRIGHTON, ETC. RY. CO.*, No. 715, *ante*.

**722. ———.]**—*VINES v. LONDON, & SOUTH COAST RY. CO.*, No. 716, *ante*.

## Part VIII.—Juries Specially Constituted.

## SECT. 1.—IN INFERIOR COURTS OF CIVIL JURISDICTION.

*See* Administration of Justice Act, 1925 (c. 28), s. 19.

**County courts.]**—*See, generally, COUNTY COURTS*, Vol. XIII., pp. 499, 500.

—Admiralty actions.]—*See ADMIRALTY*, Vol. I., pp. 248, 249, Nos. 1764, 1765.

—Probate actions.]—*See EXECUTORS*, Vol. XXIII., p. 121, No. 1183.

—Misconduct or bias of jurors—As ground for transfer of action.]—*See COUNTY COURTS*, Vol. XIII., p. 495, Nos. 445, 447.

**Other inferior courts.]**—*See, generally, COURTS*, Vol. XVI., pp. 194 *et seq.*

## SECT. 2.—UNDER LAND CLAUSES CONSOLIDATION ACT, 1845.

*See, generally, COMPULSORY PURCHASE*, Vol. XI., pp. 203 *et seq.*

**Jurisdiction of jury.]**—*See COMPULSORY PURCHASE*, Vol. XI., pp. 185 *et seq.*

**Time for summoning jury.]**—*See COMPULSORY PURCHASE*, Vol. XI., p. 170, Nos. 480, 481.

**Time for issue of warrant—After entry on lands.]**—*See COMPULSORY PURCHASE*, Vol. XI., p. 225, Nos. 1112–1116.

**Acquisition for land drainage—Form of warrant.]**

—*See COMPULSORY PURCHASE*, Vol. XI., p. 298, No. 2299.

## SECT. 3.—IN THE MAYOR'S AND CITY OF LONDON COURT.

*See MAYOR'S & CITY OF LONDON COURT.*

## Part IX.—Payment of Jurors.

*See* 1825 Act, s. 35.

**723. Right to payment—Jurors summoned—out case settled.]**—After venire returned & jury summoned, if the parties agree & do not countermand the summons, the jurymen who appear shall have their usual charges.—*CALDICOT v. PEMBROKE (EARL)* (1682), 2 Show. 248; 89 E. R. 920.

*Annotation*:—*Refd. Vickery v. L. B. etc. Ry.* (1870), L. R. 5 C. P. 165.

## PART IX.

**724 i. Amount of payment.]**—A special juror is entitled to £3 for each day's attendance at ct. whether he

serves or not, & whether in order to attend ct. he travels from his place of residence or not; if he so travels he is entitled to mileage.—*TAYLOR v. DRAKE* (1902), 9 B. C. R. 54.—*CAN.*

**724. ——— After jury sworn.]**—*ANON.* (1914), 49 L. Jo. 134.

**725. ——— Whether entitled to expenses—Jury summoned from a distance.]**—*R. v. PINNEY*, No. 462, *ante*.

**726. Amount of payment.]**—The ct. was also informed that pltf. after the verdict had paid the jury £4 a man whereas the rule of ct. is that they coming but out of Hertfordshire should have but

o. Verdict for defendant on inquisition.]—Where the verdict is for deft. under a writ de proprietate probanda, jury fees are taxable as part of his costs of the inquisition.—*HALE*

**20s. a man.**—*COTTON v. DAINTRY* (1669), 1 Vent. 29; 86 E. R. 21.

**Annotations:**—*Mentd.* *Meriton v. Stevens* (1741), Willes, 271; *Hambly v. Trott* (1776), 1 Cowp. 371; *Sampson v. Brown* (1802), 2 East, 439.

**727. — Good jury.]**—*VICKERY v. LONDON, BRIGHTON, ETC. RY. CO.*, No. 715, *ante*.

**Payment on view.]**—*See* *Regulæ Generales*, Hilary Term, 1853, r. 49.

**Coroner's juries.]**—*See* *CORONERS*, Vol. XIII., p. 260, No. 413; *Coroner's Act*, 1887 (c. 71), s. 25.

**In county courts.]**—*See* *County Courts Act*, 1888 (c. 43), s. 101; *County Courts Act*, 1919 (c. 73), s. 22 (1); *C. C. R.*, Ord. 22, r. 1.

## Part X.—Relief after Service.

*See* 1825 Act, ss. 40–42; 1870 Act, s. 19; *Central Criminal Court Act*, 1834 (c. 36), s. 4; *Lands Clauses Consolidation Act*, 1845 (c. 18), s. 57; *Municipal Corporations Act*, 1882 (c. 50), s. 186 (6); *County Courts Act*, 1888 (c. 43), s. 102.

**728. Jurisdiction to grant.]**—*R. v. JAMESON* (1896), as reported in 12 T. L. R. 551, 580.

**Annotations:**—*Mentd.* *R. v. Audley*, [1907] 1 K. B. 383; *R. v. Stride & Millard*, [1908] 1 K. B. 617; *R. v. Porter* (1909), 3 Cr. App. Rep. 237; *R. v. Crewe, Ex p. Sekgome*, [1910] 2 K. B. 576; *Coldingham Parish Council v. Smith*, [1918] 2 K. B. 90.

## Part XI.—Offences in Connection with Juries.

### SECT. 1.—BY JURORS.

*See* 1825 Act, ss. 38, 53, 54; 1862 Act, s. 12; 1870 Act, s. 20.

**729. Giving a verdict without being agreed.]**—(1) If a jury give a verdict without being agreed, they shall be fined.

(2) Jurors fined for giving a collusive verdict.—*WATTS v. BRAINS* (1600), Cro. Eliz. 778; 78 E. R. 1009.

**Annotations:**—*As to* (1) *Distd.* *Bushell's Case* (1670), Vaugh. 135. *Generally, Mentd.* *R. v. Mawgridge* (1706), Kel. 119.

**730. Giving collusive verdict.]**—*WATTS v. BRAINS*, No. 729, *ante*.

**731. Wrongfully serving as grand juror—When not returned on the panel—With malicious intent.]**—S., who was not returned by the sheriff on the grand inquest, by confederacy with the clerk who read the panel, procured himself to be sworn of the grand inquest, with intent to indict his neighbours maliciously; & accordingly did upon his own knowledge, as he pretended, cause several to be indicted on divers penal statutes, for which he was indicted on 11 Hen. 4, c. 9, by which statute it is provided, "that no indictment shall be found by any persons named to the justices without due returns of the sheriff, etc.; & if any indictment be made in any point contrary, such indictment shall be void;" & found guilty:—*Held*: (1) Justices of Assize had power to punish this offence; (2) S. was an offender within 11 Hen. 4, c. 9.—*SCARLET'S CASE* (1612), 12 Co. Rep. 98; 77 E. R. 1873.

**Annotation:**—*Generally, Reftd.* *R. v. Marsh* (1837), 6 Ad. & El. 236.

**732. Refusal to present.]**—Two of the jury of a leet refused to make a presentment that they paid 10s. for the certainty of leet; the steward imposed a fine of £6 upon them, & the lord dis-

trained for the fine, & *pro certo letæ*. Upon replevin brought:—*Held*: the fine imposed upon the jurors jointly was not lawfully imposed; it ought to have been severally assessed.—*GODFREY'S CASE* (1614), 11 Co. Rep. 42 a; 77 E. R. 1199; *sub nom. BULLEN v. GODFREY*, 1 Roll. Rep. 73.

**Annotations:**—*Reftd.* *Davidson v. Moscrop* (1801), 2 East, 56. *Mentd.* *Hungerford v. Haveland* (1627), Benl. 180; *Grips v. Ingledew* (1702), 7 Mod. Rep. 87; *Smith v. Gibson* (1735), Lee temp. Hard. 271; *Moir v. Munday* (1755), Say. 181; *Herries v. Jameson* (1794), 5 Term Rep. 553; *Morgan v. Brown* (1836), 4 Ad. & El. 515; *Kemp v. Neville* (1861), 10 C. B. N. S. 523.

**733. Juror absenting himself.]**—If, after the jury sworn & departed from the bar, one of them willfully goes out of town, whereby only eleven remain, these eleven cannot give any verdict without the twelfth, but the twelfth shall be fined for his contempt, & that jury may be discharged & a new jury sworn & new evidence given & the verdict taken of the new jury.—*HANSCOM'S CASE* (1639), 2 Hale, P. C. 296.

**Annotation:**—*Reftd.* *R. v. Mellor* (1858), Dears. & B. 468.

**734. —.]**—*R. v. MACRAE* (1892), *Times*, Nov. 19.

**735. — Without leave of court—Through illness.]**—*R. v. RHODER, ETC.* (1894), *Times*, Feb. 12.

**736. Personation.]**—*ANON.* (1641), No. 753, *post*.

*See, generally, CONTEMPT OF COURT*, Vol. XVI., p. 18.

**737. Verdict contrary to evidence & direction.]**—*BUSHELL'S CASE*, No. 561, *ante*.

**738. Failure to attend as juror—Through residing away from London.]**—A fine, for not attending as a special juror at the Court of Common Pleas, at Westminster, having been imposed upon a gentleman, having a house in London &

*v. HILYARD* (1891), 31 N. B. R. 87.—*CAN.*

**p. Agreement by parties to pay additional fees.]**—During a lengthened trial *at nisi prius* the parties by their attorneys agreed in writing that the jurors should be paid in addition to the sum they receive from the government the sum of £30 between the twelve for each day they might be engaged in the trial inclusive of the past days

of the trial:—*Held*: this agreement was illegal & void & judgment was entered for deft.—*GLASS v. MARTIN* (1866), 3 W. W. A'B. 117.—*AUS.*

**q. Two cases between same parties—Tried by same jury.]**—Where two separate cases between the same parties are, by consent, tried by the same jury, which brings in two separate verdicts, the jury is entitled to separate fees for the two cases.—*GILLANDERS*

*BROTHERS v. REEVES* (1903), 23 N. Z. L. R. 417.—*N.Z.*

### PART XI. SECT. 1.

**r. Remission of fines.]**—The ct. will in certain cases relieve jurors from fines imposed on them *at nisi prius*, after the fine has been levied by the sheriff.—*Re COLE, Re MALLORY* (1843), 6 O. S. 425.—*CAN.*



Brighthelmstone, but who resided the twelve months preceding at Brighthelmstone, the ct. refused to remit it.—*Ex p.* CLARGES (1827), 1 Y. & J. 399; 4 Dow. & Ry. M. C. 274; 148 E. R. 726.

**739. — Juror abroad.]**—Where the party summoned, on a jury, had let his house, & was abroad, which fact was communicated to the summoning officer, the ct. remitted the fine.—*Ex p.* FORD (1827), 1 Y. & J. 401; 4 Dow. & Ry. M. C. 275; 148 E. R. 727.

**740. — Summons left at wrong house.]**—Where the summons to attend on a special jury had by mistake been left at a wrong house, the ct. remitted the fine, but required the affidavit of the summoning officer to that fact.—*Ex p.* BROWN (1827), 1 Y. & J. 401; 4 Dow. & Ry. M. C. 276; 148 E. R. 727.

**741. — Jurors of county in which cause did not arise.]**—Where an issue was directed by a ct. of equity to be tried at bar by a special jury of a county in which the cause did not arise, the ct. fined those special jurors who did not attend, it being proved that they were duly summoned.—LAYBURN v. CRISP (1838), as reported in 8 C. & P. 397.

*Annotations:—Mentd.* Evans v. Rees (1839), 10 Ad. & El. 151; Thompson v. Daniel (1853), 10 Hare, 296; Mills v. Colchester Corp'n. (1867), L. R. 2 C. P. 476; Woodham v. Peterson (1871), 25 L. T. 26.

**Verdict improperly arrived at.]—See Part VII., Sect. 10, sub-sect. 3, F., ante.**

**742. Eating or drinking.]**—If jurors eat & drink at their own expense after their departure from the bar & before verdict, the verdict is not void, but the jurors can be fined. *Semble*: otherwise if they eat & drink at the expense of the parties.—HALL v. VAUGHAN (1595), Moore, K. B. 599; 72 E. R. 784.

*Annotation:—Refd.* King v. Burdett (1696), 2 Salk. 645.

**743. —.]**—If jurors before verdict eat at their own costs they shall be fined; if at the costs of the party, the verdict is void.—HAREBOTTLE v. PLACOCK (1604), Cro. Jac. 21; 79 E. R. 17.

—*J.—Sec. now, 1870 Act, s. 23.*

**At expense of parties.]—See Part VII., Sect. 10, sub-sect. 3, F., ante.**

**744. How punished.—Whether indictable for conspiracy.]**—FLOYD v. BARKER (1607), 12 Co. Rep. 23; 77 E. R. 1305.

*Annotations:—Refd.* Grenville v. College of Physicians (1700), 12 Mod. Rep. 386; Kemp v. Neville (1861), 10 C. B. N. S. 523; Dawkins v. Rokoby (1873), L. R. 8 Q. B. 255. *Mentd.* Barnardiston v. Soames (1674), Freem. K. B. 380; Gwinn v. Poole (1692), 2 Lut. App. 1560; R. v. Almon (1765), Wilm. 243; Basten v. Carew (1825), 3 B. & C. 649; Garnett v. Ferrand (1827), 6 B. & C. 611.

**745. Whether entitled to be heard by counsel.]**—The ct. will not hear counsel for a jurymen who has been fined for contempt.—CARNE v. NICOLL (1834), 3 Dowl. 115.

*Annotation:—Mentd.* Muirhead v. Evans (1851), 6 Exch. 447.

## SECT. 2.—BY SUMMONING OFFICERS.

**746. Returning insufficient jurors.]**—Upon a *venire facias* upon an issue joined, the sheriff returns twelve jurors only according to the words of the writ; where he ought to have returned twenty-four according to constant usage, for speeding the trial in case of challenge, death, sickness, or delay of the tales; the sheriff shall be

amerced for this return. For the law while preserving ancient forms observes precedents & constant usage.—ANON. (1487), Y. B. 2 Hen. 7, fo. 8, pl. 24; Jenk. 172; 145 E. R. 112.

**747. Money taken by summoning officers.]**—R. v. WHITAKER (1778), 2 Cowp. 752; 98 E. R. 1343.

—*J.—See, now, 1825 Act, s. 43.*

**748. Failure of summoning officer to attend.]**—In a case, the jury retired to consider of their verdict, & a fresh jury being called, only five appeared. The judges inquired for the summoning officer, & was informed that he was not in attendance:—*Held*: in future the ct. would fine such officer if he did not attend; for without his evidence, the jury could not be fined.—ANON. (1828), 3 C. & P. 439, N. P.

**749. Wrongfully acting as under-sheriff—Whether liable to penalties as under-sheriff.]**—A declaration for penalties under the 1825 Act, s. 46, described deft. as "acting under-sheriff" & it was proved that he was the person who in the county performed the duties of under-sheriff; but that T., in London, was nominated under-sheriff pursuant to Lighting & Watching Act, 1833 (c. 90), s. 5. On the occasion of receiving official documents from the late under-sheriff, deft., at the request of the latter, appended the word "under-sheriff" to his signature, at the same time saying that he was not under-sheriff, but T. was. Deft. had described himself in an affidavit as "acting under-sheriff":—*Held*: deft. was not liable to the penalties as under-sheriff, & pltf. was properly nonsuited.—WILLIAMS v. THOMAS (1819), 4 Exch. 479; 7 Dow. & L. 177; 19 L. J. Ex. 50; 14 L. T. O. S. 182; 13 J. P. 781; 151 E. R. 1301.

**Sheriff returning unqualified person on panel.]**—*See* 1925 Act, s. 30.

## SECT. 3.—BY OTHERS.

**750. Interference with appointment of jury—Attorney.]**—An attorney was "picked over the bar" for interfering with the appointment of a jury.—HANSON'S CASE (1610), Moore, K. B. 882; 72 E. R. 972.

**Embracery.]—See CRIMINAL LAW, Vol. XV., p. 608; 1825 Act, s. 61.**

**751. Defamation of jury—By judge.]**—R. v. SKINNER (1772), Lofft, 54; 98 E. R. 529.

*Annotations:—Refd.* Kennedy v. Hilliard (1859), 1 L. T. 78; Dawkins v. Rokoby (1873), L. R. 8 Q. B. 255; Seaman v. Nethercliff (1876), 1 C. P. D. 540; Munster v. Lamb (1883), 11 Q. B. D. 588; Copartnership Farms v. Harvey-Smith, [1918] 2 K. B. 405.

**752. — By counsel.]**—Where, on a trial for felony at Middlesex quarter sessions, counsel for prisoner, whose mode of conducting the case had been remarked upon by the foreman of the jury, in his address to the jury, uttered words which reflected upon the foreman, & being required by the judge to withdraw them, refused, & was thereupon adjudged guilty of contempt & fined; upon motion for a *certiorari* to remove the order:—*Held*: as the words used might have been & were by the judge adjudged to have been used to insult the juror, there was no excess of jurisdiction, & the ct. of Q. B. could not interfere.—*Ex p.* PATER (1864), 5 B. & S. 299; 4 New Rep. 147; 33 L. J. M. C. 142; 10 L. T. 376; 28 J. P. 612; 10 Jur. N. S.

## PART XI. SECT. 3.

**t. Tampering with jury.]**—To tamper with the jury panel is as much

an interference with justice as to tamper with the jury who actually try the case.—PARKER v. FALKNER (1889), 10 N. S. W. L. R. 7; 5 N. S. W.

W. N. 57.—AUS.

**a. Corruptly influencing juror.]**—R. v. SMITH (1912), C. P. D. 642; on appeal, App. D. 386.—S. AF.



Sect. 3.—By others.]

972 ; 12 W. R. 823 ; 9 Cox, C. C. 544 ; 122 E. R. 842.

*Annotations* :—*Mentd. Ex p. Jolliffe* (1873), 42 L. J. Q. B. 121 ; *Re Rea* (1879), 14 Cox, C. C. 256 ; *R. v. Jordan* (1888), 36 W. R. 797.

**753. Impersonation of Juror—Misdemeanour.]—**

A stranger who was not one of the jury caused himself to be sworn in the name of one who was of the jury :—*Held* : he might be indicted for that misdemeanour.—*ANON.* (1641), March, 81 ; 82 E. R. 421.

**754. ———.]—**C. was a farm bailiff or manager & resided at the farm. A summons to his employer to serve as a jurymen at the Central Criminal Ct. was delivered at the farm. C. received it, & according to the evidence, was told by his employer, who was over sixty years of age, to go to the ct. & get him excused from attendance. C. went to the ct., answered to his employer's name, & was sworn as a juror to try a case in the first ct. C. was now indicted ; the first count, charging that he personated a jurymen & the second count charging him with taking a false oath as a juror. The prosecution did not suggest that C. had any corrupt motive or that he had any thought of defeating the ends of justice. For the defence

it was stated that C. had no corrupt intention or motive of any kind whatever. It was a mere honest mistake. He had no intention of deceiving the ct. :—*Held* : it was not necessary in support of the indictment to prove that deft. had any corrupt motive, or to prove that he had anything to gain by his conduct. It was no answer to the indictment to say that he did not know that he was doing wrong. The words in the first count " with intent to deceive " were satisfied by proving that he did in fact commit the act, the necessary consequence of which was to deceive the ct., & it was not necessary for the prosecution to prove that he had any specific intention to deceive other than that which was involved as the necessary consequence of the act which he did in going into the jury-box, & taking the oath in the name of another man. It was a common law misdemeanour for any person to do that which deft. did both as to the first & second counts of the indictment, & that without proof that he had any corrupt motive in his mind.—*R. v. CLARK* (1918), 82 J. P. 295 ; 26 Cox, C. C. 138.

—*See, further*, CONTEMPT OF COURT, Vol. XVI., p. 18.

—*As ground for new trial.*]—*See CRIMINAL LAW*, Vol. XIV., pp. 309, 539, Nos. 3252, 3253, 6100, 6101.

## JURISDICTION.

*See* ADMIRALTY ; BANKRUPTCY AND INSOLVENCY ; CONFLICT OF LAWS ; COUNTY COURTS ; COURTS ; CRIMINAL LAW AND PROCEDURE ; DEPENDENCIES ; EXECUTION ; EXECUTORS AND ADMINISTRATORS ; EXTRADITION AND FUGITIVE OFFENDERS ; HUSBAND AND WIFE ; MAGISTRATES ; MAYOR'S COURT, LONDON ; SHIPPING AND NAVIGATION.

## JURORS.

*See* COMPULSORY PURCHASE OF LAND AND COMPENSATION ; CORONERS ; COUNTY COURTS ; CRIMINAL LAW AND PROCEDURE ; JURIES ; SEWERS AND DRAINS.

## JUS TERTII.

*See* INTERPLEADER ; TRESPASS.

## JUSTICES OF THE PEACE.

*See* COURTS ; CRIMINAL LAW AND PROCEDURE ; MAGISTRATES ; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

## JUSTIFIABLE HOMICIDE.

*See* CRIMINAL LAW AND PROCEDURE.

## JUSTIFICATION.

*See* CRIMINAL LAW AND PROCEDURE ; LIBEL AND SLANDER.

## JUVENILE OFFENDERS.

*See* CRIMINAL LAW AND PROCEDURE ; EDUCATION ; INFANTS AND CHILDREN ; PRISONS.

## KEEPING HOUSE.

*See* BANKRUPTCY AND INSOLVENCY.

## KIDNAPPING.

*See* CRIMINAL LAW AND PROCEDURE.

## KING.

*See* CONSTITUTIONAL LAW ; ECCLESIASTICAL LAW ; PARLIAMENT.

## KING OF ARMS.

*See* NAME AND ARMS, CHANGE OF ; PEERAGES AND DIGNITIES.

## KING'S BENCH DIVISION.

*See* COURTS ; CROWN PRACTICE.

## KING'S CORONER.

*See* CORONERS.

## KING'S COUNSEL.

*See* BARRISTERS.

## KING'S EVIDENCE.

*See* CRIMINAL LAW AND PROCEDURE ; EVIDENCE.

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## KING'S HARBOUR MASTER.

*See* WATERS AND WATERCOURSES.

## KING'S PRINTER.

*See* EVIDENCE ; COPYRIGHT AND LITERARY PROPERTY ; PRESS AND PRINTING ; STATUTES.

## KING'S PROCTOR.

*See* CONSTITUTIONAL LAW ; HUSBAND AND WIFE.

## KING'S REMEMBRANCER.

*See* CROWN PRACTICE.

## KING'S SHIP.

*See* ADMIRALTY ; ROYAL FORCES.

## KNOCK-OUT.

*See* AUCTION AND AUCTIONEERS.

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## LABOUR.

*See* TRADE AND TRADE UNIONS ; WORK AND LABOUR.

## LABOUR BUREAUX.

*See* WORK AND LABOUR.

## LACHES.

*See* EQUITY ; ESTOPPEL ; LIMITATION OF ACTIONS.

## LADING, BILL OF.

*See* BILLS OF EXCHANGE ; PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS ; SHIPPING AND NAVIGATION.

## LAKES.

*See* FISHERIES ; WATERS AND WATERCOURSES.

## LAMMAS LANDS.

*See* COMMONS AND RIGHTS OF COMMON.

## LANCASTER.

*See* CONSTITUTIONAL LAW ; COURTS.

## LAND.

*See* DESCENT AND DISTRIBUTION ; LAND IMPROVEMENT ; LAND TAX ; REAL PROPERTY AND CHATTELS REAL ; SALE OF LAND.

## LAND AGENTS.

*See* AGENCY ; SALE OF LAND ; VALUERS AND APPRAISERS.

## LAND CHARGES.

*See* LAND IMPROVEMENT ; MORTGAGE ; REAL PROPERTY AND CHATTELS REAL ; SALE OF LAND.

## LAND COMMISSIONERS.

*See* COMMONS ; COPYHOLDS ; SETTLEMENTS.

# LAND IMPROVEMENT.

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## Part I.—Apart from Statute.

### SECT. 1.—IN GENERAL.

1. Jurisdiction of court—Effect of Settled Land Acts.]—*Re DE TEISSIER'S SETTLED ESTATES, Re DE TEISSIER'S TRUSTS, DE TEISSIER v. DE TEISSIER*, No. 149, *post*.

2. ———.]—The ct. has no jurisdiction in cases not amounting to salvage, to spend settled money in pulling down & rebuilding houses on settled land.

Where settled land was vested in trustees upon trust for infants, & it appeared that if the houses on the land, which were old, were pulled down & others erected in their place, the value of the property would be largely increased both for letting & selling, & that there was no money fund available to defray the expense of rebuilding, but it did not appear that the proposed expenditure was necessary by way of salvage, an application by the trustees for leave to raise money by mtge. of the land was refused on the ground of want of jurisdiction.

The general jurisdiction of the ct. touching the expenditure of money on land is not ousted by the Settled Land Acts.—*Re MONTAGU, DERBISHIRE v. MONTAGU*, [1897] 2 Ch. 8; 66 L. J. Ch. 541; 76 L. T. 485; 45 W. R. 694; 13 T. L. R. 397; 41 Sol. Jo. 490, C. A.

3. Trust to improve—Distinguished from trust for purchase of lands.]—The distinction between a trust to improve land & to purchase land is well settled: under the former you cannot buy land; under the latter you cannot improve land, although you may build a new house, which is regarded as acquiring land (*CHITTY, J.*).—*VINE v. RALEIGH*, [1891] 2 Ch. 13; 60 L. J. Ch. 675; 63 L. T. 573; *on appeal*, [1891] 2 Ch. 22, C. A.

*Annotations*:—*Refd. Re Mason, Mason v. Mason*, [1891] 3 Ch. 467; *Re Gardiner, Gardiner v. Smith*, [1901] 1 Ch. 697.

4. — By expenditure of surplus income—Whether within Accumulations Act, 1800 (s. 98).]—Testator directed the surplus income of his residuary



**Sect. 1.—In general. Sects. 2 & 3.]**

estate, after payment of an annuity, to be expended from time to time during the life of the annuitant in the improvement of a landed estate, & in maintaining in good repair the houses on the estate:—*Held*: the direction was valid, notwithstanding the lapse of twenty-one years from testator's death, subject to a proviso that it was not to authorise the application of income to purposes, the expense of which ought to be defrayed out of capital.

All improvements in substance, which could in any fair sense be regarded as coming under the words "maintaining in good habitable repair houses & tenements on the property" are outside Accumulations Act, 1800 (c. 98), altogether. Money laid out in building houses on the land would be within the Act (*per CUR.*).—*VINE v. RALEIGH*, [1891] 2 Ch. 13; 60 L. J. Ch. 675, C. A.

*Annotations*:—*Apld.* *Re Mason*, *Mason v. Mason*, [1891] 3 Ch. 467; *Re Gardiner*, *Gardiner v. Smith*, [1901] 1 Ch. 697.

**Trust for repairs & maintenance out of income—Whether within Accumulations Act, 1800 (c. 98).—See PERPETUITIES.**

**5. Express power to make "improvements" out of income—Extent of power.]**—Testator by his will, made before but coming into operation after Settled Land Act, 1882 (c. 38), empowered his trustees to pay the expenses of insurance, repairs, & other outgoings, & of care, management, cultivation, & improvements out of the income of his settled estate:—*Held*: the power was confined to improvements of a recurring character & did not extend to improvements authorised by Settled Land Acts.

Where during the minority of a tenant in tail trustees of the settlement execute improvements authorised by Settled Land Acts, which under a special power contained in the settlement may be paid for out of income, they must not necessarily charge the expenses of such improvements being of a permanent character against income to the injury of the other persons interested under the settlement, merely because, owing to the interest of the infant tenant in tail in the income being cut down to an annuity, it may be to his advantage to have them raised out of surplus income.—*Re STAMFORD & WARRINGTON (EARL)*, *PAYNE v. GREY*, [1916] 1 Ch. 404; 85 L. J. Ch. 241; 114 L. T. 551.

**SECT. 2.—EXPENDITURE BY LIMITED OWNERS.**

**6. Whether entitled to charge settled estate—Expenditure by tenant for life—Repairs.]**—Tenant for life of real estates under a will having expended money in finishing a mansion house which testator had begun, but left unfinished, & also in repairing the mansion house which had been damaged by dry rot, the ct., in a suit for administering the trusts of the will, directed an inquiry whether it was for the benefit of all parties interested that the mansion house should be finished, but refused an inquiry as to the repairs; & said if it was found for the benefit of all parties interested that the mansion house should have been finished, & there was no personal estate applicable, the expense should be a charge on the real estates.—*HIBBERT v. COOKE* (1824), 1 Sim. & St. 552; 57 E. R. 218.

*Annotations*:—*Apld.* *Caldecott v. Brown* (1842), 2 Hare, 144. *Consd.* *Dunne v. Dunne* (1855), 3 Sm. & G. 22.

**PART I. SECT. 2.**

**6 i. Whether entitled to charge settled estate—Expenditure by tenant for**

**life—Repairs.]**—The repairs of a tenant for life, however substantial & lasting, are his own voluntary act, & do not arise from any obligation, & he cannot

*fold.* *Dent v. Dent* (1862), 30 Beav. 363; *Re De Teissier's S. E.*, *Re De Teissier's Trusts*, *De Teissier v. De Teissier*, [1893] 1 Ch. 153. *Expld.* *Re Montagu*, *Derbshire v. Montagu*, [1897] 2 Ch. 8. That is a case of salvage. There was a carcass which would have gone to ruin if not completed (*RIGBY, L.J.*).

**7. — Completion of unfinished mansion house.]**—*HIBBERT v. COOKE*, No. 6, *ante*.

**8. — Improvements—Beneficial to inheritance.]**—A tenant for life cannot lay out moneys in building or improvements on the estate, & charge them on the inheritance; & therefore, the ct. will not direct an inquiry what sums were expended by the tenant for life, in substantial improvements, beneficial to the inheritance.—*CALDECOTT v. BROWN* (1842), 2 Hare, 144; 7 Jur. 693; 67 E. R. 60.

*Annotations*:—*Consd.* *Re Barrington's Settlement*, (1860), 1 John. & H. 142. *Refd.* *Macfarlane v. Lord Advocate*, [1894] A. C. 291; *Re Blake's S. E.*, [1923] 2 Ch. 128.

**9. — Purchase of estate from trustees.]**—A tenant for life entered into possession with the consent of the trustees & paid interest on incumbrances affecting the property, & expended money in improvements; she afterwards purchased the property from the trustees, who, without requiring an account of the rents & property of the estate, allowed her to deduct from her purchase-money the amount expended of the interest & improvements:—*Held*: those sums ought not to have been allowed.—*DICKINSON v. PEACOCK* (1855), 25 L. T. O. S. 263.

**10. — Building.]**—*CALDECOTT v. BROWN*, No. 8, *ante*.

**11. — Expenditure out of income of tenant for life—By trustees—Repairs not done by first tenant for life.]**—Previous to a marriage, between B. & C., A., the father of B., agreed to settle real estates, subject to a mtge. & a money bond, upon B. & C. to be enjoyed by them during their joint lives, & after B.'s death by C. during her life or subsequent marriage, & after death or subsequent marriage for her children: & that three trustees should be appointed in either of these events, to take care of the property for the children. On the death of A. the bond came to the hands of his exor., & he deposited it with his bankers as security for a loan of money to him, & he died insolvent. B., the wife & second tenant for life, redeemed the bond, & out of the proceeds of the bond paid an arrear of interest due on the mtge.; & the trustees, who had been subsequently appointed, laid out money in repairs, which the first tenant for life should have done:—*Held*: B., the wife, was entitled to have raised out of the settled real estate the money she had paid, to redeem the bond, & for interest on the mtge. debt, but the money paid for repairs ought not to be similarly raised.—*SHARSHAW v. GIBBS* (1854), Kay, 333; 2 Eq. Rep. 314; 23 L. J. Ch. 451; 23 L. T. O. S. 37; 18 Jur. 330; 69 E. R. 141.

**12. — Improvements.]**—Trustees who had expended a sum of money on the improvement of the property retained that sum out of the income payable to the tenant for life. On the question whether that retainer was correct, the ct. was of opinion that the money could not be made a charge upon the inheritance.—*HARRIS v. HARRIS* (No. 3) (1862), 32 Beav. 333; 7 L. T. 58; 10 W. R. 826; 55 E. R. 130.

**13. — By receiver under order of court—Improvements.]**—Where during the minority of a tenant for life part of the income has been

charge the inheritance with them.—*Re SMITH'S TRUSTS* (1883), 4 O. R. 518.—*CAN.*

expended under the order of the ct. in improving property, the ct. has no power to declare the sum so expended a charge on the property, even though the tenant for life die an infant & the order may have been made in the presence of remaindermen.—*FLOYER v. BANKES* (1869), L. R. 8 F 115.

*Annotations*.—*Refd. Re Leighs' Estate* (1871), 6 Ch. App. 889, n.; *Re Stamford & Warrington, Payne v. Grey* (1911), 105 L. T. 913.

**14. Improvements not authorised out of capital at time of execution—Subsequently authorised by statute—Right of tenant for life to reimbursement.]**—An estate was settled by the will of testator, his widow being the first, & his nephew the second tenant for life. During the lifetime of the widow she expended out of her own moneys various sums in making improvements upon the estate. Some of these sums were expended before, & some after the commencement of the Settled Land Act, 1882 (c. 38). With regard to those which were expended after the commencement of the Act, no scheme was, prior to the execution of the works, submitted for approval, either to the trustees of the settlement or to the ct., in accordance with Settled Land Act, 1882 (c. 38), s. 26. The repayment to the widow of all the sums thus expended by her was secured by four bonds given to her by the nephew. After the death of the widow the nephew, being then tenant for life in possession of the estate, applied to the ct. for a direction to the trustees to apply capital money in their hands in payment of the amounts due upon the bonds:—*Held*: (1) as regarded the cost of improvements executed since the commencement of Settled Land Act, 1882 (c. 38), Settled Land Act, 1890 (c. 69), s. 15, was retrospective in its operation, & enabled the ct. to direct payment out of the capital money; (2) as regarded the cost of improvements executed before the commencement of Settled Land Act, 1882 (c. 38), even if sect. 15 was retrospective (as to which, *qu.*), the ct. had a discretion; & there was no reason why the tenant for life should be repaid out of the capital sums which he had deliberately expended in improving the estate at a time when he knew that, as the law then stood, the capital was not applicable for such purposes.—*Re ORMEROD'S SETTLED ESTATE*, [1892] 2 Ch. 318; 61 L. J. Ch. 651; 66 L. T. 845; *sub nom. Re ORMEROD'S SETTLED ESTATES*, 40 W. R. 490; 36 Sol. Jo. 427.

—*Apld. Re L. C. C., Ex p. Pennington* (1901), L. T. 808. *Refd. Re Bristol's S. E.*, [1893] 3 Ch. 161.

**Expenditure by guardian of infant.]—See** INFANTS, Vol. XXVIII., pp. 181, 182, Nos. 413–421.

**Expenditure by committee of lunatic.]—See** LUNATICS.

### SECT. 3.—OUT OF FUNDS DIRECTED TO BE LAID OUT IN LAND.

**15. Distinguished from funds held on trust to improve land.]—VINE v. RALEIGH**, No. 3, *ante*.

**16. Whether applicable to repairs & improvements.]—A** trust fund is created by will to be laid out in the purchase of lands & an estate is purchased & trust money is laid out in repairs & improvements. This is a misapplication, & shall not be allowed.—*BOSTOCK v. BLAKENEY* (1789), 2 Bro. C. C. 653; 29 E. R. 362, L. C.

*Annotations*.—*Consd. Caldecott v. Brown* (1842), 2 Hare, 144. *Refd. Mathias v. Mathias* (1858), 3 Sm. & G. 552.

**17. —.]—Where** trustees of a settlement, having a power of purchasing lands on the request

of tenants for life, desired the opinion of the ct. as to the propriety of applying £1,200, on such request, in repairs & permanent improvements, no answer was given on the petition; but it was intimated, that, on a bill filed, there would be no objection on principle to the course proposed to be taken; & subsequently the order was made in a suit instituted for the purpose.—*Re BARRINGTON'S SETTLEMENT* (1800), 1 John. & H. 142; 29 L. J. Ch. 807; 3 L. T. 17; 25 J. P. 36; 6 Jur. N. S. 1073; 70 E. R. 696.

*Annotations*.—*Apld. Re Blake's S. E.*, [1923] 2 Ch. 128. *Mentd. Macfarlane v. Lord Advocate*, [1894] A. C. 291.

**18. — Mansion house.]—Devise of lands to successive tenants for life, & then in strict settlement, with a condition that "he or they" should reside in the mansion house on the lands, & a declaration of forfeiture in case of non-residence. The first tenant for life, who was a married woman, was named as such in the will:—*Held*: although the mansion house was inadequate to the income of the devised property, & was also dilapidated, the tenant for life was not authorised to employ towards improving or repairing the mansion house any part of the capital of funds directed by testator to be laid out in the purchase of lands to the same uses.—*DUNNE v. DUNNE* (1855), 7 De G. M. & G. 207; 25 L. T. O. S. 60; 1 Jur. N. S. 1056; 3 W. R. 380; 44 E. R. 81, L. JJ.**

*Annotations*.—*Apld. Dent v. Dent* (1862), 30 Beav. 363. *Consd. Stanford v. Roberts* (1882), 52 L. J. Ch. 50.

**19. — Trustees empowered to make outlay for benefit of estate.]—*Re DE TABLEY* (LORD), LEIGHTON v. LEIGHTON, No. 58, *post*.**

**20. —.]—Testator** directed that £50,000, part of his personal estate, should be laid out in the purchase of lands, & settled to uses in favour of M., the first tenant for life, with remainder over. M., who was also exor., purchased with the money various estates, which the master estimated to be of the value of £49,773. On one of the estates he erected a mansion house at a cost of £8,000, & by improvements increased the value of the estate to £60,000. On petition by the personal representatives of M., praying that the amount so expended in building & improvements, & the costs of & relating to the purchases, might be allowed as charges on the estate:—*Held*: there was no ground for the application, & the prayer of the petition was refused, except as to the sum expended for costs & expenses in the purchases.—*MATHIAS v. MATHIAS* (1858), 3 Sm. & G. 552; 32 L. T. O. S. 25; 4 Jur. N. S. 780; 65 E. R. 777.

*Annotation*.—*Refd. Re Pumfrey, Worcester City & County Banking Co. v. Bilek* (1882), 52 L. J. Ch. 228.

**21. — Building farm house—Proceeds of sale of timber.]—Family** estates were settled in strict settlement, with a direction that the trustees should lay out the proceeds of the sale of timber in the purchase of land to be settled to the same uses:—*Held*: a sum arising from the sale of timber could not be laid out in building a farmhouse, though there was evidence that it would be a permanent improvement of the estate.—*POULETT EARL v. SOMERSET* (1871), 25 L. T. 56; 19 W. R. 648.

**22. —.]—Where** the rents of real estate devised in strict settlement were directed to be accumulated during the minority of any person who should become tenant for life, & the accumulated fund & interest thereon were from time to time to be invested in the purchase of other lands to be settled to the same uses:—*Held*: no part of such accumulated fund could be applied, at the instance of a tenant for life, in necessary repairs improvements on the estate.—*BRUNSKILL v.*

**Sect. 3.—Out of funds directed to be laid out in land.**  
**Sects. 4 & 5.]**

CAIRD (1873), L. R. 16 Eq. 493; 43 L. J. Ch. 163; 29 L. T. 365; 21 W. R. 943, L. O.  
*Annotation:—Apld. Re Nether Stowey Vicarage* (1873), L. R. 17 Eq. 156.

**23. — New buildings.]**—Money which under the provisions of a deed, will or private estate Act is to be invested in the purchase of land will in a proper case be ordered by the ct. to be employed in erecting new buildings on land already settled to the same uses. But the ct. will not sanction its being laid out in repairs or in permanent improvements nor placing new buildings on the land.—*DRAKE v. TREFUSIS* (1875), 10 Ch. App. 364; 33 L. T. 85; 23 W. R. 762, L. J.J.

*Annotations:—Consd. Donaldson v. Donaldson* (1876), 3 Ch. D. 743; *Re Venour's S. E., Venour v. Sellon* (1876), 2 Ch. D. 522. *Follid. Re Speer's Trusts* (1876), 3 Ch. D. 262. *Consd. Stanford v. Roberts* (1882), 52 L. J. Ch. 50; *Jesse v. Lloyd* (1883), 48 L. T. 656; *Conway v. Fenton* (1888), 40 Ch. D. 512; *Hale v. Sheldrake* (1889), 60 L. T. 292. *Apld. Vine v. Raleigh*, [1891] 2 Ch. 13. *Consd. Re Gerard's S. E.*, [1893] 3 Ch. 252; *Re De Tabley, Leighton v. Leighton* (1896), 75 L. T. 328. *Refd. Re De Teissier's Trusts, De Teissier v. De Teissier* (1892), 41 W. R. 186; *Re Montagu, Derbshire v. Montagu*, [1897] 1 Ch. 685. *Mentd. Re Arden* (1894), 70 L. T. 500.

**24. — —.]—VINE v. RALEIGH**, No. 4, *ante*.

**25. — Building.]**—In a case where the ct. directs that any part of any settled estates be laid out for roads, drains, etc., there is no jurisdiction to order the costs of making the same to be paid, out of a fund in ct. liable to be laid out in the purchase of land to be settled to the like uses as the settled estates. Moneys liable to be so laid out may be applied by direction of the ct. in the erection of buildings, but not in drainage or permanent improvements.—*Re VENOUR'S SETTLED ESTATES, VENOUR v. SELLON* (1876), 2 Ch. D. 522; 45 L. J. Ch. 409; 24 W. R. 752.

*Annotations:—Consd. Stanford v. Roberts* (1882), 52 L. J. Ch. 50. *Apld. Jesse v. Lloyd* (1883), 48 L. T. 656. *Mentd. A-G v. G. E. Ry.* (1879), 27 W. R. 759; *Sutton v. Sutton* (1882), 22 Ch. D. 511; *De Beauvais v. Green* (1906), 22 T. L. R. 816.

**26. — —.]—JESSE v. LLOYD**, No. 35, *post*.

**27. — Farm buildings upon land purchased.]**—Trustees of a settled estate having, out of moneys in their hands, in trust to be laid out in lands to be settled to the same uses, purchased a farm for £20,000, the ct. in an action authorised £1,000 of the same moneys to be applied in repairing, improving & rebuilding the farm buildings & cottages upon the purchased lands.—(*COWLEY (LORD) v. WELLESLEY* (1877), 46 L. J. Ch. 869.

*Annotation:—Apld. Re Blake's S. E.*, [1923] 2 Ch. 128.

**28. — Making roads & sewers.]—Re VENOUR'S SETTLED ESTATES, VENOUR v. SELLON**, No. 25, *ante*.

**29. — Drainage.]—Re VENOUR'S SETTLED ESTATES, VENOUR v. SELLON**, No. 25, *ante*.

**30. — Rebuilding—Parsonage of settled advowson.]—H.**, by his will, directed his trustees to lay out his residuary personalty in the purchase of land to go along with certain settled property. The settled property comprised an advowson, of which the parsonage house was, at testator's death, in a ruinous state, & he was about to rebuild it.—*Held*: the trustees might properly lay out part of the residuary personalty in rebuilding the house.—*Re HOTHAM'S (LORD) TRUSTS* (1871), L. R. 12 Eq. 76; 19 W. R. 791.

*Annotation:—Distd. Brunskill v. Caird* (1873), L. R. 16 Eq. 493.

**PART I. SECT. 3.**

**23 i. Whether applicable to repairs & improvements—New buildings.]—**

Trustees being empowered to invest the moneys of the trust in the purchase of real estate, may in their discretion do so in the erection of a new building,

**31. — — Farm buildings on lands purchased.]—COWLEY (LORD) v. WELLESLEY**, No. 27, *ante*.

**32. — Mansion house.]—**Testator devised real estates in strict settlement, & directed his residuary personalty to be laid out in the purchase of lands to be settled to the same uses. After the date of the will, testator executed a deed whereby he assigned specific personalty to a large amount to the same persons whom he named as the trustees & exors. of his will, upon trusts, not referring to, but corresponding with, & only in a remote contingency differing from, those of the will. The mansion house having been pulled down, & requiring to be rebuilt, the tenant for life proposed that, out of the specific personalty fund settled by the deed, £24,000 should be advanced to him to pay for the rebuilding, & that out of the same fund a sum of £40,000 should be set aside, & the dividends accumulated for twenty years, until an amount of £24,000 should be saved, with which the same fund should be recouped.—*Held*: the ct. had jurisdiction to make the order.

Building a mansion house is not an improvement in the technical sense of the word (*BACON, V.-C.*).—*DONALDSON v. DONALDSON* (1876), 3 Ch. D. 743; 34 L. T. 900; 24 W. R. 1037.

**33. Capital money arising under Lands Clauses Consolidation Act, 1845 (c. 18).]**—Purchase-money of part of a settled estate paid in under above Act ordered to be applied towards the cost of lateral additions to a house, part of the settled estate.—*Re SPEER'S TRUSTS* (1876), 3 Ch. D. 262; 24 W. R. 880.

*Annotation:—Distd. Re Gerard's S. E.*, [1893] 3 Ch. 252.

*See, generally, COMPULSORY PURCHASE*, Vol. XI., pp. 239 *et seq.*

**34. Advance to tenant for life—For rebuilding mansion house—Recoupment by sinking fund.]—DONALDSON v. DONALDSON**, No. 32, *ante*.

**35. Recoupment of trustee—Advance to complete rebuilding mansion house after destruction.]—**Testator devised his mansion house & other real estate to trustees for the term of one thousand years, upon certain trusts, & subject thereto, he devised the same upon legal limitations, under which pltf. was tenant for life. Shortly after testator's death the mansion house was burnt down. The sole acting trustee had expended, in addition to insurance moneys, a sum of £2,000 in rebuilding the mansion house, which amount he had borrowed on his own personal security & on a charge of the estate. It was admitted that this expenditure was very beneficial to the estate, & that the value thereof was increased.

There were in ct. sums of Consols arising from the sale of part of the estate, & such funds were liable to be reinvested in land.

By the decree in the action an inquiry had been directed as to what sum was necessary to complete the restoration of the mansion house, & how the same ought to be raised, but no formal order was made sanctioning the raising of a loan for the purpose.

A petition was presented by the personal representative of the trustee, asking that the funds in ct. might be sold, & that such further sum as, with the proceeds of such sale, would make up the £2,000 borrowed by the trustee, might be raised by mtge. or sale of the settled estate, in order to enable such loan to be repaid.—*Held*: the ct.

when an increased income can be obtained thereby.—*Re HADKISSON'S TRUSTS* (1876), 23 Gr. 45.—*CAN.*

had no jurisdiction to order a mtge. or sale of the settled estate, or to authorise the expenditure for the proposed purpose, even of moneys which were subject to a trust for reinvestment in land; but, it appearing that the estate had been benefited by the outlay of the trustee to the full amount of the funds in ct., & that the outlay had been *bond fide* made under the impression that it would be repaid out of the estate, the ct., would, although considering the conduct of the trustee irregular, order that he should be recouped his outlay to the extent of the funds in ct., but no further.—*JESSE v. LLOYD* (1883), 48 L. T. 656.

**Repairs or rebuilding amounting to salvage.]—**See No. 2, *ante*.

**Money arising on compulsory acquisition of land.]—**See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 239 *et seq.*

#### SECT. 4.—OUT OF PROCEEDS OF SALE OF PART OF SETTLED PROPERTY.

**36. Expenditure on mansion house—Improvement of water supply.]—**A tenant for life under a settlement containing a discretionary trust for sale of the settled estates, & also a power to sell certain settled heirlooms, asked leave of the ct. under Settled Land Act, 1882 (c. 38), s. 37, that he might be authorised to sell part of the settled estates, & also a specified portion of the heirlooms; that the money might be paid to the trustees, & that such part as might be necessary might be applied by them in paying for certain improvements, consisting of (a) a larger & better supply of water to a mansion house; (b) a new & improved system of drainage of the mansion house; (c) rebuilding of the stables, which were out of repair, (d) the building of an agent's house; & (e) the building of two cottages.

The trustees submitted that the proposed improvements, except the cottages, were not within Settled Land Act, 1882 (c. 38), s. 25; & even if they were, the ct. would not supersede the power of the trustees by giving leave to the tenant for life to sell either the estate or the heirlooms:—*Held*: the proposed outlay was all within Settled Land Act, 1882 (c. 38), s. 25, & would have been authorised without the statute; & leave given to the tenant for life to sell both the settled estates & the heirlooms, & for the application of the proceeds as prayed.

Stables are as necessary to a house as the kitchen or the cellar. They may be said to be a part of the house; that is, they are there for the enjoyment & use of the house by the man who is entitled to enjoy them (BACON, V.-C.).—*Re HOUGHTON ESTATE* (1885), 30 Ch. D. 102; 55 L. J. Ch. 37; 33 W. R. 869; *sub nom.* CHOLMONDELEY'S (MARQUIS) SETTLED ESTATE, 53 L. T. 196.

*Annotations*:—*Consd.* *Re Gerard's S. E.*, [1893] 3 Ch. 252. *Re Kensington S. E.* (1905), 21 T. L. R. 351; *Re De Crespigny's S. E.*, [1914] 1 Ch. 227.

**37. — Improved drainage.]—***Re HOUGHTON ESTATE*, No. 36, *ante*.

**38. Rebuilding stables.]—***Re HOUGHTON ESTATE*, No. 36, *ante*.

**39 Building—Agent's house.]—***Re HOUGHTON ESTATE*, No. 36, *ante*.

#### PART I. SECT. 4.

**a. Jurisdiction of court to order sale.]—**The Ct. of Ch. has no power to order the sale of a portion of a settled estate in order to raise money to make improvements upon the remainder, nor to authorise a mortgage for that pur-

pose.—*Re MOORE'S SETTLED ESTATE* (1875), 6 P. R. 281.—CAN.

#### PART I. SECT. 5.

**b. Working & managing farm—& paying outgoings.]—**A sum of £125,000, portion of trust property held in trust for beneficiaries (the

**40. — Cottages.]—***Re HOUGHTON ESTATE*, No. 36, *ante*.

#### SECT. 5.—JURISDICTION OF THE COURT IN SALVAGE.

**41. Application of doctrine.]—***Re LEGH'S SETTLED ESTATE*, No. 155, *post*.

**42. — Guided by Settled Land Acts.]—***Re DE TEISSIER'S SETTLED ESTATES, Re DE TEISSIER'S TRUSTS, DE TEISSIER v. DE TEISSIER*, No. 149, *post*.

**43. Repairing dilapidated houses—Money raised by mortgage.]—***GLOVER v. BARLOW* (1831), 21 Ch. D. 786, n.

*Annotations*:—*Foll.* *Re Jackson, Jackson v. Talbot* (1882), 21 Ch. D. 786. *Consd.* *Re Montagu, Derbshire v. Montagu*, [1897] 1 Ch. 685. *Reid.* *Conway v. Fenton* (1888), 40 Ch. D. 512.

**44. — —.]—**When an infant was absolutely entitled subject to certain trusts to the beneficial interest in real estate, the legal estate being in trustees:—*Held*: the ct. had jurisdiction to direct the raising of money by means of a mtge. of the estate for the purpose of paying the cost of repairs certified by the chief clerk to be absolutely necessary.—*Re JACKSON, JACKSON v. TALBOT* (1882), 21 Ch. D. 786.

*Annotations*:—*Consd.* *Conway v. Fenton* (1888), 40 Ch. D. 512. *Dist.* *Re De Teissier's S. E., Re De Teissier's Trusts, De Teissier v. De Teissier*, [1893] 1 Ch. 153. *Reid.* *Re De Tabley, Leighton v. Leighton* (1896), 75 L. T. 328; *Re Hawkers S. E.* (1897), 66 L. J. Ch. 341; *Re Montagu, Derbshire v. Montagu*, [1897] 2 Ch. 8; *Re Willis, Willis v. Willis* (1901), 71 L. J. Ch. 73.

**45. Pulling down & rebuilding houses.]—***Re MONTAGU, DERBISHIRE v. MONTAGU*, No. 2, *ante*.

**46. Repairing farm buildings—Agreement to let sanctioned by court.]—**A tenant for life was allowed repairs of a permanent character done to farm buildings in pursuance of an agreement for letting the premises made under the sanction of the ct.—*MACNOLTY v. FITZHERBERT* (1857), 27 L. J. Ch. 272; 30 L. T. O. S. 125; 3 Jur. N. S. 1237.

**47. — Farm untenable.]—**Land & money were vested in the trustees of a settlement for the benefit of the husband & wife for their lives & after their deaths for their children. The buildings on a farm on the land were so much out of repair as to make the farm untenable:—*Held*: the ct. had power under its original jurisdiction to sanction the expenditure of part of the money in repairing the farm buildings.—*CONWAY v. FENTON* (1888), 40 Ch. D. 512; 58 L. J. Ch. 282; 59 L. T. 928; 37 W. R. 156.

*Annotations*:—*Dist.* *Re De Teissier's S. E., Re De Teissier's Trusts, De Teissier v. De Teissier*, [1893] 1 Ch. 153. *Consd.* *Re De Tabley, Leighton v. Leighton* (1896), 75 L. T. 328; *Re Hawkers S. E.* (1897), 66 L. J. Ch. 341; *Re Montagu, Derbshire v. Montagu*, [1897] 1 Ch. 685.

**48. — Proof of salvage.]—**The evidence before me goes to show that there is need for the expenditure of a large sum for these repairs which avowedly do not fall within the scope of the Settled Land Acts. They are not within Settled Land Act, 1840 (c. 69), s. 13 (2), for there is no present intention of letting either of these properties. It was, however, said that, independently of the Settled Land Acts, I could, under the general jurisdiction of the ct., direct the outlay

shares of some being in settlement & some of them being infants), was invested in a mtge. on a sheep farm in Australia. The mtgr. had purchased the farm for £450,000, & had expended considerable sums thereon. Owing to the great drought the farm deteriorated, & the mtgr. got into

**Sect. 5.—Jurisdiction of the court in salvage.** **§ Sect. 6. Part II.]**

of capital money, & *Conway v. Fenton*, No. 47, *ante*, was referred to: that was an extremely peculiar case, & I did not decide such a question as arises here. My impression is that if I were satisfied that this expenditure was necessary for the infant, then, with the consent of the tenant in tail in remainder, I might assent to an application of money in a manner which otherwise would not be strictly right or permissible. I do not intend so to decide, but, as I said, such is my impression. It has been argued that I have no jurisdiction under the Settled Land Act to sanction this outlay, & that the general jurisdiction of the ct. in these matters was taken away by that Act. . . . Repairs done for the tenant for life are always regarded with jealousy by the ct., & the outlay of money spent for repairs ought not to be sanctioned, in my opinion, unless it is a case of salvage. Salvage cases are extremely difficult to determine, & in a case like this I would require strong evidence to prove that it was necessary for the infant in the way of salvage (*KEKEWICH, J.*).—*Re HAWKER, DUFF v. HAWKER* (1897), 45 W. R. 440; 41 Sol. Jo. 333; *sub noni. Re HAWKER'S SETTLED ESTATES*, 66 L. J. Ch. 341; 76 L. T. 287.

*Annotation:—Reid. Re Montagu, Derbyshire v. Montagu* (1897), 66 L. J. Ch. 345.

**49. Completing mansion house.—Commenced by testator.]—***HIBBERT v. COOKE*, No. 6, *ante*.

**50. ———.]—**A tenant for life had expended on the estate large sums in completing a mansion left unfinished by testatrix, in erecting a conservatory & vinery, in rebuilding a farmhouse & buildings, in erecting cottages, in erecting permanent furnaces, works, buildings & cottages at some copper works, in draining marshy ground; & in making payments to keep a foreign mine working, so as to prevent its forfeiture:—*Held*: he was entitled to no allowance for these sums out of the personal estate of testatrix held upon similar trusts, or to any inquiry respecting them, except those laid out in completing the mansion & for the foreign mine, as to which an inquiry was directed whether the outlay was for the benefit of the inheritance.—*DENT v. DENT* (1862), 30 Beav. 363; 31 L. J. Ch. 436; 8 Jur. N. S. 786; 10 W. R. 375; 54 E. R. 929.

*Annotation:—Reid. Re De Teissier's S. E., Re De Teissier's Trusts, De Teissier v. De Teissier*, (1893) 1 Ch. 153.

**51. Erecting furnaces & buildings on copper works.]—***DENT v. DENT*, No. 50, *ante*.

**52. Working mine abroad.—To prevent forfeiture.]—***DENT v. DENT*, No. 50, *ante*.

**53. Erecting conservatory.]—***DENT v. DENT*, No. 50, *ante*.

**54. Rebuilding dilapidated buildings.]—***DENT v. DENT*, No. 50, *ante*.

**55. General drainage of property.]—***DENT v. DENT*, No. 50, *ante*.

**56. Rebuilding & repairing mansion house.—Foundations given way.]—**A residential estate of small extent was settled in strict settlement upon settlor, his wife, & family, & power was given to certain trustees, during the minority of any person entitled to the rents & profits, to rebuild or repair the mansion house, & to pay for the cost out of the rents & profits; & they also had power, with the consent of the tenant for life, to lease the property for ninety-nine years. The value of the estate to

settlor & his family depended chiefly upon the residence. Since the death of settlor, his widow being tenant for life in possession, the house had become ruinous from the foundation having given way, & could only be rendered habitable by rebuilding on a new site:—*Held*: the trustees were authorised to raise by mtge. of the settled property £5,000 to be spent in rebuilding the residence, on being satisfied that the value of the estate, with the house, & subject to the mtge., would not be less than if the house had been removed & the materials sold.—*FRITH v. CAMERON* (1871), L. R. 12 Eq. 169; 40 L. J. Ch. 778; 24 L. T. 791; 19 W. R. 886. *Annotations:—Consd. Conway v. Fenton* (1888), 40 Ch. D. 512. *Reid. Re Montagu, Derbyshire v. Montagu*, [1897] 2 Ch. 8.

**57. ——— For occupation by tenant for life.]—***Re DE TEISSIER'S SETTLED ESTATES, Re DE TEISSIER'S TRUSTS, DE TEISSIER v. DE TEISSIER*, No. 149, *post*.

**58. ——— Building new roof.]—**Testator devised & bequeathed all his real & personal estate to trustees upon trust to settle his real estate upon L. for life without impeachment of waste, with remainder to her second son, an infant, in tail male, with remainders over; & to lay out his personal estate in the purchase of lands to be settled in the same manner as his real estate, & he empowered his trustees to postpone the getting in & investment of his personal estate, & to make out of the income or capital thereof any outlay for the benefit of his estate. The tenant for life applied under the general jurisdiction of the ct. that the trustees might be directed out of moneys in their hands representing personal estate to pay for permanent repairs to the mansion house, amounting to the construction of a new roof, rendered necessary by dry rot:—*Held*: the ct. had no jurisdiction to direct such an application of capital, & it was not authorised by the power in the will.—*Re DE TABLEY (LORD), LEIGHTON v. LEIGHTON* (1896), 75 L. T. 328.

*Annotation:—Reid. Re Montagu, Derbyshire v. Montagu*, [1897] 1 Ch. 685.

**59. ———.]—***Re LEGH'S SETTLED ESTATE*, No. 155, *post*.

**60. ———.]—**Testator devised a freehold mansion house to the use of trustees in trust for his sister for life, "subject to the condition that she shall keep the said premises in the state of repair in which she finds them at my death," with remainder in trust for his nephews successively for life subject to the same condition, with remainders over. & he bequeathed personal estate upon trusts corresponding to those of the mansion house. The will did not impose on the trustees any trusts whatever for the management, maintenance, or repairs of the mansion house. At testator's death the house was in general disrepair. Upon an application by the trustees as to whether they could apply capital moneys in their hands in putting the house into good repair:—*Held*: as the evidence did not show the case to be one of "salvage," the ct. could not, either under Settled Land Acts, which admittedly did not apply, or its general jurisdiction, authorise the proposed expenditure.—*Re WILLIS, WILLIS v. WILLIS*, [1902] 1 Ch. 15; 71 L. J. Ch. 73; 85 L. T. 436; 50 W. R. 70; 46 Sol. Jo. 49, C. A.

*Annotation:—Reid. Re Foster's S. E.*, [1922] 1 Ch. 348.

**61. Stocking & cultivation of farm.—For occupation by tenant for life.]—**Where real &

difficulties, & became unable to pay interest on the mtge. There was an attempted sale by the mtgor., but there was no bidding, & the farm was unoccupied. The trustees of the trust

property had taken proceedings in the Australian Cts. for foreclosure, & the decree would shortly be made absolute. The vacant farm was deteriorating; but rain had fallen & there was promise

of better seasons. The mortgaged property was subject to land tax & penalties for not keeping down rabbits:—*Held*: the ct. had jurisdiction to, & would in the circumstances of the case,



personal property were settled on the same trusts for a tenant for life, or until he should charge or incur the same, with remainder for his children, the ct., in the circumstances of the case, sanctioned an advance of £1,000 out of the personal estate to the tenant for life for the purpose of stocking a farm which was in hand & which the tenant for life was proposing to farm himself, the evidence showing that the proposed advance was necessary for the cultivation & preservation of the farm.—

*Re* HOUSEHOLD, *HOUSEHOLD v. HOUSEHOLD* (1884), 27 Ch. D. 553; 54 L. J. Ch. 157; 51 L. T. 319.  
*Annotations*.—*Apld.* *Conway v. Fenton* (1888), 40 Ch. D. 512. *Consd.* *Re De Tabley, Leighton v. Leighton* (1890), 75 L. T. 328.

#### SECT. 6.—UNDER PARTICULAR INSTRUMENTS.

*See, generally*, SETTLEMENTS; TRUSTS AND TRUSTEES; WILLS.

## Part II.—Under Improvement of Land Acts.

*See* Improvement of Land Acts, 1864 (c. 114), & 1899 (c. 46); Limited Owners Residences Act, 1870 (c. 56); Limited Owners Residences Act, 1870, Amendment Act, 1871 (c. 84); Limited Owners Reservoirs & Water Supply Further Facilities Act, 1877 (c. 31); Settled Land Act, 1925 (c. 18), s. 115.

**Where infant an interested party—Appointment of guardian to consent.**—*See* INFANTS, Vol. XXVIII., p. 290, Nos. 1442–1444.

**62. Two years rental of "estate" — What estate comprises.**—*Re* DUNN'S SETTLED ESTATE, [1877] W. N. 39.

*See* Limited Owners Residences Act, 1870, Amendment Act, 1871 (c. 84), s. 3.

**63. Priority of charge — Advance from company—Advance for purpose ultra vires the lender.**—The tenant for life had added to the mansion house, & obtained an order from the inclosure comrs. charging the expense on the inheritance. The L. Co. having power to lend money on land for improvements but not for building mansions, sought from the comrs. an order creating a first charge on the inheritance in order to advance money for the mansion house expenditure:—*Held*: a *mandamus* did not lie to the comrs. & especially at the instance of a co. having no power to lend the money for such a purpose.—*R. v. INCLOSURE COMRS.* (1870), 44 J. P. 38.

**64. — "Incumbrance affecting the land charged" — Limited Owners Residences Act, 1870 (c. 56), s. 9.**—*PROVIDENT CLERK'S MUTUAL LIFE ASSURANCE ASSOCN. v. LAW LIFE ASSURANCE SOCIETY* (1897), 13 T. L. R. 501.

**65. Effect of Settled Land Acts on existing charge—Whether expenditure transferred from income to capital.**—Where a tenant for life of settled land has prior to Settled Land Act, 1882 (c. 38), created charges for land drainage & improvements under the Improvement of Land Act, 1864 (c. 114), & other Acts, which were repayable by instalments, he will not be entitled under Settled Land Act, 1882 (c. 38), s. 21 (2), to have these charges paid out of the capital of the settled estates so as to relieve him from the payment of the instalments. Trustees who purchase such charges will hold them upon trust to receive the instalments payable by the tenant for life, & to treat them as capital.—*Re* KNATCHBULL'S SETTLED

ESTATE (1885), 29 Ch. D. 588; 54 L. J. Ch. 1168; 53 L. T. 284; 33 W. R. 569; 1 T. L. R. 398. C. A.

*Annotations*.—*Consd.* *Re* Richardson, *Richardson v. Richardson*, [1900] 2 Ch. 778; *Re* Manchester's Settlement, [1910] 1 Ch. 106. *Re* Sebright's S. E. (1886), 33 Ch. D. 429; *Re* Egmont's S. E. (1890), 45 Ch. D. 396; *Re* Dallison's S. E., [1892] 3 Ch. 522; *Re* Howard's S. E., [1892] 2 Ch. 233; *Ex p. Castle Bytham, Ex p. Mid. Ry.*, [1895] 1 Ch. 348.

**66. — Charge purchased by trustees.**—Between 1881 & 1885 the tenant for life under a settlement borrowed money under Improvement of Land Act, 1864 (c. 114), the repayment thereof being secured by terminable rentcharges created under the Act in common form, & containing no provision for redemption. These rentcharges were in 1883 & 1885 bought up by the trustee of the settlement out of capital money subject to the settlement, & became vested in him. In 1888 the portions of the estate on which the improvements had been made were sold, & the rentcharges were, under the powers of Settled Land Act, 1882 (c. 38), shifted to other portions of the estate:—*Held*: what had been done was not a redemption of the rentcharges, but an investment under Improvement of Land Act, 1864 (c. 114), s. 60; nor was it an expenditure of capital money in providing for the payment of the rentcharges; it was, therefore, not within the language of Settled Land Acts (Amendment) Act, 1887 (c. 30); the Act of 1887 was not retrospective so as to apply to purchases made before it came into operation; & for these reasons the tenant for life was not entitled to be recouped the instalments which he had paid; but he was entitled, although the improved land had been sold, to have the instalments accrued due after Mar. 25, 1889, when the question was first raised, provided for out of capital.—*Re* HOWARD'S SETTLED ESTATES, [1892] 2 Ch. 233; 61 L. J. Ch. 311; 67 L. T. 156; 40 W. R. 300; 36 Sol. Jo. 293.

*Annotations*.—*Re* Dallison's S. E., [1892] 3 Ch. 522; *Stratford to Maples* (1895), 65 L. J. Ch. 124.

**— Charges other than improvement charges.**—*See* SETTLEMENTS.

**67. Sale of part of land subject to charge — Necessary parties.**—The tenant for life of an estate which was subject to an improvement rent charge

allow the trustees to raise, by mtge. of the sheep farm itself, £30,000 for the expenses of working & managing the farm & paying outgoings.—*NEILL v. NEILL*, [1904] 1 I. R. 513.—*IR.*

#### PART II.

**c. Priority of charge.**—A loan

advanced under Land Improvement Loans Act, 1883, is subject to a first charge on the land for the improvement of which the loan is advanced.—*SANKARAN NAMBUDRIPAD v. RAMASWAMI AYYAR*, [1918] 1 L. R. 41 Mad. 691.—*IND.*

**d. —**—A rentcharge granted to secure a loan to an owner in fee,

subject to a rent, by a grant before 14 & 15 Vict. c. 20, has priority over the rent, under Land Improvement Act, 1847 (c. 32), s. 38.—*A. G. v. EVANS* (1860), 11 I. Ch. R. 171.—*IR.*

**e. Time for lodging account of claim.**—*CAMPBELL v. DALHOUSIE (EARL)* (1868), L. R. 1 Sc. & Div. 259.—*SCOT.*



created under Improvement of Land Act, 1864 (c. 114), agreed to sell a portion of the settled estate free from the rent charge. The tenant for life proposed, with the consent of the owners of the rentcharge, to exonerate the land sold from the rent-charge by virtue of Settled Land Act, 1882 (c. 38), s. 5, but the purchasers took the objection that under Improvement of Land Act, 1864 (c. 114), s. 68, the consent of the Board of Agriculture, who now represented the comrs. referred to in the Act, must be obtained:—*Held*: the

consent of the Board of Agriculture was not necessary, & a good title had been shown.—*Re STRAFFORD (EARL) & MAPLES*, [1896] 1 Ch. 235; 65 L. J. Ch. 124; 73 L. T. 586; 44 W. R. 259; 40 Sol. Jo. 130, C. A.

*Annotation*:—*Mentd. Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648.

**Charges under Improvement of Land Act, 1864 (c. 114), for contributions under district councils water supply facilities.**—*See generally*, WATER SUPPLY.

## Part III.—Under Settled Land Act, 1925.

*NOTE*.—The statutory provisions as to improvements contained in Settled Estates Act, 1877 (c. 18), & Settled Land Acts, 1882 (c. 38), 1884 (c. 18), 1887 (c. 30), & 1890 (c. 69) (in this Part of the Title referred to as 1877 Act, 1882 Act, 1884 Act, 1887 Act, & 1890 Act respectively) were repealed & replaced by Settled Land Act, 1925 (c. 18) (in this Part of this Title referred to as 1925 Act), ss. 83–89, Sched. III. In considering the cases set out in this Part regard must be had to their date, the Act under which they were decided, & the effect of the subsequent Acts.

### SECT. 1.—IMPROVEMENTS WITH CAPITAL MONEY

#### SUB-SECT. 1.—IN GENERAL.

*See, now*, 1925 Act, ss. 83, 84.

**68. Principle on which court acts — In apportioning expenditure between capital & income.**—Under 1890 Act, s. 15, the ct. has jurisdiction to sanction the application of capital moneys in repaying to a tenant for life the expenses of improvements on the settled estate executed & paid for by him without the submission of a scheme. But in exercising such jurisdiction the ct. will take care that no expenses shall be thrown upon capital, which as between tenant for life & remainderman ought in fairness to be paid out of income. The cost of works which are not permanent improvements likely to benefit the remainderman more than the tenant for life, but are mere repairs or works incidental to the ordinary use, occupation, & enjoyment of the property, ought not to be allowed out of capital moneys arising under the Settled Land Acts. The cost of additions to & alterations in the drainage & sanitary arrangements of a mansion house held to fall within this principle.—*Re TUCKER'S SETTLED ESTATES*, [1895] 2 Ch. 468; 64 L. J. Ch. 513; 72 L. T. 619; 43 W. R. 581; 39 Sol. Jo. 502; 12 R. 320, C. A.

*Annotations*:—*Apld. Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319. *Reid. Re Lever, Cordwell v. Lever*, [1897] 1 Ch. 32; *Re Norfolk's Parliamentary Estates*, *Norfolk v. Herries*, [1900] 1 Ch. 461; *Re Farnham's Settlement*, *Law Union & Crown Insce. v. Hartopp*, [1904] 2 Ch. 561; *Re Leonfeld's S. E.*, [1907] 2 Ch. 340; *Re St. Gormans S. E.*, [1924] 2 Ch. 236.

**69. — On application by tenant for life for reimbursement of money spent.**—*Re TUCKER'S SETTLED ESTATES*, No. 68, *ante*.

**70. Whether co-extensive with Improvement of Land Act, 1864 (c. 114), s. 9.**—*Re NEWTON'S SETTLED ESTATES*, [1890] W. N. 24, C. A.; *previous proceedings* (1889), 61 L. T. 787.

**71. Improvements calculated to increase or maintain income of settled estates.**—*Re GERARD'S (LORD) SETTLED ESTATE*, No. 145, *post*.

**72. Improvements with a view to sale of settled property—Whether authorised.**—*Re HOTCHKIN'S SETTLED ESTATES*, No. 208, *post*.

**73. Improvement in the nature of experiment.**—*Re BROADWATER ESTATE*, No. 99, *post*.

**74. Works incidental to authorised improvement—Pavilion on cricket ground.**—*Re ORWELL PARK ESTATE* (1904), 48 Sol. Jo. 193.

*Annotation*:—*Reid. Re De Crespigny's S. E.*, [1914] 1 Ch. 227.

**75. — Estate office on building land.**—The building of an estate office on settled land, though not an improvement *per se* within the improvement clauses of the 1882 Act, s. 25, may in a proper case be allowed under the general words of the section as an "operation incidental to, or necessary, or proper . . . for securing the full benefit of" an authorised improvement, *e.g.*, the conversion of the land into building land under clauses 17 & 18.—*Re DE CRESPIGNY'S SETTLED ESTATES*, [1914] 1 Ch. 227; 83 L. J. Ch. 346; 110 L. T. 236; 58 Sol. Jo. 252, C. A.

**76. Improvements on settled land out of the jurisdiction—Land abroad.**—*Re STROUSBERG* (1886), 32 Sol. Jo. 625.

**77. — Land in Scotland.**—Where there is power in an English settlement to lay out capital moneys in purchase of land, & part of the settled estate consists of land in Scotland, capital moneys arising out of the settlement can be applied to the improvements of such real estate.

Structural alterations to a public-house including the re-arrangement of the bar required by a licensing authority on granting a renewal of the license are improvements on which capital moneys may be expended.—*Re GURNEY'S MARRIAGE SETTLEMENT*, *SULLIVAN v. GURNEY*, [1907] 2 Ch. 496; 76 L. J. Ch. 609; 97 L. T. 687.

*See, also*, No. 187, *post*.

**78. Matters of mere amenity & luxury distinguished.**—*Re GERARD'S (LORD) SETTLED ESTATE*, No. 145, *post*.

**79. Improvements to newly purchased estate—Authorised as "purchase of land"**—Under 1882 Act, s. 21 (vii).—Installation of electric lighting & bells.—A suitable mansion house, although much out of repair & deficient in modern requirements, together with 99 acres of land had been purchased for £7,500 out of capital moneys by the trustees of a settlement at the direction of the tenant for life in place of the principal mansion house & grounds originally settled but subsequently sold. The tenant for life had obtained expert advice not to give more than £7,500 for the property & that an expenditure of £5,000 would be necessary to modernise the house & put it in proper repair & condition. Many of the works

necessary for that purpose were admittedly authorised improvements within the Settled Land Acts, but the expenditure also included a sum of £1,000 for the installation of a system of electric lighting & bells, & of £1,280 for general repairs :—*Held* : inasmuch as the tenant for life would have had to pay an enhanced price for the property if the works in question had been executed before the sale to him, an allowance out of capital moneys in respect of the expenditure upon the electric lighting & bells & repairs could be sanctioned under above sub-sect. as being in substance a purchase of land in fee simple, but the allowance in respect of those items must be limited to such a sum to be ascertained by a qualified practical surveyor as he would have advised the trustees to pay in addition to the £7,500 if the particular works in question had been executed by the vendor before the sale.—*Re BLAKE'S SETTLED ESTATES*, [1923] 2 Ch. 128 ; 92 L. J. Ch. 329 ; 128 L. T. 659 ; 67 Sol. Jo. 313.

*See, now*, 1925 Act, s. 73 (xv).

**Alterations—To farm buildings.]—See No. 97, post.**

— **To mansion house.]—See Nos. 131, 145, post.**

— **To public-house.]—See No. 77, ante.**

**Building estate—Agent's office.]—See No. 75, ante.**

— **Streets & open spaces on.]—See Sub-sect. 2, lt., post.**

— **Water supply for.]—See No. 108, post.**

**Carriage drive.]—See No. 154, post.**

**Chapel.]—See No. 145, post.**

**Coach house & harness rooms.]—See No. 146, post.**

**Cottages—Construction.]—See Sub-sect. 2, K., post.**

— **Drainage of.]—See No. 85, post.**

— **Water supply for.]—See No. 36, ante.**

**Cotton mill.]—See No. 101, post.**

**Cricket ground.]—See No. 74, ante.**

**Engine house—For electric light plant.]—See Nos. 82, 129, post.**

**Estate agent's house.]—See No. 145, post.**

— **Additions to.]—See No. 36, ante, & No. 127, post.**

**Estate office.]—See No. 75, ante.**

**Fire extinguishing apparatus.]—See No. 107, post.**

**Garden path.]—See No. 154, post.**

**Garden walls & fences.]—See Nos. 107, 154, post.**

**Golf course.]—See No. 113, post.**

**Heating apparatus.]—See No. 131, post.**

**Laundry.]—See No. 107, post.**

**Lighting installation.]—See No. 79, ante, Nos. 82, 128, 129, 134, post.**

**Mansion house—Additions to.]—See No. 145, post.**

— **Drainage of.]—See Nos. 36, 68, ante, & Nos. 82, 156, post.**

— **Installation of electric light.]—See No. 129, post.**

— **Installation of heating apparatus.]—See No. 131, post.**

— **Rebuilding.]—See Sub-sect. 2, Y., post.**

— **Reroofing.]—See Nos. 131, 145, 155, post.**

**Peach house.]—See No. 139, post.**

**Reroofing—Farm buildings.]—See No. 97, post.**

— **Mansion house.]—See Nos. 131, 145, 155, post.**

— **Thatch replaced by galvanised iron.]—See No. 90, post.**

**Silos.]—See No. 99, post.**

**Stables—Rebuilding.]—See No. 30, ante, Nos. 145, 146, post.**

**Vinery.]—See No. 139, post.**

**Walls & fences.]—See Nos. 90, 98, post.**

## SUB-SECT. 2.—EXPENDITURE NOT REPAYABLE BY INSTALMENTS.

### A. Drainage.

*See* 1925 Act, s. 83, sched. III., Part I., (i).

**80. Of mansion house—New & improved system.]—Re HOUGHTON ESTATE**, No. 36, ante.

**81. ———.]—Re DUNHAM MASSEY SETTLED ESTATES**, No. 156, post.

**82. ———.]—A tenant for life of settled estates constructed an entirely new system of drainage at the principal mansion house which involved the structural alteration of rooms & connection of closets with the outer air. He also erected an engine house for the purpose of housing the engines required to supply the mansion house with electric light. Upon the tenant for life applying to be recouped out of capital moneys his expenditure in respect of these "improvements" as coming within the 1882 Act, s. 25 :—*Held* : all expenditure substantially for the purpose of making one complete system of drainage, beginning at one end & going to the other would be allowed out of capital moneys ; (2) the expenditure upon the erection of the engine house could not be allowed as it would not "increase the value of the settled land for agricultural purposes or as woodland or otherwise" within the 1882 Act, s. 25 (12).**

The words "or otherwise" in the sub-sect. must be limited to purposes *eiusdem generis*.—*Re LECONFIELD'S (LORD) SETTLED ESTATES*, [1907] 2 Ch. 340 ; 76 L. J. Ch. 562 ; 97 L. T. 163 ; 23 T. L. R. 573.

**83. — Alterations.]—Re TUCKER'S SETTLED ESTATES**, No. 68, ante.

**84. Of long leaseholds—Drainage modernised.]—Testator gave his residuary estate to trustees on trust for conversion & investment, then to pay the income in the manner therein directed to three persons as tenants for life, then to hold the estate for the children of one of them. The investment clause contained a power to invest on freehold ground rents, & power was given to the trustees to postpone the sale of any part of the estate. Part of the estate retained by them unsold consisted of three leasehold houses held for the residue of long terms, & upon these large sums had to be expended by the trustees in putting in modern systems of drainage :—*Held* : the drainage expenses were improvements within Settled Land Acts, & under the circumstances they should be borne by capital.—*Re THOMAS, WEATHERALL v. THOMAS*, [1900] 1 Ch. 319 ; 69 L. J. Ch. 198 ; 48 W. R. 409.**

*Annotation :—Reid. Re McClure's Trusts, Carr v. Commercial Union Insce.* (1906), 76 L. J. Ch. 52.

**85. Cottages—Occupied by estate labourer.]—The decision of the Ct. was here asked for whether certain contemplated works were improvements within Settled Land Acts. In the scheme submitted to the trustee of the settled estate the following items appeared : (a) Sanitary works to a cottage in the occupation of the wife of a labourer on the settled estates. (b) Sanitary works to a house in the occupation of a doctor at a rental of £35. The doctor had in 1898 taken the house on the faith of a promise by the late tenant for life that the works now proposed should be carried out. There was evidence that the existing sanitary arrangements had been condemned by the local sanitary authorities. (c) Sanitary improvement to a number of cottages on the estate. Some of these were occupied by tradesmen, others by "labourers, farm servants, & artisans," & the remainder by members of the working classes :—*Held* : as to (a) the case came within 1882**

**Sect. 1.—Improvements with capital money: Sub-sect. 2, A., B., C., D., E., F., G., H., I., J., K., L., M., N., O., P., Q. & R.]**

Act, s. 25 (10) (20); (2) as to (b) upon the occupier giving notice of his intention to quit if the improvements were not carried out, the proposed expenditure would then be in respect of an improvement under 1890 Act, s. 13 (2), for the proposed works would then be "additions to or alterations in buildings reasonably necessary or proper to enable the same to be let"; (3) as to (c) those houses which were in the occupation of tradesmen were not in the occupation of the working classes as defined by 1890 Act, s. 18, & consequently improvements to them could not be paid for out of capital; (4) In the case of works proposed on cottages occupied by persons whose description did not come within the definition in that sect. although they did not belong to the classes referred to in 1882 Act, s. 25 (10), the works were improvements within Settled Land Acts. This was so although the building of the dwellings had never been permitted by the ct. as "not injurious to the estate" in accordance with Housing of the Working Classes Act, 1890 (c. 70), s. 74 (1) (b).—*Re CALVERLEY'S SETTLED ESTATES*, [1904] 1 Ch. 150; 73 L. J. Ch. 25; 89 L. T. 500; *sub nom. Re CALVERLEY'S SETTLED ESTATES*, CALVERLEY v. CALVERLEY 52 W. R. 206; 48 Sol. Jo. 50.

**86. — Occupied by tradesmen.]—***Re CALVERLEY'S SETTLED ESTATES*, No. 85, *ante*.

**87. Work required by occupier—As alternative to notice to quit—Drainage condemned by sanitary authorities.]—***Re CALVERLEY'S SETTLED ESTATES* No. 85, *ante*.

**88. Work required by sanitary authority.]—**Notice was served under Public Health (London) Act, 1891 (c. 76), upon the trustees of certain settled property as the owners of the premises to do certain sanitary works upon the premises. Pltfs. who were the assignees of the life interest of the equitable tenant for life, agreed with the trustees that they would themselves do the work without prejudice to the question who was liable to pay for it, & they carried out the works, & spent in so doing £255 19s. 10d.:—*Held*: [having regard to the arrangement that had been come to, pltfs. were in the circumstances of the case entitled to be subrogated to the rights of the trustees, & to have a declaration of charge on the corpus of the estate for so much of the money expended by them as had been spent upon permanent improvements, & for the costs of the application & of the appeal.—*Re FARNHAM'S SETTLEMENT*, LAW UNION & CROWN INSURANCE CO. v. HARTOPP, [1904] 2 Ch. 561; 73 L. J. Ch. 667; 91 L. T. 780; 48 Sol. Jo. 604; 2 L. G. R. 1050, C. A.

**B. Bridges.**

*See* 1925 Act, s. 83, sched. III., Part I., (ii.).

**C. Irrigation and Warping.**

*See* 1925 Act, s. 83, sched. III., Part I., (iii.).

**D. Distribution of Sewage as Manure.**

*See* 1925 Act, s. 83, sched. III., Part I., (iv.).

**E. Embanking and Weiring.**

*See* 1925 Act, s. 83, sched. III., Part I., (v.).

**89. Whether allowed.]—**An application was made that part of the proceeds of a sale, under the direction of the ct., of some settled estate might be expended in making an embankment or side weir of a river to protect other part of the same

settled estate, the banks of the river having been damaged by floods:—*Held*: the application must be granted.—*Re LEADBITTER* (1882), 30 W. R. 378.

*See, also*, No. 206, *post*.

**F. Groynes, Sea-Walls, and Defences against Water.**

*See* 1925 Act, s. 83, sched. III., Part I., (vi.).

**G. Inclosing, Straightening Fences and Re-division of Fields.**

*See* 1925 Act, s. 83, sched. III., Part I., (vii.).

**Rebuilding stone wall fences on farms.]—***See* No. 97, *post*.

**90. Erection of new fences—Partly in substitution for old—Partly dividing park.]—**A tenant for life of settled estates obtained a transfer of improvement rentcharges by which a reduction of interest on the charges was effected. In order to gain the consent of the transferors to the transfer, he paid them out of his own moneys £915:—*Held*: the repayment of the £915 to the tenant for life by the trustees of the settlement out of capital money come into their hands, could not be held to be money expended in "redeeming" or "otherwise providing for the payment of" rentcharges within sect. 1 of 1887 Act. The replacing of thatch with galvanised iron roofing is an improvement within 1882 Act, s. 25 (20), on which capital money may be spent:—*Semle*: the erection of new fences partly in place of old fences & partly to divide a park is an improvement within 1882 Act, s. 25 (6).—*Re VERNEY'S SETTLED ESTATES*, [1898] 1 Ch. 508; 67 L. J. Ch. 243; 78 L. T. 191; 46 W. R. 348; 42 Sol. Jo. 308.

**91. Inclosing new garden.]—***Re DUNRAVEN'S (EARL) SETTLED ESTATES*, No. 107, *post*.

**92. —.]—***Re WINDHAM'S SETTLED ESTATE*, No. 154, *post*.

**H. Reclamation and Dry Warping.**

*See* 1925 Act, s. 83, sched. III., Part I., (viii.).

**I. Farm and Private Roads and Roads and Streets in Villages and Towns.**

*See* 1925 Act, s. 83, sched. III., Part I., (ix.). Streets & roads in connection with building estates, *see* Sect. 1, sub-sect. 2, R., *post*.

**93. "Private road"—New carriage drive—Old carriage drive built over.]—***Re WINDHAM'S SETTLED ESTATE*, No. 154, *post*.

**94. — Garden path.]—***Re WINDHAM'S SETTLED ESTATE*, No. 154, *post*.

**J. Clearing, Trenching and Planting.**

*See* 1925 Act, s. 83, sched. III., Part I., (x.).

**K. Cottages for Labourers, Farm Servants and Artisans.**

*See* 1925 Act, s. 83, sched. III., Part I., (xi.).

**95. Labourers' cottages.]—***Re HOUGHTON ESTATE*, No. 36, *ante*.

**96. Gardener's cottage.]—***Re LISBURN'S (EARL) SETTLED ESTATES*, [1901] W. N. 91.

**House for agents, bailiffs, etc.]—***See* Sub-sect. 3, A., *post*.

**Small dwellings.]—***See* Sub-sect. 2, V., *post*.

*See, also*, No. 85, *ante*.

**L. Farm Houses, Buildings, etc.**

*See* 1925 Act, s. 83, sched. III., Part I., (xii.).

**97. New farm buildings—Whether authorised improvements—Question of evidence.]—***Re*

NEWTON'S SETTLED ESTATES, [1890] W. N. 24, C. A.; *previous proceedings* (1889), 61 L. T. 787.

**98. Rebuilding stone wall fences on farm.]—**The rebuilding of stone wall fences on farms is not within 1882 Act, s. 25 (11), (20).—*Re MARLBOROUGH'S (DUKE) SETTLEMENT* (1892), 8 T. L. R. 201.

*Annotation:—Reid. Re Dunraven's S. E.*, [1907] 3 Ch. 417.

**99. Buildings for farm purposes—"Silo."]**—(1) The tenant for life of a settled estate, after the passing of 1882 Act, constructed "silos" upon the estate, & proposed to construct others. He then applied to the ct. to allow payment for the work done & proposed to be done out of capital trust money under sect. 25 (11) of the Act:—*Held*: though a "silo" might come within the term "buildings" used in the Act, yet, inasmuch as the construction of "silos" was in the nature of an experiment, the expenditure could not be sanctioned. *Qu.*: whether the ct. had power to sanction the payment for past expenditure.

(2) On an application to the ct. for the payment for improvements out of capital money the trustees ought to appear separately from the tenant for life.—*Re BROADWATER ESTATE* (1885), 54 L. J. Ch. 1104; 53 L. T. 745; 33 W. R. 738; 1 T. L. R. 565, C. A.

**100. —.]—*Re LISBURNE'S (EARL) SETTLED ESTATES*, [1901] W. N. 91.**

**Repairs & alterations.]—***See* Sub-sect. 2, U., *post*.

#### M. Mills, Waterwheels, Engines, etc.

*See* 1925 Act, s. 83, sched. III., Part I. (xiii.).

**101. "Other mills"—Limited to mills for developing agricultural produce of land—Silk or cotton mill excluded.]—**The words "other mills" in 1882 Act, s. 25 (12), mean mills for the purpose of developing the agricultural produce of the settled land, & not for commercial purposes; & therefore, the sub-sect. does not authorise the expenditure of capital money arising under the Act upon the erection of, or any addition to, or reconstruction of, a silk & cotton mill, the same being for the development of produce imported on to the settled land.—*Re HARRINGTON'S (EARL) SETTLED ESTATES* (1906), 75 L. J. Ch. 400; *sub nom. Re HARRINGTON'S (EARL) SETTLED ESTATES*, *HARRINGTON v. PEAT*, 94 L. T. 623, C. A.

**102. Agricultural purposes or woodland or otherwise—"Or otherwise" construed ejusdem generis.]—*Re LECONFIELD'S (LORD) SETTLED ESTATES*, No. 82, *ante*.**

**103. Engine house—For electric light engine—Not included.]—*Re LECONFIELD'S (LORD) SETTLED ESTATES*, No. 82, *ante*.**

**Whether within 1925 Act, sched. III., Part I., (xxiii.).]—*See* No. 129, *post*.**

#### N. Water Supply.

*See* 1925 Act, s. 83, sched. III., Part I., (xiv.).

**104. For mansion house—Improved supply.]—*Re HOUGHTON ESTATE*, No. 38, *ante*.**

**105. — New supply.]—*Re KENSINGTON SETTLED ESTATES*, No. 148, *post*.**

**106. —.]—*Re DUNHAM MASSEY SETTLED ESTATES*, No. 156, *post*.**

**107. — Including fire extinguishing equipment.]—**Upon the application of the tenant for life of settled land under 1890 Act, s. 15, the ct. authorised the application of capital moneys in payment of the cost of the installation of a new water supply system in the principal mansion house on the Irish estates, comprising also a complete equipment for extinguishing fire, including

fire hydrants, hose, & other necessary fittings & apparatus, as being an improvement coming within 1882 Act, s. 25 (13), & also of rebuilding the walls of the garden attached to the same mansion house, the old ruinous walls having been taken down & new walls inclosing more garden ground having been built in part on the site of the old walls, as being an improvement coming within the term "inclosing" in 1882 Act, s. 25 (6). The application for the sanction of the ct. under 1890 Act, s. 13 (4), to the payment out of capital moneys of the cost of the proposed rebuilding of a laundry, 250 yards away from the mansion house, refused. 1882 Act, s. 25 (20), in authorising as an improvement the "reconstruction, enlargement, or improvement of any of those works," refers to any of the works previously mentioned in the sect., however & whenever made, & does not merely refer to works already constructed under powers given by the Act.—*Re DUNRAVEN'S (EARL) SETTLED ESTATES*, [1907] 2 Ch. 417; 76 L. J. Ch. 591; 97 L. T. 330; 23 T. L. R. 691; 51 Sol. Jo. 653.

**108. For building estate.]—**The scheme submitted in this case to the trustees, is substantially a scheme for improving the value of the K. estate by giving it the character of a building estate, & the estate could not be improved in this way without giving it an adequate & increased supply of water (LORD HALSHURY, C.).

The scheme, as stated by the Lord Chancellor, was for storing in a tank a sufficient supply of water to be distributed by gravitation over the estate. In order to obtain a sufficient supply of water it was proposed to deepen one of the wells on the estate. In carrying out the scheme it was found necessary not only to sink the well deeper than had been proposed, but also to provide for storing the water by making underground headings, to increase the size of the engine-house & tanks, & to do various other things, which all came within the scheme which had been approved (COTTON, L.J.).—*Re BULWER LYTTON'S WILL, KNEBWORTH SETTLED ESTATES* (1888), 38 Ch. D. 20; 57 L. J. Ch. 340; 59 L. T. 12; 36 W. R. 420; 4 T. L. R. 229, C. A.

*Annotations:—Reid. Re Kensington S. E.* (1905), 21 T. L. R. 351; *Re Egmont's Settltmt.* (1908), 24 T. L. R. 783.

**109. — Investment of capital moneys in shares of water company.]—*Re ORWELL PARK ESTATE* (1894), 8 R. 521.**

#### O. Tramways, Railways, Canals and Docks.

*See* 1925 Act, s. 83, sched. III., Part I., (xv.).

#### P. Jetties, Piers and Landing Places.

*See* 1925 Act, s. 83, sched. III., Part I., (xvi.).

#### Q. Markets and Market Places.

*See* 1925 Act, s. 83, sched. III., Part I., (xvii.).

#### R. Streets, Roads and Open Spaces on Building Estates.

*See* 1925 Act, s. 83, sched. III., Part I., (xviii.).

**110. Sewering & paving new streets.]—*Re LEGH'S SETTLED ESTATE*, No. 155, *post*.**

*See, generally*, HIGHWAYS, Vol. XXVI., pp. 489, 520.

**111. "Open space"—Cricket ground—Whether pavilion necessarily incidental.]—*Re ORWELL PARK ESTATE* (1904), 48 Sol. Jo. 193.**

*Annotation:—Reid. Re De Crespigny's S. E.*, [1914] 1 Ch. 227.

**Golf course.]—**The construction of a golf club house & the laying out of a golf course held

**Sect. 1.—Improvements with capital money:**  
 **sect. 2, R., S., T., U., V. & W.]**

to be an improvement within 1882 Act, s. 25 (17), as being an "open space."—*Re DE LA WARR'S (LORD) SETTLED ESTATES* (1911), 27 T. L. R. 534.

*Annotation*:—*Consd. Re De Crespigny's S. E.*, [1914] 1 Ch. 227.

**113. — Compensation paid to agricultural tenant not included.**—Capital money arising under 1882 Act, may not be expended in paying compensation to an agricultural tenant from year to year, under Agricultural Holdings Act, 1908 (c. 28), on terminating his tenancy, even though it be necessary to terminate his tenancy in order to effect a duly authorised improvement consisting in a golf course under the first named statute.—*Re DE LA WARR'S (EARL) COODEN BEACH SETTLED ESTATE*, [1913] 1 Ch. 142; 82 L. J. Ch. 174; 107 L. T. 671; *sub nom. Re COODEN BEACH ESTATE*, 29 T. L. R. 30; 57 Sol. Jo. 42, C. A.

*See, generally, OPEN SPACES.*

**Streets & roads apart from building estates.**—*See Sub-sect. 2, I., ante.*

*S. Sewers, Drains and Watercourses and Works connected therewith.*

*See* 1925 Act, s. 83, sched. III., Part I., (xix.), & *generally, SEWERS & DRAINS.*

**T. Trial Pits for and Preliminary Works for Development of Mines.**

*See* 1925 Act, s. 83, sched. III., Part I., (xx.).

**114. Scope of enactment.**—Lands under which there were mines were settled by deed in 1872. In 1874 the settlor by his will devised other real estates of his own to the trustees for the time being of the settlement, & directed that they should stand possessed thereof to the uses declared by the settlement concerning the lands comprised therein. He bequeathed his residuary personal estate to his exors., one of whom was a trustee under the settlement, upon trust to invest the same in the purchase of land, & to settle the land so purchased to the uses declared concerning his real estates therein before devised. It was proposed to apply some of the personal estate of testator, which had not yet been invested in land, in the erection of a new pumping engine & pumps for draining some mines included in the original settlement:—*Held*: the proposed works were improvements authorised by 1882 Act, s. 25 (20).—*Re MUNDY'S SETTLED ESTATES*, [1891] 1 Ch. 399; 60 L. J. Ch. 273; 64 L. T. 29; 39 W. R. 209, C. A.

*Annotations*:—*Appld. Re Hanbury's S. E.*, [1913] 1 Ch. 50 *Refd. Re Monson's S. E.*, [1898] 1 Ch. 427; *Re Coult's S. E.*, [1905] 1 Ch. 712. *Mentd. Re Byng's S. E.*, [1892] 2 Ch. 219; *Re Gee, Pearson Gee v. Pearson* (1895), 64 L. J. Ch. 606; *Re Eyre Coote, Coote v. Cadogan* (1899), 81 L. T. 535.

**Not limited to ascertaining existence of minerals.**—Upon a summons by a person having the powers of a tenant for life under Settled Land Acts, asking that capital money under the Acts might be applied in payment of the cost of certain alterations of, & additions to, freehold & leasehold collieries, part of the settled land, required by the provisions of Coal Mines Act, 1911 (c. 50):—*Held*: the works required were "improvements" within 1882 Act, s. 25 (19), (20),

& *appct.* was *prima facie* entitled to have them paid for out of capital; & the ct., in the exercise of its discretion, made the order.

The words "other preliminary works necessary or proper in connection with the development of mines" in sub-sect. 19, though pointing primarily to operations incident to discovering whether minerals exist under the settled lands, & to the procedure necessary or proper to enable the minerals, when their existence is proved, to be reached & worked, include also works, though not enlargements, improvements, or reconstructions within sub-sect. 20, which in the progress of working become necessary or proper for the development of a mine "development," continuing so long as any part of the mining area remains to be opened up.—*Re HANBURY'S SETTLED ESTATES*, [1913] 1 Ch. 50; 82 L. J. Ch. 34; 107 L. T. 670; 57 Sol. Jo. 61.

**116. — Development—What constitutes.**—*Re HANBURY'S SETTLED ESTATES*, No. 115, *ante.*

**117. — Includes all works required by Coal Mines Act, 1911 (c. 50).**—*Re HANBURY'S SETTLED ESTATES*, No. 115, *ante.*

*See, generally, MINES.*

**U Reconstruction, Enlargement or Improvement of Authorised Improvements.**

*See* 1925 Act, s. 83, sched. III., Part I., (xxi.)

**118. Scope of enactment—As applied to mines.**—*Re MUNDY'S SETTLED ESTATES*, No. 114, *ante.*

**119. — — — — —**—*Re HANBURY'S SETTLED ESTATES*, No. 115, *ante.*

**120. — Not confined to works executed under statutory powers.**—*Re DUNRAVEN'S (EARL) SETTLED ESTATES*, No. 107, *ante.*

**121. Rebuilding stone wall fences on farms.**—*Re MARLBOROUGH'S (DUKE) SETTLEMENT*, No. 98, *ante.*

**122. Reroofing farm buildings—Whether repairs or permanent improvement—Question of fact.**—*Re NEWTON'S SETTLED ESTATES*, [1890] W. N. 24, C. A.; *previous proceedings* (1889), 61 L. T. 787.

**123. — Substitution of galvanised iron for thatch.**—*Re VERNEY'S SETTLED ESTATES*, No. 90, *ante.*

**124. Conversion of barn into cowhouse.**—*Re NEWTON'S SETTLED ESTATES*, [1890] W. N. 24, C. A.; *previous proceedings* (1889), 61 L. T. 787.

**125. Rearrangement of buildings.**—*Re NEWTON'S SETTLED ESTATES*, [1890] W. N. 24, C. A.; *previous proceedings* (1889), 61 L. T. 787.

**V. Provision of Small Dwellings.**

*See* 1925 Act, s. 83, sched. III., Part I., (xxii.).

**126. Approval of original provision of dwellings by court—Whether condition precedent to repair.**—*Re CALVERLEY'S SETTLED ESTATES*, No. 85, *ante.*

**127. Improvement of estate agent's house—Ratable value under one hundred pounds.**—*Re OVERSTONE'S (LORD) SETTLED ESTATES* (1907), 123 L. T. Jo. 322.

**W. Additions or Alterations to enable Buildings to be let.**

*See* 1925 Act, s. 83, sched. III., Part I., (xxiii.).

**128. "Additions"—Confined to structural additions.**—The word "additions" in 1890 Act,

**PART III. SECT. 1. SUB-SECT. 2.—W.**

**1. To enable buildings to be let.**—*A.* was tenant for life under a will of

house property, with remainder to B. in fee. One of the houses having become vacant, A., in order to let it, but without consulting B., employed

a contractor to put in a bath & hot water supply & a new system of drainage, with the result that the house was let at a higher rent. A.



s. 13 (2), means structural additions; & therefore, an electric lighting installation, even if exclusive of fittings such as would be ordinarily supplied by a tenant, is not an addition to a building within the sub-sect.—*Re CLARKE'S SETTLEMENT*, [1902] 2 Ch. 327; 71 L. J. Ch. 593; 86 L. T. 653; 50 W. R. 585; 18 T. L. R. 610; 46 Sol. Jo. 499.

*Annotation*:—*Apprvd. Re Blagrave's S. E.*, [1903] 1 Ch. 560.

129. ———.]—To enable a mansion house, which was subject to a settlement, to be let, it was fitted with a complete electric lighting installation. A separate building, standing at some distance from the mansion house, was erected for the purposes of an engine room & accumulating room. This was fitted with a petroleum engine, a dynamo, an accumulator, etc. In the mansion house were set up a switchboard, branch circuit wiring, branch switches, wall plugs, pendants & the like; & the engine room & mansion house were connected by a cable. On an application under 1890 Act, s. 13 (2), that the expenditure so incurred might be paid for out of the capital money, the expenditure on the erection of the engine room & accumulating room was allowed, but not the expenditure on the electric plant. The tenant for life appealed as to the latter expenditure:—*Held*: the electric plant in question was not an "addition" to the mansion house & was not therefore an "improvement" within 1890 Act, s. 13 (2); an "addition" to a building must be something in the nature of a structural addition, & therefore the expenditure could not be allowed:—*Seem*: the engine room & accumulating room, being contained in a building standing at some distance from the mansion house, could not strictly be said to be an "addition" to or alteration in the mansion house or any previously existing buildings; & therefore the expenditure thereon ought not to have been allowed.—*Re BLAGRAVE'S SETTLED ESTATES*, [1903] 1 Ch. 560; 72 L. J. Ch. 317; 88 L. T. 253; 19 T. L. R. 280; 47 Sol. Jo. 334; *sub nom. Re CALCOT PARK SETTLED ESTATES*, 51 W. R. 437, C. A.

130. Alterations "—Putting in concrete floor—To stop dry-rot."—Capital moneys had been applied under an order of the ct. in the purchase of a large building situated in the City of London & let out as offices to members of the Stock Exchange. The basement had been invaded by dry-rot, & application was made by the tenant for life under 1890 Act, s. 13 (2), for an order authorising the expenditure out of capital moneys remaining in ct. of a sufficient sum to lay down a concrete floor, whereby it was anticipated that the spread of the mischief would be effectually stopped. Practically all the rooms were let mostly at yearly tenancies, but the basement tenants were complaining, & their floors had had to be repaired on numerous occasions:—*Held*: (1) the proposed works were an "alteration" within the sub-sect., & were, moreover, an "alteration reasonably necessary or proper to enable" the building "to be let"; (2) present intention to let" means intention to let as distinguished from intention to occupy, & it is not essential for the application of the sub-sect. that there should be an immediate intention to find a tenant.—*STANFORD v. ROBERTS*, [1901] 1 Ch. 440; 83 L. T. 756; *sub nom. Re*

*STANFORD, STANFORD v. ROBERTS*, 70 L. J. Ch. 203; 49 W. R. 315; 45 Sol. Jo. 219.

*Annotation*:—*As to* (1) *Reid. Re Leveson-Gower* (1905), 53 W. R. 534.

*See, now*, 1925 Act, sched. III., Part II., (iv.).

131. New roof.]—The providing of a heating apparatus & pipes, though rendering a mansion house more comfortable & convenient for occupation, is not an "improvement" directly or by analogy authorised by 1882 Act, s. 25, neither is it an "addition to or alteration in the building" within 1890 Act, s. 13 (2). But the placing of a new roof on a house, not necessarily the mansion house, in substitution for a worn out one, & the rearrangement of the main entrance are "alterations" within 1890 Act, s. 13 (2), which, if reasonably necessary & proper, may be properly paid for out of capital money.—*Re GASKELL'S SETTLED ESTATES*, [1894] 1 Ch. 485; 63 L. J. Ch. 243; 70 L. T. 554; 42 W. R. 219; 38 Sol. Jo. 200; 8 R. 67.

*Annotations*:—*Appld. Re Clarke's Settlement*, [1902] 2 Ch. 327. *Apprvd. Re Blagrave's S. E.*, [1903] 1 Ch. 560. *Reid. Re Leveson-Gower's S. E.*, [1905] 2 Ch. 95.

132. Rearrangement of main entrance—House rendered less draughty.]—*Re GASKELL'S SETTLED ESTATES*, No. 131, *ante*.

133. Provision of heating apparatus—In mansion house.]—*Re GASKELL'S SETTLED ESTATES*, No. 131, *ante*.

134. Installing electric light—In fashionable London house.]—Leasehold houses in a fashionable quarter of London were comprised in a settlement. They were more than fifty years old, & were lighted by an imperfect service of gas. In order to satisfy the modern requirements of tenants it was necessary to provide a system of electric lighting for the houses:—*Held*: the provision of an electric lighting installation, exclusive of fittings such as would be ordinarily supplied by a tenant, was an "addition" within 1890 Act, s. 13 (2), & might properly be paid for out of capital money.—*Re FRAKE'S SETTLEMENT, KINNAIRD v. FRAKE*, [1902] 1 Ch. 97; 71 L. J. Ch. 20; 85 L. T. 454; 50 W. R. 237.

*Annotations*:—*M.F. Re Clarke's Settlement*, [1902] 2 Ch. 327; *Re Blagrave's S. E.*, [1903] 1 Ch. 560.

135. ———.]—*Re CLARKE'S SETTLEMENT*, No. 128, *ante*.

*See, also*, No. 79, *ante*.

136. Electricity generating plant.]—*Re BLAGRAVE'S SETTLED ESTATES*, No. 129, *ante*.

*See, now*, 1925 Act, sched. III., Part III., (ii.).

137. Engine house.]—*Re BLAGRAVE'S SETTLED ESTATES*, No. 129, *ante*.

— Whether within sched. III., Part I., (xiii.).]—*See* No. 82, *ante*.

]—*See, now*, 1925 Act, sched. III., Part III., (ii.).

138. Sanitary improvements—Existing sanitation condemned—Notice to quit given by occupier.]—*Re CALVERLEY'S SETTLED ESTATES*, No. 85, *ante*.

139. Old building taken down & rebuilt.]—Upon the negotiation for an occupation lease of the principal mansion house upon settled land, the intending tenant agreed to take the lease on condition that the dilapidated lean-to vinery & peach house situated near the kitchen garden & five hundred feet away from the mansion house, were rebuilt. The tenant for life accordingly pulled

died shortly afterwards. The contractor, who had taken out administration to A. as a creditor, sought to have the cost of the works charged on the inheritance as being "improvements" authorised by the Settled Land Acts.

There was no capital money arising under the Acts:—*Held*: assuming the works were "improvements" authorised by the Acts, there was no power under the Acts to charge the cost of executing them on the inheritance, &

the new system of drainage was an "alteration in the buildings reasonably necessary or proper to enable the same to be let" within 1890 Act, s. 13.

—*STANDING v. GRAY*, [1903] 1 L. R. 49.



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them down & removed them & built an entirely new vinery & peach house on the same sites. Upon the application of the tenant for life under 1890 Act, ss. 13 (2), 15, to have this expenditure recouped out of capital moneys:—*Held*: the removal of an old building, & the erection of a new one in its place was not an improvement authorised by the words of sect. 13 (2), namely, "making any additions necessary or proper to enable the same to be let."—*Re LEVESON-GOWER'S SETTLED ESTATE*, [1905] 2 Ch. 95; 74 L. J. Ch. 540; 92 L. T. 836; 53 W. R. 524; 49 Sol. Jo. 482.

**140. Structural alterations to public-house—Condition precedent to renewal of license.**—*Re GURNEY'S MARRIAGE SETTLEMENT, SULLIVAN v. GURNEY*, No. 77, *ante*.

**141. "To enable buildings to be let"—Whether immediate prospect of letting necessary—Necessity for intention to let.**—*Re DE TEISSIER'S SETTLED ESTATES, Re DE TEISSIER'S TRUSTS, DE TEISSIER v. DE TEISSIER*, No. 149, *post*.

**142. ———.**—*Re GERARD'S (LORD) SETTLED ESTATE*, No. 145, *post*.

**143. ———.**—*STANFORD v. ROBERTS*, No. 130, *ante*.

**X. Building in place of Buildings Compulsorily Acquired.**

See 1925 Act, s. 83, sched. III., Part I., (xxiv.).

See, also, COMPULSORY PURCHASE OF LAND, Vol. XI., p. 240.

**Y. Rebuilding Principal Mansion House.**  
(a) *In General.*

See 1925 Act, s. 83, sched. III., Part I., (xxv.).

**144. Principal mansion house—Whether stables included.**—*Re HOUGHTON ESTATE*, No. 36, *ante*.

**145. ———.**—(1) The authorities upon the construction of Lands Clauses Act, 1845 (c. 18), s. 69, which provides for the investment of moneys arising under that Act in the purchase of land do not apply to the similar provision in 1882 Act, s. 21 (7).

(2) 1890 Act, s. 13 (2), which includes under authorised improvements "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let," implies that there must be an actual letting in contemplation: (3) *Semble*: "settled land" in the proviso in sub-sect. 4 of the same sect. which limits the sum to be applied thereunder, to one half of the annual rental of the settled land is not necessarily confined to the estate upon which the improvement is made, but includes all land in the settlement which is settled upon the same trusts.

(4) By a scheme of improvements submitted by a tenant for life under Settled Land Acts, it was proposed, to make various structural alterations in the mansion house with a view to enhance its architectural effect; to build a private chapel; to build new stables in lieu of the old ones which had become antiquated, & were ill-ventilated & ill-drained; & to build a house for the estate agent:—*Held*: these were not improvements within Settled Land Acts which could be paid for out of capital money.

(5) A stable may or may not be a part of the mansion house within 1890 Act, s. 13 (4), according to circumstances, but the building of a new stable on a fresh site in the place of an old stable which was not destroyed or in decay is not a rebuilding within the said sect.

Stables may be so connected with it, not merely physically, but by occupation, enjoyment & propinquity as to fall within the expression "rebuilding the principal mansion house" (*LINDLEY, L.J.*).—*Re GERARD'S (LORD) SETTLED ESTATE*, [1893] 3 Ch. 252; 63 L. J. Ch. 23; 69 L. T. 393; 9 T. L. R. 587; 37 Sol. Jo. 648; 7 R. 227, C. A.

*Annotations*:—As to (2) *Consd. Stanford v. Roberts*, [1901] 1 Ch. 440. As to (4) *Reid. Re Wright's S. E.* (1900), 83 L. T. 159; *Re De Crespigny's S. E.*, [1914] 1 Ch. 227. Generally, *Reid. Re Tucker's S. E.*, [1895] 2 Ch. 468.

**146. ——— Coach house & harness rooms.**—*Re LISBURNE'S (EARL) SETTLED ESTATES*, [1901] W. N. 91.

**147. ——— Whether laundry included—Two hundred & fifty yards away from house.**—*Re DUNRAVEN'S (EARL) SETTLED ESTATES*, No. 107, *ante*.

**148. Rebuilding—What amounts to—Question of fact in each case.**—(1) Whether proposed structural work is a "rebuilding" of a mansion house within 1890 Act, s. 13 (4), or merely an addition to or alteration in the house within sect. 13 (2), is a question of fact in each case. (2) In order to ascertain the "annual rental" of the settled land within sect. 13 (4), which limits the sum to be applied in rebuilding the mansion house to one half of the annual rental of the settled land, the cost of repairs ought not to be taken into account. (3) Capital moneys may be applied for the purpose of obtaining a new water supply to a mansion house.—*Re KENSINGTON SETTLED ESTATES* (1905), 21 T. L. R. 351.

*Annotations*:—As to (2) *Reid. Re Windham's S. E.*, [1912] 2 Ch. 75; *Fife's Settlt. Trusts*, [1922] 2 Ch. 348.

**149. ——— Structural alterations.]**—Under 1890 Act, s. 13, the additions to & alterations in buildings, authorised as improvements by sub-sect. 2, must be made with a present intention to let, if not an immediate prospect of letting, the buildings, & not merely with the object of making them fit to be let; alterations to a mansion house, although structural, do not amount to a "rebuilding" under sub-sect. 4; & the words "annual rental of the settled land," as used in this sub-sect. include the income of securities representing capital money.

Land & money being settled on trusts under which an infant was entitled in remainder, the trustees asked the sanction of the ct., under its general jurisdiction, to the money being applied in altering & repairing a dwelling house on the land which the tenant for life intended to live in, on the ground that it would be for the infant's benefit that the house should be prevented from deteriorating further:—*Held*: the infant's interest in the repairs was insufficient to enable the ct. to grant its sanction.

*Qu.*: whether Settled Land Acts have not the effect of excluding the application of the ct.'s general jurisdiction in such cases.—*Re DE TEISSIER'S SETTLED ESTATES, Re DE TEISSIER'S TRUSTS, DE TEISSIER v. DE TEISSIER*, [1893] 1 Ch. 153; 62 L. J. Ch. 552; 68 L. T. 275; 41 W. R. 184, 186; 9 T. L. R. 62; 37 Sol. Jo. 46, 47; 3 R. 103, 111.

*Annotations*:—*Consd. Re Gerard's S. E.*, [1893] 3 Ch. 252; *Re de Tabley, Leighton v. Leighton* (1896), 75 L. T. 328; *Re Hawker's S. E.* (1897), 66 L. J. Ch. 341; *Re Montagu Derbyshire v. Montagu*, [1897] 1 Ch. 685; *Re Wright's S. E.* (1900), 83 L. T. 159; *Stanford v. Roberts* [1901] 1 Ch. 440; *Re Willis, Willis v. Willis*, [1902] 1 Ch. 15; *Re Kensington S. E.* (1905), 21 T. L. R. 351. *Reid. Re Foster's S. E.*, [1922] 1 Ch. 348.

**150. ——— Merely architectural improvements.]**—*Re GERARD'S (LORD) SETTLED ESTATE*, No. 145, *ante*.

**151. ——— Modernising stables.**

*Re GERARD'S (LORD) SETTLED ESTATE*, No. 145, *ante*.

**152. ——— Partial reconstruction — Old walls utilised.]**—The alteration, reconstruction, & enlargement of a mansion house where part of the house was unaltered & the walls of another part were utilised:—*Held*: (1) a rebuilding under 1890 Act, s. 13 (4); (2) the "annual rental" of settled land within the proviso did not include anything in respect of any part of the land in the occupation of the tenant for life, but included the amount of the rent usually paid for a farm for the moment unoccupied.—*Re WALKER'S SETTLED ESTATE*, [1894] 1 Ch. 189; 63 L. J. Ch. 314; 70 L. T. 259; 10 T. L. R. 77; 38 Sol. Jo. 80; 8 R. 370.

*Annotations*:—As to (1) *Consd. Re Wright's S. E.* (1900), 83 L. T. 159; *Re Kensington S. E.* (1905), 21 T. L. R. 351.

**153. ——— ———.]**—It was proposed to pull down a substantial portion of the mansion house, consisting of some old & inconvenient rooms, & upon the site thereof to build other rooms; & so far as they were available for the purpose to use the old walls both internal & external:—*Held*: this would not be a "rebuilding" within 1890 Act, s. 13 (4).—*Re WRIGHT'S SETTLED ESTATES* (1900), 83 L. T. 159.

**154. ——— ——— New wings added.]**

—(1) The alteration, reconstruction, & enlargement of a mansion house where the original walls were retained but new wings were added to both the east & west ends of the old buildings:—*Held*: a rebuilding under 1890 Act, s. 13 (4).

(2) The words "annual rental" in the proviso to sub-sect. 4, must be read literally & means the total amount of the rents payable by the tenants to the landlord as appearing in the estate rent book, subject to the modification that, if any part of the land is temporarily unlet, it must for the purpose of the sub-sect. be treated as producing the rent which an occupying tenant would usually pay for it. In estimating the amount, therefore, of the "annual rental" no deductions can be made for mtge. interest, tithes, land tax, drainage rates, or rent charges. Property tax, however, may be deducted.

(3) A new carriage drive rendered necessary by reason of the building of a new wing of the mansion house over the old carriage drive:—*Held*: a "private road" within 1882 Act, s. 25 (8).

The cost of walls & iron fencing round gardens may be allowed as "inclosing" under 1882 Act, s. 26 (6), & the cost of a carriage drive to the mansion house, but not garden paths, as "private roads."—*Re WINDHAM'S SETTLED ESTATE*, [1912] 2 Ch. 75; 81 L. J. Ch. 574; 106 L. T. 832.

*Annotation*:—As to (2) *Consd. Re Fife's Settlement Trusts*, [1922] 2 Ch. 348.

**155. ——— Rebuilding necessary through dry-rot.]**—Where the principal mansion house on settled land had become infested with dry-rot, & expense to a large amount had to be incurred in rebuilding portions of the house in order to save the whole from destruction, the ct. allowed the application of capital money in the rebuilding to the extent of one-half of the annual rental of the settled land under 1890 Act, s. 13 (4), but declined to exercise its general jurisdiction by allowing the balance of the amount as being expenditure in the nature of salvage.

Expenses incurred by a local authority in sewerage, paving, & flagging new streets on settled land were charged under statutory powers on the land, & made payable, together with interest

thereon, by instalments:—*Held*: the expenses so charged constituted an incumbrance affecting settled land payable out of capital moneys under 1882 Act, s. 21 (2) & out of capital moneys the tenant for life was entitled to repayment of such portion of past instalments paid by him as represented capital, & the trustees ought to pay the corresponding portion of the remaining instalments.

The cts. have again & again been exceedingly careful in applying the principle of salvage; judges have applied it where they thought it ought clearly to be applied; but the judges have all, including myself, considered that applications based upon that doctrine must be looked at with scrupulous care (KEKEWICH, J.).—*Re LEIGH'S SETTLED ESTATE*, [1902] 2 Ch. 274; 71 L. J. Ch. 668; 86 L. T. 884; 66 J. P. 600; 50 W. R. 570; 46 Sol. Jo. 569.

*See, now*, 1925 Act, sched. III., Part II., (iv.).

**156. ———.]**—Certain structural works executed in the principal mansion house held to be a "rebuilding" of the house within 1890 Act, s. 13 (4); & a new drainage system & new water supply to the house & other works were sanctioned as improvements under Settled Land Acts.—*Re DUNHAM MASSEY SETTLED ESTATES* (1906), 22 T. L. R. 595.

**157. ——— Addition of chapel.]**—*Re GERARD'S (LORD) SETTLED ESTATE*, No. 145, *ante*.

**(b) Amount Applicable.**

*See* 1925 Act, s. 83, sched. III., Part I., (xxv.).

**158. "Annual rental" — At what time calculated.]**—Where half the amount of the annual rental of settled land is, under 1890 Act, s. 13 (4), to be repaid out of capital moneys toward the rebuilding of a mansion house, income tax & super tax, payable in respect of land, & of investments, for the time being, subject to the settlement, ought not to be deducted when ascertaining the value of the annual rental. The property, settled by the settlement, was settled subject to the life estate of R. On the death of R. estate duty became payable in respect of the settled property:—*Held*: (1) in ascertaining the amount of the annual rental of the settled land, neither the corpus nor income ought to be treated as being reduced by the amount of the estate duty payable in respect of the death of R.; (2) the point of time at which the annual rental of the settled land is to be ascertained is the date on which the scheme of improvement is approved either by the trustees of the settlement or by the ct.—*Re FIFE'S SETTLEMENT TRUSTS*, [1922] 2 Ch. 348; 91 L. J. Ch. 818; 127 L. T. 291; 66 Sol. Jo. 452.

**159. ——— Income of invested funds included.]**—*Re DE TEISSIER'S SETTLED ESTATES*, *Re DE TEISSIER'S TRUSTS*, *De Teissier v. De Teissier*, No. 149, *ante*.

**160. ——— Whole rental of settled property.]**—*Re GERARD'S (LORD) SETTLED ESTATE*, No. 145, *ante*.

**161. ——— Land occupied by tenant for life.]**—*Re WALKER'S SETTLED ESTATE*, No. 152, *ante*.

**162. ——— Farm temporarily unlet.]**—*Re WALKER'S SETTLED ESTATE*, No. 152, *ante*.

**163. ——— Deductions for outgoings — Cost of repairs.]**—*Re KENSINGTON SETTLED ESTATES*, No. 148, *ante*.

**164. ——— Property tax.]**—*Re WINDHAM'S SETTLED ESTATE*, No. 154, *ante*.

**165. ——— Income tax & super tax.]**—*Re FIFE'S SETTLEMENT TRUSTS*, No. 158, *ante*.

**166. ——— Deduction for estate duty payable in**

**Sect. 1.—Improvements with capital money: Sub-sect. 2, Y. (b); sub-sect. 3, A., B., C., D., E. & F.; sub-sect. 4, A., B. & C.; sub-sects. 5 & 6, A., B. & C.]**

**respect of first life estate.]—Re FIFE'S SETTLEMENT TRUSTS, No. 158, ante.**

**SUB-SECT. 3.—EXPENDITURE REPAYABLE BY INSTALMENTS AT DISCRETION OF TRUSTEES OR COURT.**

**A Houses for Agents, Bailiffs, etc.**

*See* 1925 Act, s. 83, sched. III., Part II., (i.).

**167. Estate agent's house.]—Re HOUGHTON ESTATE, No. 36, ante.**

**168. —.]—Re GERARD'S (LORD) SETTLED ESTATE, No. 145, ante.**

**Improvements.]—See No. 127, ante.**

**Cottages for estate labourers.]—See Sub-sect. 2, K., ante.**

**B. Offices, Workshops, etc.**

*See* 1925 Act, s. 83, sched. III., Part II., (ii.).

**169. Estate office.]—Re DE CRESPIGNY'S SETTLED ESTATES, No. 75, ante.**

**C. Houses, Shops and Accessory Buildings on Building Estate.**

*See* 1925 Act, s. 83, sched. III., Part II., (iii.).

**D. Restoration rendered necessary by Dry Rot.**

*See* 1925 Act, s. 83, sched. III., Part II., (iv.).

**Jurisdiction of court to authorise expenditure as salvage.]—See No. 155, ante.**

**Rebuilding mansion house.]—See No. 155, ante.**

**Putting in concrete floor—As alteration to enable building to be let.]—See No. 130, ante.**

**E. Necessary Additions or Alterations to Buildings.**

*See* 1925 Act, s. 83, sched. III., Part II., (v.).

**Alterations to enable buildings to be let.]—See Sub-sect. 2, W., ante.**

**F. Boring for Water and Preliminary Works.**

*See* 1925 Act, s. 83, sched. III., Part II., (vi.).

**"Preliminary works." ]—Compare Sub-sect. 2, T., ante.**

**SUB-SECT. 4.—EXPENDITURE REPAYABLE BY INSTALMENTS IN ANY EVENT.**

**A. Heating, Hydraulic or Power Plant.**

*See* 1925 Act, s. 83, sched. III., Part III., (i.).

**Heating apparatus—Whether within 1925 Act, sched. III., Part II., (iv.).]—See No. 131, ante.**

**B. Lighting Plant.**

*See* 1925 Act, s. 83, sched. III., Part III., (ii.).

**Engine house—As alteration to enable building to be let.]—See No. 129, ante.**

**Whether included under 1925 Act, sched. III., Part I., (iii.).]—See No. 82, ante.**

**Electricity generating plant—As alteration to enable building to be let.]—See No. 129, ante.**

**Installation of electric light—To enable house to be let.]—See Nos. 128, 134, ante.**

**C. Motor Vehicles and Movable Machinery.**

*See* 1925 Act, s. 83, sched. III., Part III., (iii.).

**SUB-SECT. 5.—EFFECT OF SPECIAL PROVISIONS IN SETTLEMENT.**

**170. Trustee empowered to apply income—Whether powers of tenant for life limited.]—**

The power of a tenant for life under 1882 Act, to require capital moneys to be laid out, under a proper scheme, in improvements on the settled land, is paramount to the powers of the trustees of the settlement, notwithstanding an express power in the settlement under which, had they been so minded, they could have executed & paid for the improvements out of income; the position & power of the tenant for life is not affected in this case by the fact that there are no trustees of the settlement, & that the capital moneys are in ct. at the time the expenditure is required.—*CLARKE v. THORNTON* (1887), 35 Ch. D. 307; 56 L. J. Ch. 302; 56 L. T. 294; 35 W. R. 603; 3 T. L. R. 299.

*Annotations:—Apld. Re Stamford's Estate* (1887), 56 L. T. 484; *Re Stamford's S. E.* (1889), 43 Ch. D. 84. *Distd. Cardigan v. Curzon-Howe* (1893), 9 T. L. R. 244. *Consd. Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319. *std. Re Partington, Leigh v. Kane*, [1902] 1 Ch. 711. *Unsd. Re Kecks Settltmt.*, [1904] 2 Ch. 22. *Apld. Re Stamford & Warrington, Payne v. Grey*, [1916] 1 Ch. 404. *Reid. Re Gee, Pearson Gee v. Pearson* (1895), 64 L. J. Ch. 806; *Re Egmont's S. E., Lefroy v. Egmont Earl*, [1900] 2 Ch. 151; *Re Tubbs, Dyker v. Tubbs*, [1915] 2 Ch. 137.

**171. —.]—A tenant for life of settled lands is not deprived of the right of requiring capital moneys arising under the settlement to be applied in payment for permanent improvements by reason of the trustees having powers under which they might make the improvements themselves & pay for them out of the rents & profits of the settled property. The fact that the tenant for life will derive a benefit from the exercise of any power under 1882 Act, is not in itself sufficient to prevent him from exercising the honest discretion required of him by sect. 53 of the Act.—*Re STAMFORD'S (LORD) ESTATE* (1887), 56 L. T. 484; *subsequent proceedings* (1889), 43 Ch. D. 84.**

*Annotations:—Distd. Cardigan v. Curzon-Howe* (1893), 9 T. L. R. 244. *Reid. Re Stamford & Warrington, Payne v. Grey*, [1916] 1 Ch. 404.

**172. — Whether exercise of power compulsory.]—Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY, No. 5, ante.**

**173. Tenant for life empowered to raise money by mortgage—To be repaid by instalments—Whether statutory powers curtailed.]—A settlement made in 1877 contained power for the trustees to raise money for improvements on the settled estates. The improvements authorised were, in the main, similar to those authorised by 1882 Act. The trustees were not to apply the money themselves, but were to hand it to the tenant for life to be applied by him for the purposes authorised; & the income of the settled estates was charged with the payment to the trustees of an annual sum to form a sinking fund sufficient to repay the money raised within twenty-five years from the date of its being raised. The money raised was, under 1882 Act, s. 33, capital money applicable as such under the Act:—*Held*: the provision for recoupment by the tenant for life did not tend to prevent him from exercising the powers of 1882 Act, for effecting improvements within the meaning of sect. 51 of that Act; & a tenant for life who had acted under the powers of the settlements was bound to continue making payments to the sinking fund.—*Re SUDBURY & POYNTON ESTATES, VERNON v. VERNON*, [1893] 3 Ch. 74; 62 L. J. Ch. 539; 68 L. T. 707; 41 W. R. 585; 37 Sol. Jo. 424; 3 R. 561.**

**174. Special fund created by settlor.]—**

**CARDIGAN (COUNTESS) v. CURZON-HOWE** (1893), 9 T. L. R. 244.

*Annotation*.—*Follid. Re Partington, Reigh v. Kane*, [1902] 1 Ch. 711.

**175. — Out of income.**] — Properties the leases of which contained covenants by the lessees to do works which would be repairs & improvements within Settled Land Acts, were bequeathed to trustees upon trust out of the rents & profits to pay the rents reserved by the leases & perform the lessee's covenants, & subject thereto upon trusts under which K. was tenant for life, with remainders to other persons. Without any scheme being submitted under 1882 Act, s. 26, money was expended in making improvements:—*Held*: (1) as there was a trust, providing for improvements out of income & that trust came before the trust for K., the expenses must be borne by income; (2) even if the ct. had power to direct payment for the improvements out of capital, as no scheme had been submitted the power could only be exercised under 1890 Act, s. 15, & under that sect. there was a discretion which ought not to be exercised in favour of K.—*Re PARTINGTON, REIGH v. KANE*, [1902] 1 Ch. 711; 71 L. J. Ch. 472; 86 L. T. 194; 50 W. R. 388; 18 T. L. R. 387; 46 Sol. Jo. 337.

*Annotations*.—*As to* (1) *Distd. Re Stanford & Warrington, Payne v. Grey*, [1916] 1 Ch. 404. *Reid. Re Keck's S. E.* (1904), 90 L. T. 113.

**176. Trustees directed to pay incidental expenses & outgoings—Out of income.**]—*Re THOMAS, WEATHERALL v. THOMAS*, No. 84, *ante*.

**177. Trust for improvement prior to trust for tenant for life—Construction of settlement.**]—*Re PARTINGTON, REIGH v. KANE*, No. 175, *ante*.

**178. "Reparations to buildings for residential farm or other purposes"—Construction.**]—The ct. has jurisdiction under 1890 Act, s. 15, to direct capital moneys to be applied in payment for improvements unauthorised by 1882 Act, but authorised by a settlement made prior to 1890 Act.—*Re EGMONT'S (EARL) SETTLED ESTATES, EGMONT v. LEFROY* (1900), 16 T. L. R. 360; 44 Sol. Jo. 428; *subsequent proceedings, sub nom. Re EGMONT'S (EARL) SETTLED ESTATES, LEFROY v. EGMONT (EARL)*, [1906] 2 Ch. 151.

#### SUB-SECT. 6.—WHAT FUNDS APPLICABLE.

##### A. In General.

See 1925 Act, s. 73 (1), (3), (4), (13).

"Capital money."—*See, generally, SETTLEMENTS.*

**Application of compensation under Lands Clauses Acts.**]—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 239 *et seq.*

##### B. Before Settled Land Act, 1882.

See 1925 Act, s. 73 (1) (3), (4), (13).

**179. Proceeds of sale of part of settled estate.**]—The ct. refused to sanction the sale, under 19 & 20 Vict. c. 120, of one part of a settled estate, for the purpose of employing the produce of the sale in laying out roads in another part of the estate.—*Re CHAMBERS* (1860), 28 Beav. 653; 29 L. J. Ch. 924; 3 L. T. 49; 25 J. P. 36; 6 Jur. N. S. 1005; 8 W. R. 646; 54 E. R. 517.

*Annotations*.—*Follid. Re Hurle's S. E.* (1864), 5 New Rep. 167. *Consd. Re Venour's S. E., Venour v. Sellon* (1876), 2 Ch. D. 522.

**180. Personality settled upon trusts similar to those of settled estate.**]—*Re GILBERT* (1862), cited

2 Hem. & M. p. 199; 5 New Rep. p. 168; 11 Jur. N. S. p. 79; 13 W. R. p. 172; 71 E. R. 439.

*Annotations*.—*Distd. Re Hurle's S. E.* (1864), 2 Hem. & M. 196. *N.F. Re Venour's S. E., Venour v. Sellon* (1876), 2 Ch. D. 522. *Reid. Stanford v. Roberts* (1882), 52 L. J. Ch. 50.

**181. —**]—When the instrument by which estates were settled contained a power to grant leases for building purposes, subject to the consent of a person not entitled to any estate in the property, but only to an annuity charged thereon, & she has refused her consent, the ct. would not give an absolute power to grant leases, overriding her refusal. The costs of making roads upon an estate are not such costs as the ct. will, under 19 & 20 Vict. c. 120, s. 29, direct to be raised by sale or mtge. of the settled estates, or to be charged thereon.

*Semble*: a fund of personality in ct., held upon the same trusts as the settled estate, can be so applied.—*Re HURLE'S SETTLED ESTATES* (1864), 2 Hem. & M. 196; 5 New Rep. 162; 11 L. T. 592; 11 Jur. N. S. 78; 13 W. R. 171; 71 E. R. 437.

*Annotation*.—*Consd. Re Venour's S. E., Venour v. Sellon* (1876), 2 Ch. D. 522.

**182. Proceeds of sale of former settled estate—Application to substituted estate.**]—On an application, under 19 & 20 Vict. c. 120, s. 23, permission was given to the tenant for life of a settled estate, which had been sold under an order of the ct. to apply a portion of the purchase-money on the permanent improvement of another estate which had been purchased & settled upon the trusts of the original property.—*Re CLITHEROE'S SETTLED ESTATES* (1869), 20 L. T. 6; 17 W. R. 345.

*Annotation*.—*Reid. Re Johnson's Settmt.* (1869), L. R. 8 Eq. 348.

**183. Proceeds of sale of timber.**]—Under 19 & 20 Vict. c. 120, s. 23, money arising from timber cut under an order of the ct. was ordered to be expended in erecting new farm buildings & other permanent improvements of the property.

The erection of a building is substantially the same thing as the purchase of a new estate (JAMES, L.J.).—*Re NEWMAN'S SETTLED ESTATES* (1874), 9 Ch. App. 681; 43 L. J. Ch. 702; 31 L. T. 265, L. J.J.

*Annotations*.—*Consd. Re Venour's S. E., Venour v. Sellon* (1876), 2 Ch. D. 522. *Reid. Re Bethlehem Hospital* (1875), L. R. 19 Eq. 457; *Stanford v. Roberts* (1882), 52 L. J. Ch. 50.

##### C. After Settled Land Act, 1882.

See 1925 Act, s. 73 (1), (3), (4), (13).

**184. Estates or capital money settled upon different limitations—With same tenant for life.**]—The powers conferred by 1882 Act, upon a tenant for life are, pursuant to sect. 53 to be exercised with a due regard to the interests of all parties entitled under the settlement & the discretion vested in him by the Act as to the application of capital moneys must not be so exercised as unduly to prejudice such parties, but where it is a matter of doubt then the discretion of the tenant for life, if fairly exercised, ought to prevail. Four estates A., B., C. & D. were devised by the same will in trust for the same tenant for life. After her death estates A., B., & C. were devised to different persons in strict settlement & a long term of years was created in estate D., subject to which such estate was devised as to one moiety to the uses of estate A. & as to the other moiety to the uses of estate B. The trusts of the term were for the payment off of the incumbrances on all four estates in the order in which they were devised. Upon an application by the tenant for life:—*Held*: notwithstanding the interposition of the term of years, estate B., & one moiety of estate D..

**Sect. 1.—Improvements with capital money: Sub-sect. 6, C. Sects. 2, 3, 4 & 5.]**

constituted one settled estate within 1882 Act, & capital moneys arising from the moiety of estate D. were applicable for improvements on estate B.; it appearing that this application of the moneys, though it might delay, would not endanger the payment of the incumbrances on the other estates.—*Re STAMFORD'S (LORD) SETTLED ESTATES* (1889), 43 Ch. D. 84; 58 L. J. Ch. 849; 61 L. T. 504; 38 W. R. 317.

*Annotations:—Distd. Re Partington, Reigh v. Kane, [1902] 1 Ch. 711. Reid. Re Mundy's S. E., [1891] 1 Ch. 399; Re Gerard's S. E., [1893] 3 Ch. 252; Re Thomas, Weatherall v. Thomas, [1900] 1 Ch. 319.*

**185. Estates or capital money settled upon similar limitations.—By different instruments.]—*Re MUNDY'S SETTLED ESTATES*, No. 114, *ante*.**

**186. ———.]—Testator, by will in 1844, settled freeholds in strict settlement. By deed in 1845 he declared trusts of money to be invested in lands to be settled on himself for life, with remainders on limitations identical with those declared by the will, but not declared by reference thereto, except that two terms of years were interposed. The powers & provisions of the two instruments varied in several particulars, *e.g.* by the settlement the tenants for life were made impeachable for waste; there were powers of sale & exchange, & a special provision for apportionment between capital & income of rents & royalties derived from any mines purchased under the trusts of the settlement: & this provision differed from that of Settled Land Act. The same persons were trustees of both instruments. On the application of the tenant for life under both instruments, the terms of years having ceased:—*Held*: the two instruments formed one settlement, & capital money in the hands of the trustees under the settlement might be applied towards improvements on the lands settled by the will, provided the improvements were such as would be equally authorised on the lands subject to both instruments.—*Re BYNG'S SETTLED ESTATES*, [1892] 2 Ch. 219; 61 L. J. Ch. 511; 66 L. T. 754; 40 W. R. 457.**

*Annotations:—Consd. Re Monson's S. E., [1898] 1 Ch. 427; Re Stafford's Settlt. & Will, Gerard v. Stafford, [1904] 2 Ch. 72; Re Coull's S. E., [1905] 1 Ch. 712.*

*See, generally, SETTLEMENTS.*

**187. Capital arising from lands in Ireland—For improvements on lands in England.]—**The tenant for life of estates in England & Ireland which were settled by the same will & upon the same trusts, laid out considerable sums on improvements upon the estates in England in pursuance of a scheme approved of by the trustees of the settlement, & was desirous that the trustees should apply capital moneys in their hands, being the proceeds of the sale of part of the estates in Ireland, in repaying him the sums already laid out on such improvements, & in completing the improvements authorised by the scheme which was left at the chambers of the judge. On a summons by the tenant for life against the trustees as defts.:—*Held*: the capital moneys in the hands of the trustees arising from the sale of part of the estates in Ireland might be applied in payment for improvements on the estates in England.—*Re EYRE COOTE, COOTE v. CADOGAN* (1899), 81 L. T. 535.

*See, also, Nos. 76, 77, ante.*

**SECT. 2.—DISCRETION OF TRUSTEES OR COURT.**

*See* 1925 Act, ss. 83, 84, 87; sched. III., Part II.

**NOTE.—***The former practice requiring the approval of a scheme by the trustees having been rendered obsolete by 1925 Act, ss. 84 (1), 87, the cases decided thereon have been omitted.*

**188. Duties of court—Not merely ministerial.]—**Where an application is made to the ct. under 1882 Act, s. 26 (2) (iii.), for an order sanctioning the application of capital moneys in paying for work done under a scheme of improvements approved by the trustees, the duties of the ct. are not merely ministerial; it has a discretion, & must be satisfied that the scheme is a proper one. It is not sufficient to show that the trustees have approved the scheme & the work has been done in pursuance of it.—*Re KECK'S SETTLEMENT*, [1904] 2 Ch. 22; 73 L. J. Ch. 262; 90 L. T. 113; 52 W. R. 362; 20 T. L. R. 156.

*Annotation:—Consd. Re Egmont's S. E., Lefroy v. Egmont, [1906] 2 Ch. 151.*

**189. Discretion of court—Where no scheme submitted under former practice—Whether limited to cases where tenant for life might have submitted scheme.]—*Re WORMALD'S SETTLED ESTATE, WORMALD v. OLLIVANT*, [1908] W. N. 214.**

**190. Exercise of discretion—What trustees may consider.]—**Where under 1882 Act, s. 26, a tenant for life submits for approval to the trustees of the settlement a scheme for the execution of an improvement the duty of the trustees is confined to seeing that the improvement proposed is an improvement authorised by the Act, namely, that it is for the benefit of some land comprised in the settlement; that the scheme for the execution of the improvement is a proper one for carrying out the particular improvement; & that in submitting the scheme to the trustees the tenant for life is acting *bonâ fide* & on competent skilled advice. The trustees are not concerned with the general policy pursued by the tenant for life in improving the property nor, in a case where there is capital money in hand, with the amount already spent on improvements.—*Re EGMONT'S (EARL) SETTLED ESTATES, LEFROY v. EGMONT (EARL)*, [1906] 2 Ch. 151; 75 L. J. Ch. 649; 95 L. T. 187; 54 W. R. 504; 22 T. L. R. 430.

**191. ——— Delay in application of tenant for life.]—*Re ALLEN'S SETTLED ESTATE* (1909), 126 L. T. Jo. 282.**

**Improvements as to which trustees or court have discretion.]—*See* Sect. 1, sub-sect. 3, *ante*.**

**192. Improvements executed out of income—Not authorised out of capital at time of execution—Whether subsequently recoverable.]—*Re ORMRON'S SETTLED ESTATE*, No. 14, *ante*.**

**193. ——— Authorised out of capital at time of execution—Statutory powers extended by settlement.]—**In Aug. 1919, before ordering certain necessary improvements to the mansion house the life tenant asked the estate solrs. if they could be paid out of capital. The solrs., forgetting that the statutory powers had been widely extended by the settlement, replied in the negative. The life tenant accepted this view & ordered the work at his own expense without any scheme, & notwithstanding a suggestion as to the applicability of capital in a subsequent letter of Apr. 1920, from one of the partners, who did not know of his firm's previous letter to the contrary, he not only made no claim for recoupment out of capital, but went on to pay the final instalment out of his own pocket on Oct. 16, 1920. In Apr. 1921, the life tenant met with a serious accident, & from that time until his death on Mar. 31, 1922, he was unable to attend to business. On May 23, 1923, his exors. applied for recoupment under 1890 Act, s. 15:—*Held*:



in the above circumstances, the discretion under 1890 Act, s. 15, ought to be exercised, & the application allowed.—*Re St. GERMAN'S SETTLED ESTATES*, [1924] 2 Ch. 236; 93 L. J. Ch. 611; 132 L. T. 55.

**Special fund created by settlor.**—*See* Nos. 174, 175, *ante*.

### SECT. 3.—EXECUTION OF IMPROVEMENTS.

*See* 1925 Act, ss. 86, 87, 89.

**194. By limited company.—For shares in company.**—Where the evidence is clear that, under the circumstances of the case, to allow a scheme, whereby a co. is to execute improvements within Settled Land Acts, is more beneficial to the estate than expending capital on moneys thereon, the ct. may sanction the scheme, although one of the terms is a sale of part of the settled land, necessary to enable the co. to carry out the improvements, in consideration of fully paid up shares in the co.—*Re ORWELL PARK ESTATE* (1894), 8 R. 521.

**195. Power of tenant for life to cut timber.—“Timber not planted or left standing for shelter or ornament.”**—In an action to restrain the cutting of timber on the ground of equitable waste, the question to be decided is whether the timber was in fact planted or left for ornament or shelter, not whether it is ornamental or useful for shelter; but the ct. will accept the evidence of competent persons, founded on inference from the present appearance & condition of the timber, as some evidence that it was so planted or left.

I quite accept the argument which was put forward on behalf of defts. that although the issue is ultimately for the ct. to determine whether the timber has or has not been left for shelter or ornament, that issue is not determined by saying whether in the opinion of the ct. the timber is ornamental or not. That is not the issue. If the timber has been planted or left by the owners of the estate for the time being for shelter or for ornament, that is protected under the rule which protects ornamental timber, even though the opinion of persons at the present day may be that the timber in its position is not in fact ornamental (*SWINFEN EADY, J.*).—*WELD-BLUNDELL v. WOLSELEY*, [1903] 2 Ch. 664; 73 L. J. Ch. 45; 89 L. T. 59; 51 W. R. 635; 47 Sol. Jo. 653.

*See, generally*, AGRICULTURE, Vol. II., pp. 106 *et seq.*

### SECT. 4.—MAINTENANCE, REPAIR AND INSURANCE OF IMPROVEMENTS.

*See* 1925 Act, s. 88.

### SECT. 5.—IMPROVEMENT CHARGES.

*See, now*, 1925 Act, ss. 73 (1) (xiii), 88 (8).

**196. Reimbursement of tenant of life.—Whether allowed.—Charge created under Improvement of Land Act, 1864 (c. 114).**—*Re KNATCHBULL'S SETTLED ESTATE*, No. 65, *ante*.

**197. ————**—*Re HOWARD'S SETTLED ESTATES*, No. 66, *ante*.

**198. ————**—Where improvements authorised by Settled Land Acts have been effected upon settled land & paid for with money borrowed & repayable by a rentcharge under above Act, the ct. cannot under 1890 Act, s. 15, direct the trustees to apply capital moneys in their hands in repaying to the tenant for life any instalments of

such rentcharge paid by him before the date at which he has required provision to be made for payment or redemption under 1887 Act.—*Re DALISON'S SETTLED ESTATE*, [1892] 3 Ch. 522; 61 L. J. Ch. 712; 41 W. R. 15.

**Annotations.**—*Fold. Re Bristol's S. E.*, [1893] 3 Ch. 161. *Reid. Re Tucker's S. E.*, [1895] 2 Ch. 466; *Re Verney's S. E.*, [1898] 1 Ch. 508.

**199. ———— Charge of land drainage.—Confined to capital.**—Where settled land is subject to a charge for land drainage improvements, repayable by instalments, money, in the hands of the trustees of the settlement, which is applicable as capital money arising under 1882 Act, may now, under 1887 Act, be from time to time applied in payment of such portions of the instalments as represent capital, so as to relieve the tenant for life from the payment thereof, but such money ought not to be applied in payment of such portions of the instalments as represent interest.—*Re SUDELEY'S (LORD) SETTLED ESTATES* (1887), 37 Ch. D. 123; 57 L. J. Ch. 182; 58 L. T. 7; 36 W. R. 162; 4 T. L. R. 139.

**Annotations.**—*Dist. Re Egmont's S. E.* (1890), 45 Ch. D. 395. *Reid. Re Howard's S. E.*, [1892] 2 Ch. 233; *Re Verney's S. E.*, [1898] 1 Ch. 508.

**200. ————**—This was an adjourned summons asking for a declaration that trustees might apply capital in payment of such part as represented principal of (a) rentcharges due to the Inclosure Comrs. for money borrowed for land drainage, (b) a rentcharge payable under an order made on June 21, 1883, by the Land Comrs., intituled under the Improvement of Land Act, 1864 (c. 114), & the Settled Land Act, 1882 (c. 38).

On June 18, 1889, KAY, J., authorised certain payments in respect of the land drainage rentcharge, & directed the second part of the summons to stand over for further evidence showing that the work done came within the description of improvements in sect. 25 of 1882 Act. The Inspector of Works of the Land Comrs. had made a certificate in Apr. 1883, in which he stated that the works consisted of new farm buildings, conversion of a barn into a cowhouse, a new roof to a cowhouse, a new cowhouse, & re-arrangement of buildings, that £1,904 10s. 3d. had been expended in executing the works in accordance with the plans & specifications approved by the Land Comrs., & that in his opinion the works “will produce a permanent improvement in the yearly value of the land exceeding the yearly amount proposed to be charged thereon.” There was no satisfactory evidence of the nature of the works executed, but it was contended that the certificate was sufficient to show that the works were permanent improvements within 1882 Act:—*Held*: (1) there was no evidence here that the work done was not work for which the tenant for life was liable, nor that the work came within the description of improvements in sect. 25 of 1882 Act; (2) without such evidence the ct. could not authorise the trustees to apply capital in payment of the rentcharge payable under the order made by the Land Comrs.—*Re NEWTON'S SETTLED ESTATES* (1889), 61 L. T. 787; *subsequent proceedings*, [1890] W. N. 21, C. A.

**201. ———— As to instalments already paid.**

—*Re HOWARD'S SETTLED ESTATES*, No. 66, *ante*.

**202. ————**—*Re DALISON'S SETTLED ESTATE*, No. 198, *ante*.

**203. ————**—The ct. will not, under 1890 Act, s. 15, make a prospective order directing future capital money to be applied in repayment to the tenant for life of money expended by him on permanent improvements he has already executed, or in repayment to him of moneys paid,



**Sect. 5.—Improvement charges. Sect. 6. Part IV.**  
 **Sects. 1 & 2.]**

or to be paid, in keeping down rentcharges created by him for raising money for such improvements.—*Re* BRISTOL'S (MARQUIS) SETTLED ESTATES, [1893] 3 Ch. 161; 62 L. J. Ch. 901; 69 L. T. 304; 42 W. R. 46; 37 Sol. Jo. 716; 3 R. 689.

*Annotations*:—*Consd.* *Re* Norfolk's Parliamentary Estate, Norfolk v. Herries, [1900] 1 Ch. 461. *Refd.* *Re* Egmont's S. E., Lefroy v. Egmont, [1906] 2 Ch. 151.

**204. — Payment to obtain transfer of charges — To secure lower rate of interest.]—***Re* VERNEY'S SETTLED ESTATES, No. 90, *ante*.

**205. Redemption of rentcharge — Bonus required by owner as condition of redemption.]—***Held*: by 1887 Act, s. 1, the trustees of a settled estate are authorised to apply "capital moneys," in redeeming a terminable rentcharge, granted in consideration of money borrowed for the purpose of effecting improvements on the estate, by paying not only the balance of principal remaining unpaid, but also a reasonable & proper sum by way of bonus to compensate the lender for loss of interest by reason of the redemption.—*Re* EGMONT'S (LORD) SETTLED ESTATES (1890), 45 Ch. D. 395; 59 L. J. Ch. 768; 63 L. T. 608; 38 W. R. 762; 6 T. L. R. 481, C. A.

*Annotations*:—*Consd.* *Re* Howard's S. E., [1892] 2 Ch. 233; *Re* Verney's S. E., [1898] 1 Ch. 508. *Refd.* *Re* Dalison's S. E., [1892] 3 Ch. 522.

**SECT. 6.—PROCEDURE.**

*See* 1925 Act, ss. 84, 113.

**206. Application to court — For payment out—How made.]—**Petitions were presented by the governors of two hospitals under Lands Clauses Consolidation Act, 1845 (c. 18), & other Acts, asking for the payment out of ct. of large sums of money, being the purchase money of land in the metropolis belonging to the hospitals, & for the investment of such sums, by 1882 Act, in the construction of a sea wall. It was contended by the Metropolitan Board of Works that the proper

method of procedure was by summons in chambers under R. S. C., Ord. 55, r. 2 (7), & not by petition:—*Held*: though applications like the present one fell within R. S. C., Ord. 55, yet, as the present petitions were a cheaper & more expeditious method of procedure than summonses, the ct. would exercise the discretion conferred upon it by R. S. C., Ord. 70, r. 1, & allow the present application; but those who proceeded by petition in matters which could be done by summons, did so at the risk of having to pay any additional costs they might incur thereby.—*Re* BETHLEHEM & BRIDEWELL HOSPITALS (1885), 30 Ch. D. 541; 54 L. J. Ch. 1143; 53 L. T. 558; 34 W. R. 148; 1 T. L. R. 681.

*Annotations*:—*Refd.* *Re* Martin & Varlow (1894), 43 W. R. 247. *Mentd.* *Ex p.* Castle Bytham, *Ex p.* Mid. Ry., [1895] 1 Ch. 348.

*See, generally*, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 250, 251, 268, 269, Nos. 1537–1548, 1917–1920; & PRACTICE.

**207. — Trustees & tenant for life to appear separately.]—***Re* BROADWATER ESTATE, No. 99, *ante*.

**208. — Whether trustees can be heard in support of application by tenant for life—Interests of tenant for life & remaindermen in conflict.]—***Held*: the ct. will not hear counsel for the trustees of a settlement in support of an application by the tenant for life when his interest is opposed to those of the remaindermen, it being the duty of the trustees to act as a check upon him. *Qu.*: whether the expense of improvements on lands which have been sold, & so are no longer comprised in the settlement, can be afterwards paid out of capital money.—*Re* HOTCHKIN'S SETTLED ESTATES (1887), 35 Ch. D. 41; 56 L. J. Ch. 445; 56 L. T. 244; 35 W. R. 463; 3 T. L. R. 401, C. A.

*Annotations*:—*Refd.* *Re* Howard's S. E., [1892] 2 Ch. 233. *Mentd.* *Re* Lytton's Will, Knebowth's S. E. (1888), 38 Ch. D. 20; *Re* Dalison's S. E., [1892] 3 Ch. 522; *Re* Millard's S. E., [1893] 3 Ch. 116.

**— What court has jurisdiction.]—***See* 1925 Act, s. 113.

**Appeals.]—***See* R. S. C., Ord. 54D., r. 5; & *generally*, PRACTICE.

## Part IV.—Under Private Improvement Acts.

### SECT. 1.—IN GENERAL.

**209. "Improvements" — Drainage Act — Whether farm buildings included.]—**A local Act empowered a drainage co., with leave of inclosure comrs., to contract with owners of estates, having a limited interest, to execute works of drainage, irrigation, warping, reclamation, inclosure, & improvement, & if beneficial, the owner might charge the expense on the inheritance. The statute defines the works that might be done to include engine houses, tile sheds, buildings, etc., & all other works necessary & proper for executing the contracts. M. being a limited owner contracted for works, some of which consisted of cowsheds, additional farmhouses, cider houses, which would be rendered necessary for the farm after the drainage works were executed:—*Held*: such buildings were not authorised either under the word "improvements," or under the words "works necessary for executing the contracts."—*WEST OF ENGLAND DRAINAGE CO. v. INCLOSURE COMRS.* (1862), 26 J. P. 644.

**210. — Effect of Improvements Company's Act on power of borrower—Borrower's powers**

**limited by statute.]—**Lands Improvement Company's Acts, 1853, 1855, & 1859, which empower the co. to make improvement loans to landowners, including corpns. holding lands, to be secured by a charge on the fee of lands to be improved under the hand & seal of the Inclosure Comrs. do not enable a corpn. under a prior statutory prohibition against borrowing on land beyond a certain limit to exceed the limit for the purpose of effecting improvements on their lands.

The Act of 1853 provided that the execution by the comrs. of any charge in pursuance of the Act should be conclusive evidence of such charge having been duly made & executed, & being a valid charge under the Act:—*Held*: he sect. was conclusive as to the observance of the formalities required by the Act, but was not conclusive as to the capacity of the landowner to contract.—*WENLOCK (BARONESS) v. RIVER DEE CO.* (1888), 38 Ch. D. 534; 57 L. J. Ch. 946; 59 L. T. 485; 4 T. L. R. 438, C. A.

*Annotations*:—*Consd.* *A.-G. v. L. C. C.* (1901), 70 L. J. Ch. 367. *Refd.* *Pollock v. Lands Improvement Co.* (1888), 58 L. T. 374; *Re* National Debenture & Assets Corp., [1891] 2 Ch. 505. *Mentd.* *Jenkin v. Pharmaceutical Soc. of Great Britain*, [1921] 1 Ch. 392.

211. "Works necessary for executing contracts"—*Drainage Act—Whether farm buildings included.*—*WEST OF ENGLAND DRAINAGE CO. v. INCLOSURE COMRS.*, No. 209, *ante*.

212. "Owner of limited interest in land"—*Purchaser in possession subject to vendor's lien.*—The special Act 11 & 12 Vict. c. cxlii, incorporating a co. for the purpose (*inter alia*) of draining & reclaiming land, empowered the "owner of a limited interest in land" to contract with the co. for the execution of drainage & reclamation works, & for that purpose to charge on the land, in the manner provided by the Act, the cost of executing the works. The Act defined the term "owner of a limited interest in land," as including "any person entitled to any land subject to any mtge. or charge thereon, provided such person shall be in possession of the land mortgaged or charged":—*Held*: this definition included a purchaser in possession of land upon which the vendor had a lien for unpaid purchase-money.—*LANDOWNERS WEST OF ENGLAND & SOUTH WALES LAND DRAINAGE & INCLOSURE CO. v. ASHFORD* (1880), 16 Ch. D. 411; 50 L. J. Ch. 276; 44 L. T. 20; *subsequent proceedings* (1884), 33 W. R. 41.

*Annotations*:—*Mentd.* *Re Romford Canal Co.*, *Pocock's Claim*, *Trickett's Claim*, *Carew's Claim* (1883), 24 Ch. D. 85; *Howard v. Patent Ivory Manufacturing Co.*, *Re Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156; *Re Morsey Ry.* (1895), 64 L. J. Ch. 625.

213. — *Glebe lands—Vicar.*—A vicar is the "owner of a limited interest in land" in regard to the glebe of the parish, for the purposes of the *Landowners, West of England & South Wales Land Drainage & Enclosure Companies Act*, 1848.—*ACLAND v. NAPLETON* (1888), cited in 59 L. T. at p. 310; 36 W. R. at p. 829.

*Annotation*:—*Apld.* *Goodden v. Coles* (1888), 36 W. R. 828.

214. — — — — —. — *The vicar of a parish mortgaged a part of the glebe under the powers of a statute giving owners of limited interests in land power to charge the costs of certain improvements on the land. The mtgee. brought an action for payment, or foreclosure, or sale:—Held*: the patron having no interest in the soil, but only in the right of appointment to the cure of souls, need not be joined as a party to the action.—*GOODDEN v. COLES* (1888), 59 L. T. 309; 36 W. R. 828.

*See, also*, No. 221, *post*.

215. — *Whether share in company an interest in land*—*Within Statutes of Mortmain.*—*See CHARITIES*, Vol. VIII., p. 272, No. 376.

## SECT. 2.—IMPROVEMENT CHARGES.

215. *Right to—Advance for improvement ultra vires.*—A co. having powers by its private Acts of Parliament to advance money for certain improvements to land, but not for building mansions, applied to the Inclosure Comrs. for an absolute order, under Improvement of Land Act, 1864 (c. 114), s. 49, for a charge upon the inheritance of land, the mansion upon which had been added to in pursuance of a provisional order granted by the comrs. under sect. 27 of that Act & 33 & 34 Vict. (c. 56) & 34 & 35 Vict. (c. 84). The co. had not obtained any sanction from its shareholders under Improvement of Land Act, 1864 (c. 114), s. 54, for the extension of its powers; & the form of the absolute order applied for was that which created a first charge on the land under

sect. 59 & sched. B. of the Act of 1864:—*Held*: upon a rule for *mandamus* to compel the comrs. to grant this absolute order, by reason of 33 & 34 Vict. c. 56, s. 9, no one could be entitled to an order in this form; & this co., without the aid of Improvement of Land Act, 1864 (c. 114), s. 54, was not entitled to an absolute order at all.—*RE INCLOSURE COMRS., Ex p. LANDS IMPROVEMENT CO.* (1879), 41 L. T. 407, D. C.

216. — *Action for declaration—Necessary parties.*—*SCOTTISH WIDOWS' FUND v. CRAIG*, No. 221, *post*.

217. *Validity—Whether certificate of Inclosure Commissioners conclusive.*—*WENLOCK (BARONESS) v. RIVER DEE CO.*, No. 210, *ante*.

218. *Priority—Part of land subject to prior charge.*—The Lands Improvement Company's Act, 1853 (c. cliv), s. 51, enacts that when the inheritance of any land is charged under the Act with any money, the co. shall have a charge upon such land, & such charge shall have priority over every other then existing & future charge whatsoever, except quit rents, etc. Provided that, in case a part only of the land is subject to a mtge., such charge shall have priority over the mtgo. only to the extent of a due proportion of such charge, to be ascertained & apportioned by the comr. The proviso to that sect. was repealed by Lands Improvement Company's Amendment Act, 1855 (c. lxxxiv), s. 14, which re-enacted it down to the words "to be ascertained," etc., for which were substituted the words "when & so soon as the same shall be ascertained under & pursuant to sect. 70, of the recited Act." Sect. 70 enables the comrs., in the case of a part of the land only being mortgaged, to apportion the charge so that the part mortgaged should after apportionment be subject only to an apportioned part of the charge, & this upon the application of the mtgee. without the consent of other parties. The Lands Improvement Co. advanced money upon land, part of which was mortgaged, & obtained a rent-charge upon the land of £104 6s. 6d. This debt. agreed to purchase from them, as a prior charge, but objected afterwards to complete, on the ground that the charge was subsequent to the mtge.:—*Held*: Lands Improvement Company's Act, 1853 (c. cliv), s. 51, gave the co. a prior charge over every part of the land, & the effect of Lands Improvement Company's Amendment Act, 1855 (c. lxxxiv), s. 14, was, that that charge was to remain prior over every part until after an apportionment should be made under sect. 71, when the mortgaged part would be charged only with a due proportion.—*LANDS IMPROVEMENT CO. v. RICHMOND* (1855), 17 C. B. 145; 25 L. J. C. P. 73; 26 L. T. O. S. 105; 19 J. P. 800; 4 W. R. 197; 139 E. R. 1024.

219. — *Construction of successive statutes.*—Two separate land improvement cos. were incorporated by private Acts, the one by an Act of 1849 & the other by an Act of 1853. Both Acts contained a sect. which provided that, upon the final order or certificate of the Inclosure Comrs. of the execution of the improvements, the co. should have a first charge upon the inheritance of the improved land in priority over every other then existing or future charge. The co. of 1853 having executed improvements of land, already subject to a charge in favour of the co. of 1849, contended that the charge of the co. of 1849 was

## PART IV. SECT. 2.

*g. Enforcement—Not against landowner personally.*—By *Scottish Drainage & Improvement Cos. Act*, 1856, s.

co. was incorporated for the purpose of advancing money for the improvement of land, the expenses of such improvement to be charged on the fee

of the lands:—*Held*: it was not competent for the co. to maintain a personal action against a landowner for the annual charge upon the land under the

**Sect. 2.—Improvement charges. Parts V. & VI.]**

displaced by the Act of 1853:—*Held*: the two Acts were not irreconcilable & the charge which was first in order of time was entitled to priority.—*POLLOCK v. LANDS IMPROVEMENT CO.* (1888), 37 Ch. D. 661; 57 L. J. Ch. 853; 58 L. T. 374; 36 W. R. 617.

**220. — Prior charge created by landowner.]—**

Pltf. co., which was incorporated by a special Act of Parliament, entered into a provisional contract in 1905 with the owners of certain land to execute improvements on the land, the expense of which was to be charged upon the estate. The improvements were duly sanctioned by a provisional order of the Board of Agriculture, & by an absolute order dated Oct. 30, 1906, it was declared that the inheritance of the land in question was charged with the sum of £1,080, paid for the improvements, & to be satisfied by a rent charge of £52 issuing out of the land for forty years:—*Held*: (1) pltf. were under no obligation to investigate or inquire into the title of the land on which the improvements were executed; (2) pltf. had by sects. 62 & 64 of their Act priority in respect of

their charge over mtgs. created by the landowners before the date of pltf.' charge.—*GENERAL LAND DRAINAGE & IMPROVEMENT CO. v. UNITED COUNTIES BANK, LTD.* (1910), 103 L. T. 418; 26 T. L. R. 619.

**221. Enforcement—By sale—Charge on glebe.]**

—A rentcharge for a certain period of time, in arrear, charged by an order made by the Inclosure Comrs. upon the inheritance of the glebe lands of a rectory, under the provisions of a private Act, was, under the provisions of the same Act, ordered to be raised by a sale of the glebe lands. In an action by the owners of a rentcharge, in arrear, charged on glebe lands, for a declaration that they were entitled under the order made by the Inclosure Comrs. to a charge on the lands for the sums due & to become due of the rentcharge, & asking for a sale of the lands, the Ecclesiastical Comrs. were made defs.:—*Held*: on demurrer, they were not necessary parties.—*SCOTTISH WIDOWS' FUND v. CRAIG* (1882), 20 Ch. D. 208; 51 L. J. Ch. 363; 30 W. R. 463.

*Annotations*:—*Consd.* *Bailey v. Badham* (1885), 54 L. J. Ch. 1067; *Hambro v. Hambro*, [1894] 2 Ch. 564. *Refd.* *Northern Assec. Co. v. Harrison*, [1889] W. N. 74; *Hornsey District Council v. Smith*, [1897] 1 Ch. 843; *Blackburne v. Hope-Edwardes*, [1901] 1 Ch. 419.

## Part V.—Under Land Drainage Acts.

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**222. Jurisdiction of court to sanction scheme—Under Settled Estates Act, 1877 (c. 18).]**—An application was made asking that the ct. should, under above Act, sanction a scheme for draining an agricultural estate, & declare the expenses of the scheme to be a charge on the estate; or, in the alternative, that petitioner might be at liberty to make permanent improvements under Land Drainage Act, 1845 (c. 56), & to charge the expenses

on the estate under that Act:—*Held*: the ct. had no jurisdiction under above Act to sanction the scheme; but a reference to chambers would be made under Land Drainage Act, 1845 (c. 56), s. 4.—*Re POYNDEY'S SETTLED ESTATES, DICKSON-POYNDEY v. COOK* (1881), 50 L. J. Ch. 753; 45 L. T. 403; 30 W. R. 7.

**223. Tenant for life—Includes “tenant pur autre vie.”]**—A tenant *pur autre vie* is a “tenant for life” within Sewers Act, 1833 (c. 22), s. 24.—*BLAYDES v. SELBY* (1891), 7 T. L. R. 567.

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**By agricultural tenant.]—See AGRICULTURE,** Vol. II., pp. 41 *et seq.*

**By mortgagee.]—See MORTGAGE.**

**By joint owners.]—See PARTITION.**

**224. By purchaser—Sale set aside.]—**Under powers contained in an Act of Parliament a railway co. bought part of a settled estate from the tenant for life, & immediately resold to B. & C., who

expended large sums in permanent improvements. On the sale being set aside at the instance of the remaindermen, B. & C. were allowed such sums as they had expended in improvements. Interest at 25 per cent. allowed on such sums from the death of the tenant for life.—*STEPNEY v. BIDDULPH* (1865), 5 New Rep. 505; 12 L. T. 176; 13 W. R. 578.

*Annotation*:—*Mentd.* *Vyse v. Foster* (1872), 27 L. T. 774.

Act.—*SCOTTISH DRAINAGE & IMPROVEMENT CO. v. CAMPBELL* (1889), 14 App. Cas. 139.—*SCOT.*

**PART V.**

**h. Advances to tenant for life—**

*Payment out of fund in court.]—*Advances to a tenant for life, under Drainage Act, 1842, should not be paid out of the fund so lodged in ct., such fund representing the corpus of the estate, & the tenant for life being

bound to pay the annual instalments which fall due during his lifetime it being possible that all instalments may become payable during his life.—*Re PUBLIC WORKS COMRS., Ex p. STUDERT* (1856), 6 I. Ch. R. 53.—*IR.*

## LAND REGISTRY.

*See* REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

## LAND REVENUES OF THE CROWN.

*See* CONSTITUTIONAL LAW.

— — — — —

## LAND SOCIETY.

*See* BUILDING SOCIETIES.

# LAND TAX.

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# SECT. 1.—NATURE OF LAND TAX.

1. Charge upon inhabitants of district.]—*R. v. LONDON GAS LIGHT CO.*, No. 54, *post*.
2. Not a parochial assessment.]—*WATERLOO BRIDGE CO. v. CULL*, No. 48, *post*.

## SECT. 2.—INCIDENCE.

### SUB-SECT. 1.—PROPERTY CHARGED.

#### A. In General.

*See, generally*, Land Tax Act, 1797 (c. 5) ; Land Tax Perpetuation Act, 1798 (c. 60).

3. General words of Act—Cover property not specifically mentioned.]—*METROPOLITAN RY. CO. v. FOWLER*, No. 6, *post*.

4. Manors—Fine due on admission.]—This question was truly considered as of great concern to the public at large. It has undergone a very deliberate examination, & we are all of opinion, that the lord of the manor is not bound to make any deduction, for the land tax, out of a fine due for admission on a descent, which is the present case. The grounds which led us to this determination lie in a very narrow compass. In the first place, the land tax is annual, & however probable its continuance may be, there can be no legal presumption as to the future intentions of the legislature, & there can be no deduction, by anticipation, of an uncertain future burden. In the second place, the tax, though commonly called a tax upon land, is not, in its nature, a charge upon the land. It is a tax upon the faculties of men, estimated, first, according to their personal estate, secondly, by the offices they hold, & lastly, by the land in their occupation. The land is but the measure by which the faculties of the person taxed are estimated ; & where it is intended by the legislature that the burden should not ultimately rest upon the person charged, a power of deducting is given him by the Act ; as in the case of rents, & other certain outgoings. But no deduction is allowed for fines, which are uncertain (*LORD LOUGHBOROUGH*).—*GRANT v. ASTLE* (1781), 2 Doug. K. B. 724, n. ; 99 E. R. 460.

#### B. Hereditaments.

*See* Land Tax Act, 1797 (c. 5), s. 4.

5. Easement—Pipes laid in street—Waterworks company.]—A waterworks co. incorporated in pursuance of a local Act, were empowered to lay pipes in the streets, roads, etc., & did lay pipes accordingly. The co. were assessed to the land tax, as holders of land in a district within which

they had pipes laid down, but in which they had no other property ; & their goods were distrained for land tax. In an action of trespass for so taking the goods of the co. : plea : not guilty by statute :—*Held* : they were not liable to be assessed to the land tax for the land occupied by their pipes.—*CHELSEA WATERWORKS CO. v. BOWLEY* (1851), 17 Q. B. 358 ; 20 L. J. Q. B. 520 ; 17 L. T. O. S. 284 ; 15 J. P. 450 ; 15 Jur. 1129 ; 117 E. R. 1316.

*Annotations* :—*Consd.* *R. v. East London Waterworks Co.* (1852), 18 Q. B. 705 ; *Met. Ry. v. Fowler*, [1893] A. C. 416. *Reid.* *Waterloo Bridge Co. v. Cull* (1858), 1 E. & E. 213 ; *West Middleton Waterworks Co. v. Hampton Overseers* (1859), 5 Jur. N. S. 1159 ; *Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299. *Mentd.* *M. S. & L. Ry. v. Doncaster Union* (1893), 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

6. — Railway tunnel under highway—*Special Act*.]—A special Act authorised the Metropolitan Ry. Co. to construct an underground railway, & provided that with respect to lands under a highway the co. should not be required wholly to take such lands, but might appropriate & use the subsoil & undersurface. Under this Act the co. constructed a tunnel under a highway for the purposes of the railway :—*Held* : upon the true construction of their special Act the co. had with respect to the tunnel an interest in land & not merely an easement ; the tunnel was a " hereditament " within Land Tax Act, 1797 (c. 5), s. 4, & the co. was in respect thereof chargeable with the land tax imposed by that statute.

It is quite certain when one reads the whole of these words [of Land Tax Act, 1797 (c. 5), s. 4] that there is no principle which would justify cutting down the general words used, & warrant the conclusion that property which comes within the description of the more general words is to be exempt from taxation because it is not specifically mentioned (*LORD HERSCHELL, C.*).—*METROPOLITAN RY. CO. v. FOWLER*, [1893] A. C. 416 ; 62 L. J. Q. B. 553 ; 60 L. T. 390 ; 57 J. P. 756 ; 42 W. R. 270 ; 9 T. L. R. 610 ; 1 R. 264, H. L.

*Annotations* :—*Consd.* *Westminster Corpn. v. Johnson*, [1904] 2 K. B. 737 ; *Newton Chambers v. Hall*, [1907] 2 K. B. 446 ; *C. L. Ry. v. City of London Land Tax Commr.*, [1911] 2 Ch. 467. *Reid.* *Southport Corpn. v. Ormestock Union Assmt. Com.*, [1894] 1 Q. B. 196. *Mentd.* *Farmer v. Waterloo & City Ry.*, [1895] 1 Ch. 527 ; *Liverpool Corpn. v. West Derby Union Assmt. Com.*, [1908], 72 J. P. 397 ; *Toronto Corpn. v. Consumers' Gas Co.*, [1916] 2 A. C. 618 ; *Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299 ; *Derry v. Sanders*, [1918] 1 K. B. 223.

—*See, generally*, EASEMENTS, Vol. XIX., pp. 7 *et seq.*

7. Interest in land—Railway tunnel.]—*METROPOLITAN RY. CO. v. FOWLER*, No. 6, *ante*.

8. Whether subsoil included—Vested in local

## SECT. 2, SUB-SECT. 1.—B.

a. Leasehold estate in Crown Lands.]—*A.-G. FOR QUEENSLAND & GOLDSBROUGH MORTGAGE CO. LTD. v. A.-G. FOR COMMONWEALTH* (1915), 20 C. L. R.

## 148.—AUS.

b. Grant of timber—& right to enter & cut during term of years.]—A grant of the timber upon a piece of land & of the exclusive right to enter

upon the land & cut the timber during a term of years is a grant of a leasehold estate in the land upon which the grantee is liable to land tax.—*TAXES COMR. v. KAURI TIMBER CO. LTD.* (1899), 17 N. Z. L. R. 696.—N.Z.



*Sect. 2.—Incidence: Sub-sect. 1, B., C. & D.; sub-sect. 2, A.]*

**authority—Public conveniences under street.]—**A sanitary authority providing & maintaining an underground lavatory & sanitary convenience for the use of the public under the powers conferred by Public Health (London) Act, 1891 (c. 76), s. 4, & having the subsoil of the road vested in it under Public Health (London) Act, 1891 (c. 76), s. 4 (2), has or holds a tenement or hereditament within Land Tax Act, 1797 (c. 5), s. 5, in respect of which it is chargeable with land tax.—**WESTMINSTER CORPN. v. JOHNSON, WESTMINSTER CORPN. v. FULLER**, [1904] 2 K. B. 737; 73 L. J. K. B. 774; 91 L. T. 334; 68 J. P. 549; 53 W. R. 4; 20 T. L. R. 701; 2 L. G. R. 1378, C. A.

**Annotations:—Folld.** City of London Land Tax Comrs. v. C. L. Ry., [1913] A. C. 364. **Reid.** Ystradyfodwg & Pontypridd Main Sewerage Board v. Bensted, [1907] 1 K. B. 490; Associated Newspapers v. City of London Corpn., [1916] 2 A. C. 429.

**9. — Subsoil of highway ad medium flum — Adjoining land exonerated.] — LONDON (CITY) LAND TAX COMRS. v. CENTRAL LONDON RY. CO., No. 109, post.**

**Tolls.]—See Sub-sect. 1, C., post.**

#### C. Tolls.

*See Land Tax Act, 1797 (c. 5), ss. 4, 122.*

**10. Whether tolls liable—Separate franchise.]**

—The Charing Cross Bridge co. were incorporated by Act of Parliament, & were authorised to build a bridge across the Thames & make approaches to it & take tolls from foot passengers passing over the bridge. By the Act, half the bridge was to be in the parish of St. Martin in the Fields, in the county of Middlesex, the other half in the parish of Lambeth, in the county of Surrey. Under the provisions of the Act, the Hungerford Market co. had, by deed, granted to the Bridge co. for ninety nine years, leave & licence to construct on the wharf on the river side of Hungerford Market, in the parish of St. Martin in the Fields, such piers & toll-houses as might be necessary for the support & use of the bridge, & also a right of way over Hungerford Market for foot passengers to & from the bridge. A pier & toll-house at the Middlesex end of the bridge were built by the bridge co. under this deed on the market co.'s land, the land tax on which had been previously redeemed. Another toll-house was placed on the bridge on a pier erected in the bed of the river, & tolls were received at this latter toll-house in respect of passengers landing on the bridge from steamboats:—**Held**: the tolls received by the bridge co. from passengers were not merely a profit derived from a beneficial occupation of the land, but the right to them was a separate & distinct franchise, & assessable as such to the land tax under Land Tax Act, 1797 (c. 5), s. 4, & was not affected by the circumstance that the land tax on the land on which one of the termini was built had been redeemed.—**CHARING CROSS BRIDGE CO. v. MITCHELL** (1855), 4 E. & B. 502; 3 C. L. R. 1101; 24 L. J. Q. B. 249; 25 L. T. O. S. 131; 19 J. P. 595; 1 Jur. N. S. 608; 3 W. R. 378; 119 E. R. 206, Ex. Ch.

**Annotations:—Distd.** Tritton v. Nichols (1856), 20 J. P. Jo. 787; New River Co. v. Hertford Land Tax Comrs. (1857), 2 H. & N. 129; C. L. Ry. v. City of London Land Tax Comrs., [1911] 1 Ch. 467. **Reid.** Waterloo Bridge Co. v. Cull (1859), 1 E. & E. 245; Met. Ry. v. Fowler (1891), 60 L. J. Q. B. 518; Newton, Chambers v. Hall, [1907] 2 K. B. 446.

#### SECT. 2, SUB-SECT 1.—D

**17. How leviable.—On company as corporate body.]—MORGAN v. LAND TAX**

**DEPUTY FEDERAL COMR. (1912), 15**

**C. L. R. 861.—AUS.**

**17H. ———.]—A.-G. FOR QUEEN-**

**11. ———.]—**A railway was constructed under statutory powers partly under lands previously exonerated from land tax, partly under a highway adjoining exonerated lands. The co. were empowered to charge tolls for passengers & goods:—**Held**: the portion of the railway constructed under the exonerated lands was free from land tax & the power to charge tolls for passengers & goods was not a new & separate franchise assessable in respect of that portion.—**CENTRAL LONDON RY. CO. v. LONDON (CITY) LAND TAX COMRS.**, [1911] 1 Ch. 467; 80 L. J. Ch. 348; 104 L. T. 245; 75 J. P. 292; 27 T. L. R. 296; 9 L. G. R. 580; *on appeal*, [1911] 2 Ch. 467, C. A.; *sub nom.* LONDON (CITY) LAND TAX COMRS. v. CENTRAL LONDON RY. CO., [1913] A. C. 364, H. L.

**Annotations:—Mentd.** Maclaren v. A.-G. for Quebec, [1914] A. C. 258; A.-G. of Southern Nigeria v. Holt (Liverpool), [1915] A. C. 599.

**12. What tolls liable — Bridge tolls — Private property.]—**The Act incorporating the Vauxhall Bridge co. authorised them to take tolls, & enacted that the shares of the proprietors should be personal estate, & not in the nature of real property:—**Held**: the co. were liable under Land Tax Perpetuation Act, 1798 (c. 60), to be rated to the land tax in respect of their tolls.

It was argued that the exemption in respect of tolls & duties contained in Land Tax Act, 1797 (c. 5), s. 122, excludes both tolls in question. We are, however, clearly of opinion that the tolls & duties therein mentioned are the tolls upon the ordinary turnpike road in which no private interest or profit exists. The tolls now in question are in the nature of private property. We therefore are clearly of opinion that the Vauxhall Bridge co. are liable to be rated to the land tax in respect of their tolls (*per cur.*).—**VAUXHALL BRIDGE CO. v. SAWYER** (1851), 6 Exch. 504; 20 L. J. Ex. 304; 17 L. T. O. S. 144; 15 J. P. 643.

**Annotations:—Folld.** Charing Cross Bridge Co. v. Mitchell (1855), 4 E. & B. 549. **Consd.** Newton, Chambers v. Hall, [1907] 2 K. B. 446. **Reid.** Tritton v. Nichols (1856), 20 J. P. Jo. 787; New River Co. v. Hertford Land Tax Comrs. (1857), 2 H. & N. 129; Waterloo Bridge Co. v. Cull (1859), 1 E. & E. 213; C. L. Ry. v. City of London Land Tax Comrs., [1911] 1 Ch. 467.

**13. ——— Tax redeemed on land supporting bridge.]—CHARING CROSS BRIDGE CO. v. MITCHELL, No. 10, ante.**

**14. ———.] — WATERLOO BRIDGE CO. v. CULL, No. 48, post.**

**15. ——— Bridge exempted from rates & taxes.]—**By a local Act, the Battersea Bridge was exempt from rates & all taxes:—**Held**: by such exemption it was intended to exempt the tolls empowered by the Act to be taken for the use of bridge.

In respect of the land tax it is impossible to separate the land from what it earns. . . . If we are to give any meaning to this sect. we must say that it exempts not only the bridge, but what it earns (**COLERIDGE, J.**).—**TRITTON v. NICHOLLS** (1856), 28 L. T. O. S. 85; 5 W. R. 24; 20 J. P. Jo. 787.

**16. ——— Bridge exempt from parochial rates & assessments.]—WATERLOO BRIDGE CO. v. CULL, No. 48, post.**

#### D. Shares.

**On what shares chargeable.]—See Land Tax Act, 1797 (c. 5), s. 57.**

**17. How leviable.—On company as corporate body.]—**As to this second point (whether capital

**LAND & GOLDSBROUGH MORTGAGE CO., LTD. v. A.-G. FOR COMMONWEALTH** (1915), 20 C. L. R. 148.—**AUS.**

of co. was liable to be taxed as corporate property or whether tax should have been laid upon such individual member of co. in his own word] it cannot bear question whether they should be taxed in their corporate capacity or as individuals. It was intended & it is the natural & proper way, to tax the corp., in their corporate capacity. & this is what the Act manifestly meant: the tax is to be paid out of the stock: & this will occasion a proportionable deduction out of the dividends (FOSTER, J.).—ROYAL EXCHANGE ASSURANCE CO. v. VAUGHAN (1757), 1 Burr. 155; 1 Keny. 320; 97 E. R. 243.

## SUB-SECT. 2.—PAYMENT OF LAND TAX.

### A. In General.

**By whom payable.]—See Land Tax Act, 1797 (c. 5), s. 4, 40.**

**18. — Tenant *primâ facie* liable — Landlord & tenant named in assessment.]—With respect to the public, the land tax is to be considered a tenant's tax, whatever may be the view of it as between landlord & tenant, consequently where both are named & neither expressly rated, but the tenant pays, the tenant acquires a settlement.—R. v. MITCHAM (INHABITANTS) (1783). Cald. Mag. Cas. 276; 1 Doug. K. B. 226, n.; 99 E. R. 147.**

**Annotations:—***Folld. R. v. St. Lawrence, Winchester* (1784), Cald. Mag. Cas. 379. *Consd. R. v. Folkestone* (1789), 3 Term Rep. 505. *Refd. Goodchild v. St. John, Hackney, Trustees, Lamb v. St. John, Hackney, Trustees, Hawkins v. Lamberhurst Churchwardens & Overseers* (1858), E. B. & E. 1; C. L. Ry. v. City of London Land Tax Comrs., [1911] 2 Ch. 487; *Piggott v. Cuckfield Union Assmt. Com.* (1921), 125 L. T. 402. *Mentd. Hales v. Freeman* (1819), 4 Moore, C. P. 21.

**19. — — — — —.]—(1) Land tax is a tenant's tax as between him & the public & consequently where both landlord's & tenant's names appear upon the rate it is *primâ facie* a rating of the tenant.**

**(2) Who is rated is a question of fact.—R. v. ST. LAWRENCE, WINCHESTER (INHABITANTS)** (1784), Cald. Mag. Cas. 379; 4 Doug. K. B. 190; 99 E. R. 834.

**Annotations:—As to (1) Refd. R. v. St. James, Bury St. Edmunds (1784), Cald. Mag. Cas. 385; *R. v. Folkestone* (1789), 3 Term Rep. 505; *Goodchild v. St. John, Hackney, Trustees, Lamb v. St. John, Hackney, Trustees, Hawkins v. Lamberhurst Churchwardens & Overseers* (1858), E. B. & E. 1; *Piggott v. Cuckfield Union Assmt. Com.* (1921), 125 L. T. 402.**

**20. — — — — —.]—Whether the landlord or tenant be rated to the land tax is a question of fact, to be found by the justices at sessions: & if they state it as a fact, this ct. is precluded from considering whether they have drawn a right conclusion, though they state all the other circumstances of the case.**

The land tax is *primâ facie* a tenant's tax, & if nothing appear to the contrary, the occupier must be presumed to be the person rated (BULLER, J.).—R. v. FOLKESTONE (INHABITANTS) (1789), 3 Term Rep. 505; 100 E. R. 702.

**— — — — — Unless entitled to diplomatic immunity.]—See Land Tax Act, 1797 (c. 5), s. 40.**

**Agreements for payment.]—See LANDLORD & TENANT.**

**21. Whether landlord or tenant rated — Question of fact.]—R. v. ST. LAWRENCE, WINCHESTER (INHABITANTS), No. 19, ante.**

**22. — — — — —.]—R. v. FOLKESTONE (INHABITANTS), No. 20, ante.**

**23. — — — — —.]—In a settlement case depending upon the pauper's being rated, the justices at the sessions must state, as a fact, whether the landlord or tenant were rated; & if they only state the evidence of that fact, this ct. will send the case down to be restated.—R. v. RAINHAM (INHABITANTS) (1793), 5 Term Rep. 240; Nolan, 222; 101 E. R. 135.**

**24. Apportionment — Between tenant for life & remainderman.]—Land tax, quit-rent, etc., not apportioned as between tenant for life & the**

## SECT. 2, SUB-SECT. 2.—A.

**c. Whether landlord or tenant rated — Contribution by tenant.]—A lessee of land is liable to pay contribution in respect of land tax paid by his landlord.—HOUSON v. METROPOLITAN MUTUAL PERMANENT BUILDING & INVESTMENT ASSOC., LTD. (1899), 20 N. S. W. L. R. (L.) 316; 16 N. S. W. W. N. 99.—AUS.**

**d. — — — — —.]—COOPER v. SPARKE, [1901] 1 S. R. N. S. W. 110; 18 N. S. W. W. N. 128.—AUS.**

**24 i. Apportionment — Between tenant for life & remainderman.]—The tenant for life is the only owner of the land for the purpose of taxation, & owners of estates in remainder are not liable to taxation.—SENDALL v. LAND TAX FEDERAL COMR., CRACE v. LAND TAX FEDERAL COMR. (1911), 12 C. L. R. 653.—AUS.**

**24 ii. — — — — —.]—An equitable tenant for life of land under a will died in Dec. 1916:—*Held*: the estate of the life tenant was liable for payment of the whole of the tax upon the land for the year ending June 30, 1917.—RABETT v. FORREST. (1918) 18 S. R. N. S. W. 131; 35 N. S. W. W. N. 48.—AUS.**

**24 iii. — — — — —.]—The whole burden of the land tax is thrown upon the person for the time being entitled in possession to the rents & profits. Where trustees are assessed in respect of a trust estate, the tax is payable out of income & not out of capital.—*Re GEORGETTI'S WILL, GEORGETTI v. GEORGETTI* (1900), 18 N. Z. L. R. 849.—N.Z.**

**e. — — — — — As between vendor & pur-**

**chaser.]—R. v. BLACKWOOD (1890), 16 V. L. R. 157.—AUS.**

**f. — — — — —.]—In order to exempt an owner of land from payment of tax, the land must have passed from him, & the consideration passed from the transferee without any secret understanding or trust.—*HARDING v. LAND TAX COMRS.*, [1891] A. C. 446.—AUS.**

**g. — — — — —.]—HANN v. COSMOPOLITAN LAND BANK CO., LTD. (1890), 16 V. L. R. 805.—AUS.**

**h. — — — — —.]—*Ex p.* HOPE (1904), 29 V. L. R. 868.—AUS.**

**k. — — — — —.]—*R. v.* KING (1904), 29 V. L. R. 949.—AUS.**

**l. — — — — —.]—*R. v.* ATKINSON (1906), 3 C. L. R. 632.—AUS.**

**m. — — — — —.]—A vendor of land is entitled to recover from the purchaser a sum which represents a portion of the federal land tax payable in respect of land whose improved value is equivalent to that of the land sold proportionate to the period of the year during which the purchaser has been in possession.—*PATTERSON v. FARRELL* (1912), 14 C. L. R. 348.—AUS.**

**n. — — — — —.]—*Re CLARKE & LEARMOUTH'S CONTRACT*, [1916] V. L. R. 151.—AUS.**

**o. — — — — — Purchase of less than six hundred & forty acres.]—A. purchased from B. land less than 640 acres, the minimum quantity liable to land tax:—*Held*: B. was not entitled on completion to charge A. with the land tax from the date of A.'s possession, either as his proportion of the tax paid by B., or as an outgoing contracted**

**to be paid for in respect of his purchase.—COUNTRY ESTATE CO., LTD. v. GRAVES, [1895] A. C. 113.—AUS.**

**p. When payable.—On classification as "landed estate."]—Land does not become a "landed estate" prior to classification, & there is no liability to pay land tax prior to the time at which it has been valued & classified under the Land Tax Act.—*R. v. BUCKLEY SWAMP ESTATE CO., LTD.* (1892), 18 V. L. R. 657.—AUS.**

**q. — — — — —.]—*R. v.* PALMER, [1905] V. L. R. 30.—AUS.**

**r. — — — — — When assessment book complete & notice issued in Gazette.]—COOPER v. TAXATION COMR. (1) (1897), 19 N. S. W. L. R. (E.) 1.—AUS.**

**t. In case of joint tenancy.]—There is one assessment of land owned jointly & only one deduction is allowable from that assessment.—*TAXATION COMRS. v. COVENEY* (1898), 19 N. S. W. L. R. (L.) 231; 15 N. S. W. W. N. 42.—AUS.**

**u. — — — — —.]—UNION TRUSTEE CO. OF AUSTRALIA, LTD. v. LAND TAX FEDERAL COMR. (1915), 20 C. L. R. 526.—AUS.**

**v. — — — — —.]—Several persons each of whom was a registered proprietor of a separate parcel of land, entered into a partnership, & by the indenture of partnership it was provided that the assets & capital of the partnership should consist of the several parcels of land & certain chattels, but on the expiration or determination of the partnership the real estate should be & remain the property of each individual in whose name it was shown to be in the certificates of title:—*Held*:**

*Sect. 2.—Incidence: Sub-sect. 2, A., B. & C. (a), (b), (c), (d) & (e).]*

remainder.—*SUTTON v. CHAPLIN* (1804), 10 Ves. 66; 32 E. R. 768.

—*]*—See REAL PROPERTY; RENTCHARGES & ANNUITIES; SETTLEMENTS; WILLS.

*B. Deductions on Rentcharges, Annuities, etc.*

See Land Tax Act, 1797 (c. 5), ss. 5, 24.

Rentcharges & annuities generally, see RENTCHARGES & ANNUITIES.

**25. Duty of owner of charge to allow deduction**

—**Unless terms of charge otherwise provide.]**—If one covenants to pay an annuity to S. the covenantor shall not deduct for taxes; for the charge is on the person of the covenantor, & not the land. . . . So if H. grants an annuity to S. & afterwards secures it out of a real estate, there shall be no deduction for taxes; for the subsequent security cannot lessen the effect of his former grant, which in its creation was tax-free (*LORD COWPER, C.*).—*ROBINSON v. STEPHENS* (1709), 2 Salk. 616; 91 E. R. 522, L. C.

**26. —**—*]*—On a grant of a fee-farm rent, "without any deduction, defalcation, or abatement, for or in any respect whatsoever," the grantee is entitled to receive the full rent, without deducting the land tax.—*BRADBURY v. WRIGHT* (1781), 2 Doug. K. B. 624; 99 E. R. 395.

*Annotations:—Fold. Parish v. Sleeman* (1860), 1 De G. F. & J. 326. *Reid. Festing v. Taylor* (1862), 28 J. P. 261. *Mentd. Mu-grave v. Emmerson* (1847), 10 Q. B. 326.

**27. What amount may be deducted—Sum in proportion to amount paid.]**—Tenant under assessed deduct with the landlord *pro rata* only.—*SHERINGTON v. ANDREWS* (1698), Comb. 483; 12 Mod. Rep. 171; 90 E. R. 605.

**28. —**—*]*—The owner of a fee-farm rent issuing out of a manor, shall only pay taxes for the rent in proportion as the manor is taxed.—*RANDOLPH v. BROCKMAN* (1706), 7 Bro. Parl. Cas. 1; 3 E. R. 1, H. L.

**29. —**—*]*—An annuity of £40 *per annum* charged upon land; the tenant insisted to have a deduction of 4s. in the pound for land tax, but because the assessment in the parish where the lands lay was no more than 2s. 6d. such a deduction was only allowed.—*KING v. WESTON* (1709), 2 Eq. Cas. Abr. 62; 22 E. R. 54.

the partners were properly assessed as joint owners in respect of the unimproved value of the fee simple in the whole of the lands.—*SEYMOUR BROTHERS v. DEPUTY FEDERAL COMR. OF S. A. LAND TAX*, [1918] 25 C. L. R. 303.—**AUS.**

#### SECT. 2, SUB-SECT. 2.—B.

**c. Mortgages on several properties**  
*Mortgages in possession—One deduction allowed.]*—Resp. society were the mtgees. in possession of a large number of parcels of land mortgaged to them by different mtgors. —*Held:* the society, being mtgees. in possession & not a bare trustee of different estates for the benefit of different *cetui que trust*, was only entitled to one deduction upon the aggregate value of all the said parcels of land.—*TAXATION COMRS. v. ST. JOSEPH'S INVESTMENT & BUILDING SOCIETY* (1898), 19 N. S. W. L. R. (L.) 183; 15 N. S. W. W. N. 78.—**AUS.**

**d. Interest on mortgage.]**—*TAXATION COMRS. v. JENNINGS* (1898), 19 N. S. W. L. R. (L.) 193; 15 N. S. W. W. N. 86.—**AUS.**

**e. —**—*Where no interest paid.]*

—No deduction of land tax is allowed in respect of interest on mtge. where no interest paid.—*NORTH SYDNEY INVESTMENT CO. (LIQUIDATOR) v. TAXATION COMRS.* (1898), 19 N. S. W. L. R. (L.) 225; 15 N. S. W. W. N. 82.—**AUS.**

**f. —**—*Mortgages out of jurisdiction.]*—Mtgers. are not entitled to deduction from land tax in respect of interest paid to mtgors. out of jurisdiction.—*TAXATION COMRS. v. ARMSTRONG* (1901), 1 S. R. N. S. W. 48; 18 N. S. W. W. N. 101.—**AUS.**

**g. Land held in trust for benefit of number of persons.]**—*NEILL v. LAND TAX FEDERAL COMR.* (1912), 14 C. L. R. 207.—**AUS.**

**h. —**—*]*—*READING v. LAND TAX FEDERAL COMR.* (1912), 14 C. L. R. 217.—**AUS.**

**k. —**—*]*—*ISLES v. LAND TAX FEDERAL COMR.* (1912), 14 C. L. R. 372.—**AUS.**

**l. —**—*]*—*HART v. LAND TAX FEDERAL COMR.* (1913), 15 C. L. R. 545.—**AUS.**

**m. —**—*]*—Where an "original

**30. —**—*]*—*ATWOOD v. LAMPREY* (1719), 3 P. Wms. 127, n.; 2 Eq. Cas. Abr. 62; 22 E. R. 54.

*Annotation:—Consd. Currie v. Goold* (1817), 2 Madd. 163.

**31. —**—*]*—An owner of a quit-rent shall pay taxes only in proportion to what the land pays; but if the matter has been examined by the comrs. of the land tax, this ct. will not re-examine it.

A quit-rent, or fee-farm, in case of payment to the land tax, suppose a tax of 4s. in the pound, ought not to have 4s. in the pound deducted, unless the land, out of which such rent or fee-farm issues, pays 4s. in the pound, but is to pay only in proportion as such land pays (*LORD COWPER, C.*).—*BROCKMAN v. HONEYWOOD* (1716), 1 P. Wms. 328; 24 E. R. 411, L. C.

**32. —**—*]*—*Qu.:* whether an annuity or rent-charge out of the profits of the New River co. is to bear the full assessment to the land tax, or is to have the benefit, according to the proportion, of a reduction, in consequence of an assessment upon the profits of the co. at an undervalue.—*ADAIR v. NEW RIVER PLATE CO.* (1805), 11 Ves. 429; 32 E. R. 1153, L. C.

*Annotations:—Mentd. Cockburn v. Thompson* (1809), 16 Ves. 321; *Meux v. Maltby* (1818), 2 Swan. 277; *Long v. Yonge* (1830), 2 Sim. 369; *Newton v. Egmont* (1832), 5 Sim. 130; *Attwood v. Small* (1840), 6 Cl. & Fin. 1039; *London Sewers Comrs. v. Gellatly* (1876), 24 W. R. 1059; *Bedford v. Ellis*, [1901] A. C. 1; *Markt v. Knight S.S. Co., Sale & Frazar v. Knight S.S. Co.*, [1910] 2 K. B. 1021.

**33. Omission by person entitled to make deduction.]**—*ATWOOD v. LAMPREY* (1719), 3 P. Wms. 127, n.; 2 Eq. Cas. Abr. 62; 22 E. R. 54.

*Annotation:—Reid. Currie v. Goold* (1817), 2 Madd. 163.

**34. —**—*]*—Where an annuity is given to a relation for life, & it has been paid for any length of years without any deduction for the land tax, it will be presumed to have been so paid by mutual consent, & the payer is not entitled to be relieved.—*NICHOLLS v. LEESON* (1747), 3 Atk. 573; 26 E. R. 1131, L. C.

*Annotation:—Apld. Currie v. Goold* (1817), 2 Madd. 163.

**35. Jointure without any deduction—Whether land tax included.]**—Where a person had a power to make a jointure without any deduction for any charges imposed, or to be imposed, parliamentary or otherwise; this does not mean only such as are fixed & certain, but the land tax, though a fluctuating one, is clearly within the power.—*BLANDFORD (MARCHIONESS) v. MARLBOROUGH*

share in the land" as defined in Land Tax Assessment Act, 1910-12, s. 38 (a), is, in the circumstances mentioned in the sect. held for the benefit of several persons each of whom is a relative by blood, marriage, or adoption of the original testator, the deduction mentioned in the sect. may be made in respect of them as if the share were held by one person only.—*ARCHER v. DEPUTY FEDERAL COMR. OF LAND TAX, TASMANIA* (1914), 17 C. L. R. 444.—**AUS.**

**n. —**—*]*—*PARKER v. DEPUTY FEDERAL COMR. OF LAND TAX, TASMANIA* (1914), 17 C. L. R. 438.—**AUS.**

**o. —**—*]*—*LEWIS v. LAND TAX FEDERAL COMRS.* (1914), 17 C. L. R. 566.—**AUS.**

**p. —**—*]*—*HOYSTEAD v. TAXATION FEDERAL COMR.* (1920), 27 C. L. R. 400.—**AUS.**

**q. —**—*]*—*TERRY v. TAXATION FEDERAL COMR.* (1920), 27 C. L. R. 429.—**AUS.**

**r. Annual sum paid by trustees to guardian of infants.]**—*SYDNEY LAND TAX DEPUTY FEDERAL COMR. v.*

(DOWAGER DUCHESS) (1743), 2 Atk. 542; 26 E. R. 725, L. C.

*Annotations.*—*Distd.* Tyrconnell v. Ancaster (1754), Amb. 237. *Consd.* Floyer v. Bankes (1863), 3 De G. J. & Sm. 306. *Mentd.* Phillips v. James (1865), 3 De G. J. & Sm. 72.

36. — [Power to jointure lands of the clear yearly value, etc., means clear of incumbrances, charges & outgoing not according to the custom of the country; does not mean clear land tax.—TYRCONNELL (EARL) v. ANCASTER (DUKE), ANCASTER (DUKE) v. SHERRARD (LADY) (1754), 2 Ves. Sen. 499; Amb. 237; 28 E. R. 320, L. C.

*Annotation.*—*Mentd.* Saunders v. Shafto, [1905] 1 Ch. 126.

### C. Exemptions.

#### (a) Crown Lands.

37. General rule—King's dock-yards.]—The King's dock-yards are not assessable to the land tax.—A. G. v. HILL (1836), 2 M. & W. 160; 6 L. J. Ex. 105; 150 E. R. 711.

*Annotations.*—*Apld.* R. v. Woods, Forests & Land Revenues Comrs. (1837), Will. Will. & Dav 364. *Consd.* Colchester v. Kewney (1866), L. R. 1 Exch. 368. *Refd.* Westminster Corp'n. v. Johnson, Same v. Fuller, [1904] 2 K. B. 737.

38. Conditions precedent to exemption—Occupation by Crown.]—In Land Tax Act, 1797 (c. 5), s. 25 (rendered perpetual by Land Tax Perpetuation Act, 1798 (c. 60), s. 1), is contained an exemption from land tax of "any hospital" in respect of its site. Comrs. appointed by the Crown to administer a fund subscribed by the public for that purpose founded, in 1857, an asylum for the maintenance & education of three hundred daughters of soldiers, sailors, & marines, dying in active service. The asylum was built & maintained entirely out of that fund, & solely for the benefit of the children, & was under the control of the Comrs.:—*Held*: (1) the asylum was not within the exemption in the Act, that exemption applying only to institutions & sites existing at the time when the tax was made perpetual; (2) it was not exempt as Crown property, such exemption depending, not on the ownership, but the occupation of the Crown.—COLCHESTER (LORD) v. KEWNEY (1867), L. R. 2 Exch. 253; 36 L. J. Ex. 172; 16 L. T. 463; 31 J. P. 468; 15 W. R. 939, Ex. Ch.

*Annotations.*—*As to* (1) *Consd.* Rabbits v. Cox (1877), 3 Q. B. D. 307; St. Thomas', St. Bartholomew's & Bridewell Hospitals v. Hudgell, [1901] 1 K. B. 364; Westminster Corp'n. v. Johnson, Westminster Corp'n. v. Fuller, [1904] 2 K. B. 737. *Newton, Chambers v. Hall*, [1907] 2 K. B. 448. *Refd.* Associated Newspapers v. City of London Corp'n., [1916] 2 A. C. 429.

39. — Crown land at passing of Land Tax Perpetuation Act, 1798 (c. 60).]—COLCHESTER (LORD) v. KEWNEY, No. 38, *ante*.

#### (b) Poor Persons.

See Land Tax, 1797 (c. 5), s. 80.

#### (c) Colleges, Hospitals, etc.

See Land Tax Act, 1797 (c. 5), ss. 25, 27.

40. To what institutions exemption applies—Institutions existing at date of Land Tax Perpetuation Act, 1798 (c. 60).]—COLCHESTER (LORD) v. KEWNEY, No. 38, *ante*.

41. To what property exemption extends—Property within limits of institution.]—A house within the limits of an hospital, appropriated to an officer of the hospital for the time being, is not

assessable to the land tax.—HARRISON v. BULCOCK (1788), 1 Hy. Bl. 68; 126 E. R. 42.

*Annotations.*—*Apld.* All Souls' College, Oxford v. Costar (1804), 3 Bos. & P. 635. *Distd.* Colchester v. Kewney (1866), L. R. 1 Exch. 368. *Mentd.* Downing College, Cambridge v. Purchas (1832), 3 B. & Ad. 162; Mersey Docks & Harbour Board v. Cameron (1861), 9 C. B. N. S. 811.

42. — Property belonging to institution on or before March 25, 1693—Though land assessed & tax paid.]—Any houses or lands, which on or before Mar. 25, 1693, belonged to any of the hospitals mentioned by name in Land Tax Act, 1797 (c. 5), s. 25, are exempt from land tax, whether they form part of or are appurtenant to the sites of the hospitals or not, & whether they are in the occupation of the hospitals themselves or are let on lease to tenants.—ST. THOMAS', ST. BARTHOLOMEW'S & BRIDEWELL HOSPITALS v. HUDGELL, [1901] 1 K. B. 364; 70 L. J. Q. B. 115; 17 T. L. R. 86; *sub nom.* LONDON CORPN. & ST. THOMAS'S HOSPITAL v. HUDGELL, 83 L. T. 677; 65 J. P. 149.

43. — Property acquired between March 25, 1693 & passing of Land Tax Perpetuation Tax, 1798 (c. 60).]—Buildings of a college in one of the universities taken into & made part of the college between the passing of the first land tax Act, & the Act which made that tax perpetual, are exempted from the land tax. But where a college, soon after the passing of the first land tax Act, purchased land of a parish under a private Act of Parliament, which provided that the college should pay all taxes which the premises then were, or should thereafter be subject to, it was held that the lands purchased were not exempted from the land tax.—ALL SOULS COLLEGE, OXFORD v. COSTAR (1804), 3 Bos. & P. 635; 127 E. R. 342.

*Annotation.*—*Distd.* Colchester v. Kewney (1866), L. R. 1 Exch. 368.

44. — Land purchased under private Act—Proviso as to payment of taxes.]—ALL SOULS COLLEGE, OXFORD v. COSTAR, No. 43, *ante*.

45. What amounts to a hospital—Unincorporated orphanage.]—COLCHESTER (LORD) v. KEWNEY, No. 38, *ante*.

46. — Land Tax Act, 1797 (c. 5), s. 25.]—COLCHESTER (LORD) v. KEWNEY, No. 38, *ante*.

Exempted lands put to other uses.]—See No. 58, *post*.

#### (d) Landowner Exempt from Income Tax.

See Finance Act, 1920 (c. 18), ss. 63, 64, sched. IV.

#### (e) Property Exempted from Rates and Taxes.

47. Bridge exempt from rates & taxes—Liability of tolls to land tax.]—TRITTON v. NICHOLLS, No. 15, *ante*.

48. Bridge exempt from parochial rates & assessments—Liability of tolls to land tax.]—(1) Under Land Tax Act, 1797 (c. 5), bridge tolls are ratable to the land tax.

Tolls are a distinct element from the land on which a bridge is built, & therefore the redemption of the land from the land tax does not exempt the tolls from ratability.

(2) A sect. enacting that the bridge & roads shall not be chargeable with any parochial rates or assessments whatsoever, which shall or may be charged upon any parish, etc., in which the bridge

HINDMARSH (1912), 14 C. L. R. 334.—AUS.

t. Right of equitable tenant for

life to deductions.]—HEDDERWICK v. LAND TAX FEDERAL COMR. (1913), 16 C. L. R. 27.—AUS.

a. Unimproved value of lease.]—BLACK V. LAND TAX FEDERAL COMR. (1920), 27 C. L. R. 483.—AUS.

*Sect. 2.—Incidence: Sub-sect. 2, C. (e), (f) & (g); sub-sect. 3. Sect. 3: Sub-sects. 1 & 2. Sect. 4: Sub-sects. 1, 2 & 3, A. & B.]*

or roads may be, only exempts from rates upon the parish for local purposes, & not from liability to the land tax.

(3) The northern parts of the bridge & approaches were within the parish of St. Clement Danes & in the land tax division of the Duchy of Lancaster, & the assessment of the tolls was included under the head of Savoy Ward, which was included in the division of the Duchy of Lancaster, & the assessment was made by the comrs. for the division:—*Held*: this was merely a false description, which worked no prejudice.

(4) One of the assessors & collectors appointed by the comrs. was not a resident within the division from which they were appointed, under Land Tax Act, 1797 (c. 5), s. 47, according to the requirements of that sect.:—*Held*: the acts of the assessors & collectors were not therefore invalid. —*WATERLOO BRIDGE CO. v. CULL* (1858), 1 E. & E. 213; 28 L. J. Q. B. 70; 32 L. T. O. S. 158; 23 J. P. 533; 5 Jur. N. S. 464; 7 W. R. 87; 120 E. R. 888; *affd.* (1859), 1 E. & E. 245, Ex. Ch. *Annotations*:—*As to* (2) *Distd.* Carr v. Fowle, [1893] 1 Q. B. 251. *Refd.* R. v. Kent J.B. (1860), 24 J. P. 710.

(f) *Adjoining Land Exonerated.*

**49. Supports of bridge on exonerated land—Liability of tolls to tax.**—*CHARING CROSS BRIDGE CO. v. MITCHELL*, No. 10, *ante*.

**50.** ————] —*WATERLOO BRIDGE CO. v. CULL*, No. 48, *ante*.

**51. Land adjoining highway exonerated—Liability of soil ad medium flum.]**—*LONDON (CITY) LAND TAX COMRS. v. CENTRAL LONDON RY. CO.*, No. 109, *post*.

(g) *Under Particular Statutes.*

**52. Lands embanked on Thames—7 Geo. 3, c. 37.]**—Houses, built on lands embanked from the Thames, in pursuance of above Act, which vests those lands in the owners, free from taxes, are not liable to be assessed to the general land tax imposed by 27 Geo. 3 (c. 5), though such Act is conceived in general terms, & is subsequent in point of time to the Act creating the exemption. —*WILLIAMS v. PRITCHARD* (1790), 4 Term Rep. 2; 100 E. R. 862.

*Annotations*:—*Consd.* Pontefract Assmt. Com. v. Hartley, Pontefract Assmt. Com. v. Pontefract Park Trustees (1897), 77 L. T. 565. *Expld.* Slon College v. City of London Corp., [1901] 1 K. B. 617. *Consd.* Stewart v. River Thames Conservators, [1908] 1 K. B. 893; Associated Newspapers v. City of London Corp., [1916] 2 A. C. 429. *Refd.* R. v. Poor Law Comrs. (1837), 1 Nev. & P. K. B. 371; R. v. Poor Law Comrs., *Re* Whitechapel Union (1837), 2 Nev. & P. K. B. 8; *Re* St. Pancras Parish, R. v. England & Wales Poor Law Comrs. (1837), 6 Ad. & El. 1; *Re* Whitechapel Union, R. v. England & Wales Poor Law Comrs. (1837), 6 Ad. & El. 34; *Re* Ryder (1857), 29 L. T. O. S. 217; Netherlands Steamboat Co. v. City of London Corp., [1904], 68 J. P. 377; Associated Newspapers v. City of London Corp., [1914] 2 K. B. 603; Pole-Carew v. Craddock, [1920] 3 K. B. 109. *Mentd.* *Re* Stewart v. Jones (1852), 22 L. J. Q. B. 1.

**53.** ————]—Above Act, exempting the owners of certain lands embanked from the river Thames from all taxes & assessments whatsoever, does not exempt the occupiers of houses built on such lands from the payment of the house & window duties, imposed by 38 Geo. 3, c. 40.

**SECT. 2, SUB-SECT. 2.—C. (g).**

**b. Land used exclusively for charitable purposes.]**—Under New South Wales Land & Income Tax Assessment Act, 1895, s. 11 (3), glebe lands by Crown grant vested in repps. for

parochial church purposes in connection with the Church of England, but let on building leases or subdivided for that purpose:—*Held*: not exempt from assessment for land tax as being lands occupied or used exclusively in connection with public charitable purposes

When the Act [7 Geo. 3, c. 37] passed, certain improvements of the property on the banks of the Thames were in view; & in order to encourage the scheme the lands to be improved were exempted from certain local taxes; of this nature was the land tax (*LORD KENYON, C.J.*).—*PERCHARD v. HEYWOOD* (1800), 8 Term Rep. 468; 101 E. R. 1494.

*Annotations*:—*Distd.* R. v. London Gas Light & Coke Co. (1828), 8 B. & C. 54. *Expld.* Slon College v. City of London Corp., [1901] 1 K. B. 617. *Consd.* Associated Newspapers v. City of London Corp., [1914] 2 K. B. 603. *Expld.* Associated Newspapers v. City of London Corp., [1916] 2 A. C. 429. *Refd.* Netherlands Steamboat Co. v. City of London Corp., (1904), 68 J. P. 377; Pole-Carew v. Craddock, [1920] 3 K. B. 109.

**54.** ————]—(1) Houses built on lands embanked from the Thames, in pursuance of the statute 7 Geo. 3, c. 37, which vests those lands in the owners, "free from all taxes & assessments whatsoever," are not liable to be rated for the relief of the poor. Such land is exempt from the land tax.

(2) The land tax is an assessment charged upon the inhabitants of a particular district.—*R. v. LONDON GAS LIGHT CO.* (1828), 8 B. & C. 54; 2 Man. & Ry. K. B. 12; 1 Man. & Ry. M. C. 263; 6 L. J. O. S. M. C. 113; 108 E. R. 963.

*Annotations*:—*As to* (1) *Consd.* Pontefract Assmt. Com. v. Hartley, Pontefract Assmt. Com. v. Pontefract Park Trustees (1897), 77 L. T. 565. *Expld.* Slon College v. City of London Corp., [1901] 1 K. B. 617. *Consd.* Netherlands Steamboat Co. v. City of London Corp. (1904), 68 J. P. 377; City of London Corp. v. Associated Newspapers, [1915] A. C. 674. *Expld.* Associated Newspapers v. City of London Corp., [1916] 2 A. C. 429. *Refd.* R. v. Barnby Dun (1835), 4 Nev. & M. K. B. 436; Jonas v. St. Dunstan-in-the-West (1806), 5 L. G. R. 147; Pole-Carew v. Craddock (1920), 7 Tax Cas. 488. *As to* (2) *Refd.* Associated Newspapers v. City of London Corp., [1916] 2 A. C. 429.

**55. Exemption from parochial rates—Under local Act—Whether sufficient.]**—*WATERLOO BRIDGE CO. v. CULL*, No. 48, *ante*.

**56. Rentcharge—Under Extraordinary Tithe Redemption Act, 1886 (c. 54).]**—The annual rentcharge, payable under above Act, in lieu of the extraordinary charge previously leviable on hop-grounds, orchards, etc., is not liable to land tax.—*CARR v. FOWLE*, [1893] 1 Q. B. 251; 62 L. J. Q. B. 177; 68 L. T. 123; 57 J. P. 136; 41 W. R. 365; 9 T. L. R. 181; 37 Sol. Jo. 196; 5 R. 163, D. C.

**SUB-SECT. 3—EFFECT OF SUBSEQUENT DEALINGS WITH LAND.**

**57. Exchange of lands—Under Inclosure Act, 1836 (c. 115)—Whether chargeability transferred.]**—Upon an exchange of lands under above Act, which contains a clause assimilating the tenure & quality of lands exchanged & allotted to that of the lands in respect of which the allotment or exchange is made, the statute does not transfer a liability to land tax from one property exchanged to the other.—*COOCH v. WALDEN* (1877), 46 L. J. Ch. 639.

**58. Land formerly exempted put to other use—Continuance of exemption.]**—Taxing Acts must be construed strictly; where, therefore, land which in 1692 being employed for charitable purposes, as the site of an almshouse, or hospital was, on that account, declared by a statute then passed,

or a church.—*TAXATION COMRS. v. ST. MARK'S GLEBE TRUSTEES*, [1902] A. C. 416.—*AUS.*

**c. ———.]**—*R. v. SANDHURST & NORTHERN DISTRICT CO., LTD.*, [1915] V. L. R. 682.—*AUS.*



4 Will. & Mar. c. 1, to be exempt from land tax at that time imposed, & the like words of exemption were used in a subsequent statute, Land Tax Act, 1787 (c. 5), the fact that other land had since been applied to the same charitable purposes, & the original land had been, by order of the Ct. of Ch. directed to be held by the trustees of the charity to their own use, freed from its charitable trusts, did not, without more, render it liable, even in the hands of a tenant, to the taxation from which it had been previously exempt.—*Cox v. RABBITS* (1878), 3 App. Cas. 473; 47 L. J. Q. B. 385; 38 L. T. 430; 42 J. P. 676; 26 W. R. 483, H. L.; *affg.* S. C. *sub nom.* *RABBITS v. COX* (1877), 3 Q. B. D. 307, C. A.

*Annotations*:—*Reid*, St. Thomas', St. Bartholomew's & Bridewell Hospitals v. Hudgell, [1901] 1 K. B. 364; Westminster Corpn. v. Johnson, Westminster Corpn. v. Fuller, [1904] 2 K. B. 737. *Mentl.* Associated Newspapers v. City of London Corpn., [1916] 2 A. C. 429.

### SECT. 3.—COMMISSIONERS.

#### SUB-SECT. 1.—QUALIFICATION.

See Taxes Management Act, 1880 (c. 19), s. 5; Land Tax Commissioners Acts, 1798 (c. 48), s. 1; 1827 (c. 75), s. 6; 1906 (c. 52), s. 2; Land Tax Act, 1797 (c. 5), s. 86.

#### SUB-SECT. 2.—APPOINTMENT.

See Land Tax Commissioners Acts, 1827 (c. 75), s. 1; 1906 (c. 52), ss. 1, 3; Land Tax Act, 1797 (c. 5), s. 87.

### SECT. 4.—ASSESSMENT.

#### SUB-SECT. 1.—ASSESSORS.

See, generally, Land Tax Act, 1797 (c. 5), s. 8; Taxes Management Act, 1880 (c. 19), ss. 42-47.

**59. Appointment of unqualified person—Validity of Acts.**—*WATERLOO BRIDGE Co. v. CULL*, No. 48, *ante*.

#### SUB-SECT. 2.—DUTY TO ASSESS.

**60. Enforcement by court.**—*Re WIDDECOMBE-IN-THE-MOOR LAND-TAX ASSESSMENT*, A.-G. v. LAND-TAX COMRS. (1823), 12 Price, 647; 147 E. R. 835.

Compare Sect. 4, sub-sect. 4.

#### SUB-SECT. 3.—PLACE OF ASSESSMENT.

##### A. In General.

See Land Tax Act, 1797 (c. 5), ss. 8, 36, 53; Taxes Management Act, 1880 (c. 19), ss. 53, 54.

**61. Parish where land lies.**—Farmer ought to be taxed for common appendant in the parish where the farm lies.—*R. v. Fox* (1694), 1 Salk. 168; 91 E. R. 156.

**62. — Doubt as to locality—Question for jury.**—In an action of trespass against the land tax collector, on a dispute, as to whether ptff.'s lands were in that parish for which deft. was collector, it was held to have been rightly left to

the jury "whether the whole or any part of the lands were in that parish."—*MARGETTS v. MORLEY* (1832), 1 L. J. K. B. 112.

**63. Lands assessed in wrong parish—Transfer to other parish—Effect of long usage.**—Two properties in one parish had been assessed to the land tax, from the time of the earliest schedule in existence, as part of the district or place, in which were comprised the next adjoining parish, these two properties, & a third property which had been reputed to be extra-parochial. The only lands in this district liable to land tax since 1806 had been those belonging to these three properties. In 1873 the two first mentioned properties were transferred to & assessed in the parish in which they were situated, under Land Tax Act, 1834 (c. 60), s. 1; & upon appeal by the owner of the third property, the Land Tax Comrs. affirmed the transfer:—*Held*: upon *mandamus* to the comrs., obtained at the instance of applt., the usage established under such circumstances ought to be sustained, & the transfer & new assessment must be set aside, under Land Tax Act, 1797 (c. 5), ss. 36, 53.—*It. v. LAND TAX COMRS.* (1877), 36 L. T. 374; 41 J. P. 401, D. C.

#### B. Property of New River Company.

See Land Tax Act, 1797 (c. 5), s. 57.

**64. Property owned in 1798—Assessable in London.**—By charter of James I., the governor & co. of the New River were incorporated, & the New River cut & stream granted to them in fee. The shares of the proprietors have been held to be real estate. By Land Tax Act, 1797 (c. 5), the county of Hertford was to contribute £41,508 10s. 9½d., & the city of London £123,390 0s. 7d., towards the land tax. By sect. 4, all the lands, tenements & hereditaments, etc., whatsoever, lying within the respective districts into which Great Britain was apportioned, & all persons, bodies politic & corporate, having any lands, are to be equally charged with a pound rate towards the sum imposed upon such respective districts. By sect. 57, all & any persons having any shares in the New River were to be assessed by the comrs. for the City of London, & the tax was to be paid by the governor or the treasurer or receiver, to such person as the comrs. should appoint. From time to time various shareholders redeemed the land tax on their shares. The New River commences in Hertfordshire, & runs for three miles through the parish of A. in that county. The river, as it existed in 1798, had never been redeemed from land tax except as aforesaid. The co. had since that time purchased land in Hertfordshire, the land tax on the whole of which, with the exception of two roods & ten perches, had been redeemed. On part of the land so purchased, the land tax of which had been redeemed, there were two wells, from the sale of the water of which the co. derive a profit:—*Held*: (1) no other land tax was payable upon the property of the New River co. as it existed in 1798 than that imposed by sect. 57, & consequently the river was not taxable in Hertfordshire; (2) as to the property since purchased, the land tax of which had not been redeemed, such property continued to be taxable in Hertfordshire; (3) the co. were not liable to be assessed to the land tax in respect of the springs inasmuch as the redemption of the land tax on the land on which the wells stand relieved the land

#### SECT. 4, SUB-SECT. 2.

**60 i. Enforcement by court.**—*LORD ADVOCATE v. EDINBURGH COUNTY SUPPLY COMRS.* (1861), 23 Dunl. (Ct. of Sess.) 933; 33 Sc. Jur. 484.—*SCOT.*

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**Sect. 4.—Assessment: Sub-sect. 3, B.; sub-sects. 4, 5, 6 & 7. Sects. 5 & 6: Sub-sect. 1.]**

& all its natural productions from any further tax, though possibly at the time of such redemption it might not have been known that such springs existed.—*NEW RIVER CO. v. HERTFORD LAND TAX COMRS.* (1857), 2 H. & N. 129; 26 L. J. Ex. 281; 157 E. R. 53; *sub nom.* *NEW RIVER CO. v. GREAT AMWELL LAND TAX COMRS.*, 29 L. T. O. S. 200; 21 J. P. 727; 5 W. R. 611.

*Annotation:—As to (3) Apid. Newton, Chambers v. Hall, [1907] 2 K. B. 446.*

**65. Property acquired after 1798—Assessable as before acquisition.]—NEW RIVER CO. v. HERTFORD LAND TAX COMRS., No. 64, *ante*.**

#### SUB-SECT. 4.—MODE OF ASSESSMENT.

*See Taxes Management Act, 1880 (c. 19), s. 48 (1).*

**66. Duties of commissioners—How regulated.]**—The duty of the comrs. of land tax, in assessing the contributions by the several parishes within a division, is regulated, not by Land Tax Act, 1797 (c. 5), s. 8, but by Land Tax Perpetuation Act, 1798 (c. 60), s. 74, re-enacted by Land Tax Redemption Act, 1802 (c. 116), s. 180, which treats the quota payable by each parish towards making up the amount charged on the division as permanent at its then proportion to the other parishes of the division. This is not altered by any later enactment. Where, therefore, such quota had, up to the year 1852, been unchanged for one hundred & fifty years, it was held that the comrs. were right in continuing the assessment for that year at such quota, although the result was that an unequal poundage was levied in the several parishes.—*R. v. LAND TAX COMRS., TOWER DIVISION, MIDDLESEX* (1853), 2 E. & B. 694; 1 C. L. R. 828; 22 L. J. Q. B. 386; 21 L. T. O. S. 227; 17 J. P. 455; 18 Jur. 285; 1 W. R. 479; 118 E. R. 928.

*Annotations:—Consd. R. v. Land Tax Comrs. (1877), 36 L. T. 374; Westminster Corpn. v. Johnson, Same v. Fuller, [1904] 2 K. B. 737; East Riding Land Tax Comrs. v. Loundesborough, [1917] 1 K. B. 531. Refd. Waterloo Bridge Co. v. Cull (1858), 1 E. & E. 213; Colchester v. Kewney (1866), L. R. 1 Exch. 368; Simpkin v. Robinson (1881), 45 L. T. 221; St. Thomas, St. Bartholomew's & Bridewell Hospitals v. Hudgell, [1901] 1 K. B. 364.*

**67. — To tax land equally.]—R. v. BARNWELL LAND TAX COMRS.** (1709), 11 Mod. Rep. 206; 88 E. R. 992.

**68. —.]—R. v. LAND TAX COMRS., No. 71, *post*.**

**69. — To charge divisions proportionately.]**—The comrs. ought to charge the land tax upon the several divisions within the city of Westminster, in proportion to the sums assessed upon them respectively by 4 Will. & Mar. (c. 1).—*Re WESTMINSTER LAND TAX COMRS.* (1746), Park. 74; 145 E. R. 717.

*Annotation:—Consd. Re Holborn Land Tax Assessment (1850), 5 Exch. 548.*

#### SECT. 4, SUB-SECT. 4.

**d. Duties of commissioners—To consider improvements.]—AUSTRALIAN GASLIGHT CO. v. TAXATION COMRS.** (1898), 19 N. S. W. L. R. (L.) 360; 15 N. S. W. W. N. 156.—*AUS.*

**e. —.]—LAND TAX COMR. v. NATHAN** (1913), 16 C. L. R. 654.—*AUS.*

**f. —.]—MORRISON v. LAND TAX FEDERAL COMR.** (1914), 17 C. L. R. 498.—*AUS.*

**g. —.]—McDONALD v.**

**N. S. W. LAND TAX DEPUTY FEDERAL COMRS.** (1915), 20 C. L. R. 231.—*AUS.*

**h. — To consider probability of higher price if subdivided.]—FEDERAL LAND TAX COMR. v. DUNCAN** (1915), 19 C. L. R. 557.—*AUS.*

**72 i. Fluctuation in value of property—Assessment perpetual.]—WELINGTON & MANAWATU RY. CO., LTD. v. TAXES COMRS.** (1893), 13 N. Z. L. R. 143.—*N.Z.*

**k. Land sub-divided into leasehold allotments—Each allotment separately taxable.]—COOPER v. TAXATION**

**70. Equalisation of assessment—Discretion of commissioners—Jurisdiction of court to interfere.]**

—The Ct. of Exch. has no jurisdiction to order the Comrs. of land tax to cause the proportion charged upon a division to be equally assessed.—*Re HOLBORN LAND TAX ASSESSMENT* (1850), 5 Exch. 548; 15 L. T. O. S. 282; 155 E. R. 241.

*Annotation:—Refd. Simpkin v. Robinson (1881), 45 L. T. 221.*

**71. —.]—Comrs. of land tax, acting under Land Tax Act, 1797 (c. 5), are bound to assess the amount chargeable on the division for which they act according to the real value of the assessable property for the year; & they are not justified in retaining an assessment which has been in use many years, & after changes in the value of property, merely because the making of a new estimate would be difficult & require expenses for which they do not possess funds. *Qu.*: whether the ct. will grant a *mandamus* calling on the comrs. to meet & make an equal assessment for the year according to the best of their judgment & discretion, on a suggestion that they had made their assessment on an old & disproportioned estimate though requested by an inhabitant of the division paying land tax to reduce the assessment on his district to an equal pound rate: the comrs. deposing in answer to the rule *nisi* for a *mandamus* that they had made the assessment for the year, & made it according to the best of their judgment & discretion.—*R. v. LAND TAX COMRS.* (1851), 16 Q. B. 381; 117 E. R. 925; *sub nom.* *Re LAND TAX COMRS., Ex p. PYM*, 20 L. J. Q. B. 211; 15 Jur. 190; *sub nom.* *Re BRADLEY HAVERSTOE LAND-TAX COMRS., Ex p. NETTHORPE v. ADEANE'S TRUSTEES*, 16 L. T. O. S. 411; 15 J. P. 100.**

**72. Fluctuation in value of property—Assessment perpetual.]—R. v. LAND TAX COMRS., No. 71, *ante*.**

**73. — Ancient quota.]—R. v. LAND TAX COMRS., TOWER DIVISION, MIDDLESEX, No. 68, *ante*.**

**74. — Assessment on real value for year.]—R. v. LAND TAX COMRS., No. 71, *ante*.**

#### SUB-SECT. 5.—DELIVERY OF ASSESSMENT.

*See Land Tax Act, 1797 (c. 5), s. 8; Management Act, 1880 (c. 19), ss. 61, 70, 83.*

**75. To collector—Duplicate assessment.]—R. v. WEST RIDING OF YORKSHIRE LAND-TAX ASSESSMENT COMRS.** (1850), 14 J. P. Jo. 30.

#### SUB-SECT. 6.—ASSESSMENT BY TWO BODIES.

*See Land Tax Redemption Act, 1838 (c. 58), ss. 2-4.*

**76. By two separate & distinct bodies—Acting for different districts—Remedy by appeal.]—Land Tax Redemption Act, 1858 (c. 58), s. 2, which**

**COMRS.** (1898), 19 N. S. W. L. R. (L.) 303; 15 N. S. W. W. N. 119.—*AUS.*

**l. Several parcels of land—Equivalent to minimum quantity liable to tax—Necessity for valuation as landed estate.]—R. v. GIDUEY** (1899), 25 V. L. R. 81.—*AUS.*

**m. Separate trust estates—Distinct trustees—Same life tenant.]—BELL v. TAXES COMR.** (1895), 14 N. Z. L. R. 438.—*N.Z.*

**n. Tenants in common—Partners in business.]—TAXES COMR. v. SMITH** (1907), 26 N. Z. L. R. 961.—*N.Z.*

enables this ct. on the application of the owner or occupier of lands, to call upon comrs. of land tax to appear & maintain, or relinquish their assessments, in cases where such person has been rated twice for the same land, applies only to cases in which two separate & distinct bodies of comrs., acting for different districts, have both assessed the same land, each claiming it to be within their district or division, & not to a case where the land has been rated twice by the same body of comrs. In the latter case the remedy is by appeal under Land Tax Act, 1797 (c. 5), s. 23.—*Re GLATTON LAND-TAX* (1840), 6 M. & W. 689; 9 L. J. Ex. 211; 151 E. R. 589; *sub nom. Re GLATTON LAND-TAX*, *Ex p. MARGETTS*, 4 J. P. 464.

SUB-SECT. 7.—RE-ASSESSMENT.

*See Taxes Management Act, 1880 (c. 19); Land Tax Commissioners Act, 1906 (c. 52).*

**77. Order on commissioners to reassess—Service on clerk.**—If the acting comrs. of the land tax assessed taxes, etc., refuse, unless indemnified, to proceed to make a re-assessment on the parish, to which the deficiency applies, in execution of the powers entrusted to them by the several Acts of Parliament, where *insuper* has been set on the parish whose collector is a defaulter, the ct. will order them to do so by rule to show cause in the nature of a *mandamus*.—*Re WOOTTON (INHABITANTS)* (1818), 6 Price, 103; 146 E. R. 754.

SECT. 5.—APPEALS.

*See Land Tax Act, 1797 (c. 5), ss. 8, 23; Taxes Management Act, 1880 (c. 19), s. 16.*

**78. To commissioners—Unequal taxation.**—A *mandamus* is not a proper remedy for an unequal taxation; but the proper remedy is by appeal to the comrs. But perhaps if the assessors refuse to tax any part, a *mandamus* lies (HOLT, C.J.).—*BUTLER v. COBBET* (1709), 11 Mod. Rep. 254; 88 E. R. 1023.

**79. Land rated twice by same commissioners.**—*Re GLATTON LAND-TAX*, No. 78, *ante*.

**80. Whether decision of commissioners conclusive—As to sufficiency of notice of appeal.**—(1) It is a good notice of appeal against an assessment of comrs. of land tax for applt. to say that he is aggrieved, without going on to state in what respect he is overrated.

(2) Where the comrs. of land tax refuse to go into an appeal by giving effect to an insufficient objection to the notice of appeal, this ct. will by *mandamus* compel them to hear & determine the appeal.—*Re UGLEY LAND-TAX COMRS.*, *Ex p. LAKE* (1843), 2 L. T. O. S. 152; 8 J. P. 59.

**81. As to basis of assessment.**—In assessing tithe rentcharge to the land tax the comrs. under Land Tax Redemption Act, 1802 (c. 116), s. 180, are bound to use as a basis the ratable or net annual value & not the gross estimated rental.

This remedy [*mandamus*] which the rector has had recourse to is not available. The comrs. have done their best. They appear to have gone wrong but that does not matter; there is no

appeal from them (MATHEW, J.).—*R. v. LAND TAX COMRS.* (1894), 58 J. P. 446, D. C.

**82. As to right to assess.**—*DARLEY v. FITZALAN HOWARD* (1913), 135 L. T. Jo. 327.

—J.—*See DISTRESS*, Vol. XVIII., p. 424, Nos. 1617, 1618.

SECT. 6.—COLLECTION.

SUB-SECT. 1.—IN GENERAL.

*See Taxes Management Act, 1880 (c. 19), ss. 72–79, 82, 83, 85, 100–107, 110, 111, 114–121.*

**83. Authority of collectors to collect—When terminated.**—On May 25, 1899, various sums were due & unpaid from pltf. for income tax, house duty, & land tax for the year ending Apr. 5, 1899. Defts., who were duly appointed collectors for the period from Apr. 1898, to Apr. 1899, levied a distress on pltf.'s premises for such unpaid sums. At the time when the distress was levied, no day had been appointed under Taxes Management Act, 1880 (c. 19), s. 100, to receive the moneys collected, & no schedule of arrears had been delivered under sect. 103.—*Held*: the warrant given by the comrs. in Form 5 of Sched. II. of Taxes Management Act, 1880 (c. 19), gave defts. power to distrain without limit as to time for duties payable for the year ending Apr. 5, 1899. Collectors appointed under sect. 73 (1) of the Act do not become *functi officio* on Apr. 5, but are appointed to collect the taxes for the year ending Apr. 5. Until a day has been appointed by the board under sect. 100 of the Act to receive the moneys received by the collectors, & the money collected has been paid over, & a schedule of arrears delivered under sect. 103, the collectors' authority to collect has not terminated.—*ELLIOTT v. YATES*, [1900] 2 Q. B. 370; 60 L. J. Q. B. 820; 82 L. T. 812; 64 J. P. 564; 48 W. R. 610; 16 T. L. R. 473; 44 Sol. Jo. 591, C. A.

**84. Bond given by collector—Containing invalid condition—Condition severable.**—By 43 Geo. 3, c. 99, s. 13, it is enacted that the collectors shall give security to the comrs. for duly paying such moneys as shall come to their hands, & for duly demanding the sums assessed, & for duly enforcing the Act against defaulters; & by Land Tax Act, 1797 (c. 5), s. 21, the collectors are required to give security to the comrs. for duly paying to the receiver-general the sums collected by them. Debt. was sued on a bond containing these conditions, & also a condition to render an account, & pay the sums collected to the comrs.:—*Held*: the latter condition did not vitiate the bond.—*COLLINS v. GWYNNE* (1831), 7 Bing. 423; 5 Moo. & P. 276; 9 L. J. O. S. C. P. 130; 131 E. R. 163; *subsequent proceedings*, *sub nom. GWYNNE v. BURNELL* (1840), 7 Cl. & Fin. 572. *Annotation*:—*Reid*, *Kepp v. Wiggitt* (1848), 6 C. B. 280.

—**Construction of.**—*See GUARANTEE*, Vo XXVI., p. 54, No. 392.

*See, generally*, BONDS, Vol. VII., pp. 164 *et seq.*

**85. Arrears—Service of order on sheriff.**—*A.-G. v. ASHBY TOLVILLE (INHABITANTS)* (1823), 12 Price, 649; 147 E. R. 835.

**86. Trespass against commissioner—Seizure of goods for redeemed tax—Necessity for notice of action.**—To an action of trespass against debt., who was a land tax comr., for authorising a seizure of pltf.'s goods, for a land tax, which had been previously redeemed, but without debt.'s

SECT. 5.

*a. Appeal withdrawn on commissioner admitting owner's claim for deduction—Commissioner precluded from reasserting former claim.*—*COX v. LAND TAX DEPUTY FEDERAL COMR.*, TASMANIA (1914), 17 C. L. R. 450.—AUS

*Sect. 6.—Collection: Sub-sects. 1 & 2. Sect. 7: Sub-sects. 1, 2 & 3.]*

knowledge, deft. pleaded not guilty, by statute, & stated in his particulars that he relied upon Land Tax Act, 1797 (c. 5), & 21 Jac. 1, c. 12. Pltf. being unable to prove that he had given notice of action under 5 & 6 Will. 4, c. 20, s. 19, & being also unable to prove the particulars, to show that deft. had waived the benefit of that statute, was nonsuited:—*Held*: deft. was entitled to notice of action, & the nonsuit was right.—*THOMAS v. WILLIAMS & BOWER* (1843), 1 Dow. & L. 624; 13 L. J. Ex. 87; 2 L. T. O. S. 103; 7 J. P. 708.

**87. ——— Land not liable to assessment.]**—*DARLEY v. FITZALAN HOWARD* (1913), 135 L. T. Jo. 327.

**Distress for land tax.]**—*See* DISTRESS, Vol. XVIII., pp. 424, 425, Nos. 1617–1627.

#### SUB-SECT. 2.—SURPLUS LAND TAX.

*See* Taxes Management Act, 1880 (c. 19), s. 114 (7), (8), (9).

**88. What is surplus land tax—Not moneys arising from excessive quota.]**—By Taxes Management Act, 1880 (c. 19), s. 114 (9), the comrs. of land tax are directed to apply any excess or surplus moneys received by them in respect of land tax in the redemption of the land tax chargeable on the parish in which the excess has arisen:—*Held*: the surplus to which such directions relate is to be understood as limited to a surplus arising from the causes specified in the preamble to 6 Geo. 4, c. 32, s. 1, namely, from the occasional necessity of making the total of the assessments in the parish exceed the authorised quota by reason of the uncertainty as to the occupation of houses & the changes in the sizes & number of the buildings occupied, & other similar causes, & not as including a surplus arising from the parish quota itself being fixed at an amount not authorised by law.—*EAST RIDING OF YORKSHIRE LAND TAX COMRS. v. LONDESBOROUGH (Earl)*, [1917] 1 K. B. 531; 86 L. J. K. B. 1273; 116 L. T. 699.

#### SECT. 7.—REDEMPTION.

##### SUB-SECT. 1.—WHO MAY REDEEM.

*See* Land Tax Redemption Act, 1802 (c. 116), ss. 9–17.

**89. Committee of lunatic.]**—Notwithstanding the provisions contained in the Land Tax Redemption Act, 1802 (c. 116), it is the duty of the committee of a lunatic to obtain the sanction of the Lord Chancellor before proceeding to a sale of any part of the lunatic's estate, for the purpose of raising moneys wherewith to redeem the land tax.—*Re WADE* (1849), 1 H. & Tw. 202; 47 E. R. 1384, L. C.

**90. Incumbent of living.]**—In 1798, K., the ecclesiastical incumbent of a living, redeemed the land tax charged on his rectory out of his own estate, under Land Tax Perpetuation Act, 1798 (c. 60), & did not, in his contract with the Comrs. for the Reduction of the National Debt declare his option to be considered a purchaser of the land tax, whereby, according to Land Tax Perpetuation Act, 1798 (c. 60), s. 37, the lands became exonerated from the land tax & chargeable for the benefit of the incumbent, his exors., administrators, & assigns, with the amount of the £3 per cent. Consols transferred & with the pay-

ment of a yearly sum, by way of interest, equal to the amount of the land tax redeemed:—*Held*: K., as an ecclesiastical incumbent, had such an estate as is contemplated by Land Tax Perpetuation Act, 1798 (c. 60), s. 37, taken in connection with 39 Geo. 3, c. 6, s. 5; & he was entitled to create the charge upon the living; & his personal representatives were entitled to maintain an action against the succeeding incumbent for the recovery of the interest accrued due on the amount of the £3 per cent. Consols so transferred from the time when the latter succeeded to the rectory.—*KILDERBEE v. AMBROSE* (1854), 10 Exch. 454; 3 C. L. R. 181; 24 L. J. Ex. 49; 24 L. T. O. S. 158; 19 J. P. 23; 156 E. R. 515.

**91. ———.]**—The guardian of an infant tenant in tail redeemed the land tax on the estate, but made no declaration, in pursuance of Land Tax Perpetuation Act, 1798 (c. 60), so as to make the land tax a charge on the inheritance. In a suit by the guardian, who was also administrator of the infant tenant in tail, it was declared that the land tax was an annuity or rentcharge in favour of the infant's personal estate; & the ct. directed proper deeds to be executed by the then tenant for life & tenant in tail, charging the estate with the amount of land tax as an annuity. This was done by deeds not affecting the estate in remainder after the estate tail. On the death of the survivor of the tenant for life & tenant in tail the personal representative of the infant claimed the benefit of the decree against the inheritance:—*Held*: the declaration effectually charged the inheritance; & the legal charges executed by the tenant for life & tenant in tail having failed, the tenant in remainder, after the determination of these estates, was directed legally to charge the estate with the annuity.—*WARE v. POLHILL* (1852), 5 De G. & Sm. 455; 19 L. T. O. S. 198; 64 E. R. 1196.

**92. Trustees & guardians of infants—Out of personal estate of infant—Equitable charge on estate.]**—Application of the personal estate of infant tenant in tail to the redemption of the land tax by persons, not having authority within the Act. Equity, by analogy to the option, to be reserved by guardians, etc., under the Act, for the personal representative of the infant to charge the estate in the possession of the remaindermen.—*WARE v. POLHILL* (1805), 11 Ves. 257; 32 E. R. 1087, L. C.

*Annotations:—Consd. Ware v. Polhill* (1852), 19 L. T. O. S. 198; *Ware v. Egmont* (1854), 4 De G. M. & G. 460; *Bulkeley v. Hope* (1855), 1 K. & J. 482. *Mentd. Southampton v. Hertford* (1813), 2 Ves. & B. 54; *Burges v. Mawbey* (1823), Turn. & R. 167; *Ibbetson v. Ibbetson* (1840), 10 Sim. 495; *Ferrand v. Willson* (1845), 4 Hare, 344; *Dungannon v. Smith* (1846), 12 Cl. & Fin 546; *Briggs v. Oxford* (1852), 1 De G. M. & G. 363; *Doncaster v. Doncaster* (1856), 3 K. & J. 26; *Lantsbery v. Collier* (1856), 2 K. & J. 709; *Wolley v. Jenkins* (1857), 28 L. T. O. S. 362; *Horton v. Smith* (1858), 4 K. & J. 624; *Tatte v. Swinstead* (1859), 28 Beav. 525; *A.-G. v. Ailesbury* (1887), 12 App. Cas. 672; *Re Allott, Hamner v. Allott*, [1924] 2 Ch. 498.

**93. ———.]**—A testator, who died in 1782, devised real estate to uses under which P., an infant, was tenant in tail in possession, & bequeathed personality to A. & B. upon trust at their discretion to lay it out in the purchase of real estates to be settled to the same uses. In 1799, certain comrs., acting under Land Tax Perpetuation Act, 1798 (c. 60), contracted with A. & B. as trustees & guardians of P., the infant for the redemption of the land tax on the devised estate. In 1802 P. died, still in his infancy. In 1835 X. contracted to purchase that estate which was described as free from land tax, & the above statements were made in the abstract of title

delivered to X. X. made no inquiry as to the circumstances attending the redemption, took a conveyance, & enjoyed the property free from all claims in respect of the land tax until 1848. The administrator of P., the infant, filed a bill against X., stating that the money laid out in the redemption of the land tax had been personal estate belonging to the infant, & that its character had not been changed; & alleging that the purchaser had constructive notice of that fact, & claiming an equitable charge on the estate purchased by X. —*Held*: as A. & B. might have redeemed the land tax out of the personalty bequeathed to them, to be laid out in the purchase of real estate to be settled to the same uses as the devised estate, X. was not bound to inquire into the circumstances attending the redemption, & he had not constructive notice thereof.—*WARE v. EGMONT (LORD)* (1854), 4 De G. M. & G. 460; 3 Eq. Rep. 1; 24 L. J. Ch. 361; 24 L. T. O. S. 105; 1 Jur. N. S. 97; 3 W. R. 48; 43 E. R. 580, L. C.

*Annotations*.—*Mentd.* Atterbury v. Wallis (1856), 8 De G. M. & G. 454; *Re* Morrison (1856), 27 L. T. O. S. 44; Dawson v. Prince (1857), 2 De G. & J. 41; Jones v. Williams (1857), 24 Beav. 47; Montefiore v. Brown (1858), 7 H. L. Cas. 241; Macbryde v. Eykyn (1871), 24 L. T. 461; Cavander v. Bulteel (1873), 9 Ch. App. 30, n.; Banco de Lima v. Anglo-Peruvian Bank (1878), 3 Ch. D. 160; *Re* Hall (1887), 37 Ch. D. 715; English & Scottish Investment Co. v. Brunton (1892), 41 W. R. 133; *Re* New Chile Gold Mining Co. (1892), 68 L. T. 15; Bailey v. Barnes, (1894) 1 Ch. 25; *Re* White & Smith's Contract, [1896] 1 Ch. 637; Molyneux v. Hawtrey, [1903] 2 K. B. 487; *Re* Child & Hodgson's Contract (1905), 54 W. R. 234.

#### SUB-SECT. 2.—PROCEDURE FOR REDEMPTION.

*See* Land Tax Redemption Act, 1802 (c. 116), ss. 35, 37, 38, 76, 129, 130, 164; Land Tax Redemption Act, 1813 (c. 123), s. 1, 10–12, 21; Land Tax Redemption Act, 1817 (c. 100), s. 23; Inland Revenue Board Act, 1849 (c. 1); Finance Act, 1896 (c. 28), s. 34.

**94. Enforcement of registration of contract—Mandamus.**—(1) No authority in the Ct. of Ch. to compel the comrs. of land tax to grant certificates to persons proposing to purchase in the form of Sched. A. though it would seem a *mandamus* would lie for such purpose.

(2) The registry of contract in the manner directed by the Act may, I think, be enforced by *mandamus* (*LORD ELDON, C.*)—*WILLIAMS v. STEWARD* (1817), 3 Mer. 472; 36 E. R. 182, L. C.

**95. Enforcement of issue of certificate—Mandamus.**—*WILLIAMS v. STEWARD*, No. 94, *ante*.

*Mandamus* generally, *see* CROWN PRACTICE, Vol. XVI., pp. 276 *et seq.*

**96. Redemption by corporation—Necessity for assent of commissioners.**—A prebendary agreed by writing, in consideration of a sum in 3 per cent. stock of the amount necessary for redeeming the land tax to convey to a lessee then in possession, a part of the reversion in the prebendal estate, such part to be set out & valued by B., & approved by the King's comrs. The lessee furnished the sum required for purchasing the stock, & the prebendary concluded the necessary contract with the land tax comrs., transferred the stock into the names of the Comrs. for Reducing the National Debt, & had the contracts duly registered; the land was also set out & valued; but the lessee then refused to sign the necessary memorial for the purpose of obtaining the approbation of the King's comrs. pursuant to Land Tax Redemption Act, 1802 (c. 116), s. 76. The prebendary afterwards distrained upon an under-tenant of the

land for the amount of the redeemed land tax, as additional rent, pursuant to Land Tax Redemption Act, 1802 (c. 116), s. 88.—*Held*: (1) there had been no valid sale of the land, for want of the assent of the comrs. & because, in order to comply with the provisions of Land Tax Redemption Act, 1812 (c. 116), s. 69, the prebendary ought to have sold, not only the fee simple of the lands demised, but also the rents, services, & other profits; (2) he had no right by Land Tax Redemption Act, 1802 (c. 116), s. 88, to distrain until the precise quantity of land, & the portion of reserved rent, to be sold, were ascertained by the comrs.—*WARNER v. POTCHETT* (1832), 3 B. & Ad. 921; 110 E. R. 330.

*Annotation*.—*As to* (2) *Refd.* Willoughby v. Willoughby (1843), 4 Q. B. 687.

*See, now*, Land Tax Redemption Act, 1838 (c. 58), s. 1.

#### SUB-SECT. 3.—EVIDENCE OF REDEMPTION.

*See* Land Tax Redemption Act, 1802 (c. 116), s. 165.

**97. Copy contract with commissioners—Original not admissible.**—*BURDON v. RICKETS* (1809), 2 Camp. 121, n., N. P.

**98. Certificate of commissioners—Or copy register.**—An estate, described in the particulars of sale to be land tax redeemed, was sold, in 1856, subject to a condition "that every deed dated more than ten years ago should be conclusive evidence of everything recited or stated therein." In the witnessing part of a deed of conveyance, dated in 1844, & which formed part of the title, the purchase-money was acknowledged to have been received by M., the then vendor, from H., the then purchaser, "in full for the absolute purchase of the premises, & the fee simple & inheritance thereof in possession, free from land tax & all other incumbrances"—*Held*: (1) this was not a direct recital of the fact that the land tax had been redeemed so as to bind the purchaser under the above condition; (2) a statutory declaration by M. made in 1844, "that to the best of his knowledge & belief no land tax had ever been paid for or in respect of the freehold subsequently to the purchase or redemption thereof in or about the year 1799," left it doubtful whether the land tax had ever been redeemed. The proper evidence that the land tax had been redeemed would have been the certificate of the comrs., or a copy of the register.—*POPPLETON v. BUCHANAN, BUCHANAN v. POPPLETON* (1858), 4 C. B. N. S. 20; 27 L. J. C. P. 210; 31 L. T. O. S. 83; 22 J. P. 546; 4 Jur. N. S. 414; 6 W. R. 372; 140 E. R. 986.

**99. Discrepancy in description of lands—Onus of proof.**—(1) Where a manor has once been charged with land tax, & the tax once redeemed, no after-inclosure of the waste lands will render the manor liable to re-assessment.

(2) If there be a discrepancy between the contract for & the certificate of redemption on the one hand & the schedule to such contract & certificate & the duplicate assessment on the other, the contract & certificate is to be deemed the true description, in the absence of affirmative evidence to the contrary, which evidence it lies upon the land tax comrs. to produce.

*Ptfs.* were the exors. of the will of H., & *def.* was a collector of land tax. In 1799 the predecessor in title of H. had entered into a contract for the redemption of the land tax charged upon (*inter alia*) a manor of which such predecessor was lord. The certificate of contract given by the

Sect. 7.—Redemption: Sub-sects. 3, 4, 5 & 6.]

land tax comrs. set out that the manor, grove, & woodlands were charged with land tax to the amount of £70 4s., & the contract for redemption, that the tax charged upon the manor, grove & woodlands was redeemed for a sum therein mentioned, but neither the duplicate assessment nor the schedules to the certificate or contract made any mention of such manor, groves, & woodlands. In 1844 H. bought the manor, & afterwards brought the waste into profitable occupation. No demand of land tax was made of him until 1867, when £12 17s. 4d. was demanded as a sum "assessed & not exonerated." H. refusing to pay, & being distrained upon by debt., brought an action for illegal distress, which was continued by plffs.:—*Held*: upon a special case stated without pleadings, plffs. were entitled to judgment.—*HODGSON v. PEARSON* (1874), 31 L. T. 679; 39 J. P. 198.

*Annotations*:—As to (1) *Consd. Newton, Chambers v. Hall*, [1907] 2 K. B. 446. *Generally, Reifd. C. L. Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467.

**100. Declaration by court—To supply defect of title.**—The ct. will not declare the land tax on an estate to have been redeemed, merely for the benefit of a trustee for sale, & to supply an alleged defect of title, although such redemption has in fact taken place.—*Re JACKMAN'S LAND-TAX, Ex p. SPARKES* (1824), M'Cle. 518.

**101. Payment of redemption money—To commissioners of Inland Revenue.**—By Land Tax Redemption Act, 1802 (c. 116), s. 98, it is required that, upon a sale of lands for the redemption of the land tax, the purchase-money should be paid into the Bank of England, to the account of the comrs. for the liquidation of the national debt, & no discharge from the land tax is obtained until the money is so paid.

In the year 1800 the guardians of M., an infant, under the powers of this Act, sold lands belonging to him for the redemption of the land tax; the purchase-money was paid by H., the purchaser, into the hands of solrs., who were employed professionally both by the guardians & the purchaser, & remained in their hands until 1807, when M. came of age, & his guardian accounted with him; & afterwards he settled accounts with the solrs. to whom the purchase-money had been paid, & took a security for a balance due to him, in which the purchase-money was included. Under these circumstances the money was not paid into the Bank according to the Act, & H. continued to pay the land tax upon the premises purchased by him. No proceedings were taken on either side, until 1825, when M. brought an ejectment to recover possession of the premises; & the devisee & trustees under the will of H., who was dead, filed a bill to restrain the proceeding at law:—*Held*: principally on the ground that H. continued to pay the land tax, he could have no relief in equity.—*HICKS v. MORANT* (1831), 5 Bl. N. S. 643; 2 Dow. & Cl. 414; 5 E. R. 457, H. L.

*Annotation*:—*Reifd. Doe d. Blewitt v. Phillips* (1841), 1 Q. B. 84.

#### SUB-SECT. 4.—WHAT INCLUDED IN REDEMPTION CONTRACT.

See Land Tax Redemption Act, 1802 (c. 116), s. 127.

**102. Land allotted in respect of rights of common of redeemed land.**—Where lands are allotted under an Inclosure Act in respect of rights of common

appurtenant to other lands of which the land tax has been redeemed, the land tax does not attach upon the allotment.—*BOEHM v. WOOD* (1823), Turn. & R. 332; 37 E. R. 1128.

*Annotation*:—*Consd. Cooch v. Walden* (1877), 46 L. J. Ch. 639.

**103. Land tax on manor—Includes waste of manor—Subsequently inclosed.**—*HODGSON v. PEARSON*, No. 99, *ante*.

**104. Separate & distinct franchise—Created subsequent to redemption—Tolls.**—*CHARING CROSS BRIDGE CO. v. MITCHELL*, No. 10, *ante*.

**105. ————**—*WATERLOO BRIDGE CO. v. CULL*, No. 48, *ante*.

**106. ———— In existence at time of redemption.**—In redemption contracts the word "lands" must be construed as having its natural meaning, including everything down to the centre of the earth, unless at the time of redemption there is in existence a separate & distinct hereditament liable to be separately assessed; & if there is such a separate hereditament, all the circumstances of the case existing at the time of redemption must be looked at in order to see whether the intention of the registered certificate was that the surface only should be redeemed or the land & everything beneath it.

As coal & the profit to be derived from mining are nothing but the natural production & profit of the land, unopened seams of coal under land belonging to the same owner, in respect of which the land tax is redeemed, are included in the redemption.—*NEWTON, CHAMBERS & CO., LTD. v. HALL*, [1907] 2 K. B. 446; 76 L. J. K. B. 908; 96 L. T. 743; 71 J. P. 388; 23 T. L. R. 511.

*Annotation*:—*Consd. C. J. Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467.

**107. Natural production & profit of lands redeemed—Springs upon land.**—*NEW RIVER CO. v. HERTFORD LAND TAX COMRS.*, No. 64, *ante*.

**108. ———— Unopened seams of coal.**—*NEWTON, CHAMBERS & CO., LTD. v. HALL*, No. 106, *ante*.

**109. Land abutting on highway—Subsoil ad medium filum.**—Where the land tax upon land adjoining a public highway has been redeemed, the presumption that the soil of the highway *ad medium filum* belongs to the owner of the adjoining land applies so as to extend the exoneration from tax to the middle of the highway. A railway was constructed, under statutory powers, in the city of London, partly beneath a highway adjoining lands in respect of which the land tax had been previously redeemed:—*Held*: the portion of the railway under the moiety of the highway adjoining the exonerated lands was not liable to land tax.—*LONDON (CITY) LAND TAX COMRS. v. CENTRAL LONDON RY. CO.*, [1913] A. C. 364; 82 L. J. Ch. 274; 108 L. T. 690; 77 J. P. 289; 29 T. L. R. 395; 57 Sol. Jo. 403; 11 L. G. R. 693, H. L.; *affg. S. C. sub nom. CENTRAL LONDON RY. CO. v. LONDON (CITY) LAND TAX COMRS.*, [1911] 2 Ch. 467, C. A.

*Annotations*:—*Reifd. Maclaren v. A.-G. for Quebec*, [1914] A. C. 258; *A.-G. of Southern Nigeria v. Holt* (Liverpool), [1915] A. C. 599.

#### SUB-SECT. 5.—APPLICATION OF REDEMPTION MONEYS.

See Land Tax Redemption Act, 1802 (c. 116), ss. 166-171; Land Tax Redemption Act, 1813 (c. 123), s. 13; Land Tax Redemption (Investment) Act, 1853 (c. 90), s. 8; Finance Act, 1896 (c. 28), s. 32 (1), sched.; Finance Act, 1921 (c. 32), s. 64.



**110. Payment to Commissioners of Inland Revenue.]—**HICKS v. MORANT, No. 101, *ante*.

**111. Application of surplus stock—Arising from sale of land.]—**Surplus stock, arising from sales under the Acts for the redemption of the land tax, will be ordered to be transferred to the party, who, if it were laid out in the purchase of lands, would be entitled to have the lands conveyed to him in fee.—*Re FORTESCUE* (1826), 3 Russ. 128; 38 E. R. 524.

*Annotation:—Mentd.* Thornhill v. Milbank (1864), 10 L. T. 124.

**Surplus land tax.]—**See Sect. 6, sub-sect. 2, *ante*.

SUB-SECT. 6.—CHARGE ON LANDS IN FAVOUR OF OWNER WHO REDEEMS.

See Land Tax Redemption Act, 1802 (c. 116), ss. 116, 125; Land Charges Registration & Searches Act, 1888 (c. 51); Finance Act, 1896 (c. 28), s. 33 (a).

**112. Redeemed tax personal estate.]—**Land tax redeemed by one who is *cestui que use* for life, & in possession at the time of the purchase, is personal property, & descendible to his personal representatives.—*MONDAY v. HURLEY & BOND* (1827), 5 L. J. O. S. K. B. 212.

**113. —.]—**A. being under a settlement tenant for life in remainder, after prior estates for life & in tail with remainder to his own first & other sons in tail, with an ultimate remainder in fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estate during the life of the first tenant for life, & took an assignment to himself under the land tax Act. The prior tenant for life afterwards died without issue, having devised to A. the ultimate fee; & A. being in a dying state, & having no issue, made his will, & devised the fee of the settled estate without declaring any intention with respect to the land tax redeemed. The land tax at his death continues to be part of his personal estate.—*TREVOR v. TREVOR* (1833), 2 My. & K. 675; 39 E. R. 1102.

*Annotation:—Mentd.* Horton v. Smith (1858), 27 L. J. Ch. 773.

**114. Right to free land from charge—Created by previous tenant for life.]—**Under Land Tax Redemption Act, 1802 (c. 116), a remainderman in possession can compel the representatives of the tenant of a previous particular estate, who has redeemed the land tax, to receive the consideration money for such redemption, with all arrears of interest, so as to free the land from the charge & payment of the interest to which it was subject for the benefit of such tenant under Land Tax Redemption Act, 1802 (c. 116), s. 123. A tenant in common of the remainder if he tender the whole amount & that is refused, & the interest distrained for, may plead the tender in bar of an avowry.—*COUSINS v. HARRIS* (1848), 12 Q. B. 726; 17 L. J. Q. B. 273; 12 L. T. O. S. 44; 12 Jur. 835; 116 E. R. 1043.

*Annotations:—Refd.* Kilderbee v. Ambrose (1854), 10 Exch. 454; Skene v. Cook, [1902] 1 K. B. 682.

**115. Whether merger for benefit of freehold.]—**Guardians of an infant tenant in tail redeemed the land tax on the entailed estate. The tenant in tail died, having bequeathed the land tax to the next tenant in tail. The latter tenant in tail suffered a recovery & settled the estate, but always dealt with the redeemed land tax as a subsisting charge. The settlement contained in its operative part the usual general words, "all the estate," etc.:—*Held*: the land tax was not merged by

its redemption, by the recovery, by the operation of the settlement, or otherwise, but passed by a bequest of it in the settlor's will.—*BLUNDELL v. STANLEY* (1849), 3 De G. & Sm. 433; 18 L. J. Ch. 300; 13 L. T. O. S. 380; 18 Jur. 998; 64 E. R. 549.

*Annotations:—Consd.* Bulkeley v. Hope (1855), 1 K. & J. 482. *Refd.* Neame v. Moorsom (1866), L. R. 3 Eq. 91.

**116. —.]—**A tenant in tail of two estates redeemed the land tax on both with the money produced by the sale of part of one. One of the estates, under a shifting use, went over:—*Held*: on redemption, the land tax merged with the ownership, & the owner of the one estate had no right, as against the owner of the other, for an apportionment.—*HARRISON v. ROUND* (1852), 2 De G. M. & G. 190; 22 L. J. Ch. 322; 20 L. T. O. S. 118; 17 Jur. 563; 1 W. R. 26; 42 E. R. 844, L. C.

*Annotations:—Mentd.* Wyndham v. Fane (1853), 11 Hare, 287; Langdale v. Briggs (1856), 3 Sm. & G. 255; Macoubrey v. Jones (1856), 2 K. & J. 684; Curzon v. Curzon (1859), 1 Giff. 248; Collingwood v. Stanhope (1869), L. R. 4 H. L. 43; Meyrick v. Laws, Meyrick v. Mathias (1874), 9 Ch. App. 237; *Re Wright's Trustees & Marshall* (1884), 28 Ch. D. 93; *Re Fitzgerald's S. E., Saunders v. Boyd*, [1891] 3 Ch. 394; Shuttleworth v. Murray, [1900] 1 Ch. 795; *Re Constable's S. E.*, [1919] 1 Ch. 178; *Re Meeking*, Meeking v. Meeking, [1922] 2 Ch. 523.

**117. —.]—**The guardians of an infant tenant in tail of lands redeemed the land tax, under Land Tax Perpetuation Act, 1798 (c. 60), without declaring an option, under sects. 17 & 37, to be considered on the footing of third persons purchasing the tax. Subsequently, the lands became vested in fee in S., who conveyed them to trustees & their heirs, upon trusts for sale for his benefit. The trustees, by his direction, purchased & took a conveyance of "the land tax or rentcharge in lieu of land tax chargeable upon the lands," upon the like trusts:—*Held*: the land tax *quid* tax was extinguished upon its redemption by the guardians; the rentcharge which remained in lieu of land tax was not a statutory tax, capable of being enforced by the remedies provided by the Act, but a charge effected by the operation of equity; & such charge merged upon being conveyed to the trustees.—*BULKELEY v. HOPE* (1855), 1 K. & J. 482; 24 L. J. Ch. 356; 26 L. T. O. S. 56; 1 Jur. N. S. 864; 3 W. R. 360; 69 E. R. 549; *on appeal* (1856), 8 De G. M. & G. 36, L. J.

*Annotation:—Mentd.* Pryse v. Pryse (1872), L. R. 15 Eq. 86.

**118. —. Redemption by lessee.]—**C., the owner of leaseholds, renewable by custom, contracted, in 1798, to redeem the land tax thereon, under Land Tax Perpetuation Act, 1798 (c. 60), & transferred to the comrs. a sum of Consols for that purpose, but did not exercise the option under sect. 17 of the Act. After the death of C., T. D., & M. D., who were entitled in equal shares to the leaseholds under his will, which contained no reference to the land tax, & also to his residuary personal estate, by a settlement made in 1818, assigned the leaseholds, & all their "estate & interest" therein, to trustees upon the trusts of the settlement. The recitals did not refer to the land tax. T. D. died in 1821, having made no claim to a moiety of the charge in respect of the land tax. On the death of M. D., the personal representative of T. D. & M. D. claimed, as against those entitled under the settlement, a charge in respect of the land tax:—*Held*: C., on redeeming the land tax, became entitled to the interest on the Consols transferred by him as a rentcharge on the leaseholds for his own benefit; it did not pass under the general words of the settlement of 1818, but remained as a separate



**Sect. 7.—Redemption: Sub-sects. 3, 7, 8 & 9.]**

property in the settlors, as residuary legatees of C.; their representative was now entitled to it as a charge on the leaseholds; & the fact of T. D. not having made any claim was no bar.—*NEAME v. MOORSOM* (1866), L. R. 3 Eq. 91; 36 L. J. Ch. 274; 12 Jur. N. S. 913; 15 W. R. 51.

**119. Redemption by incumbent of living — Charge upon benefice.]—***KILDERBEE v. AMBROSE*, No. 90, *ante*.

**120. Redemption of land charged with fee farm rent.—Right to deduct interest from rent.]—**The owner of lands charged with a fee farm rent, payable to a purchaser from the Crown under statutes 22 Car. 2, c. 6, & 22 & 23 Car. 2, c. 24, having redeemed the land tax chargeable on the lands out of which the fee farm rent issues, is entitled under the land tax Act, to deduct 4s. in the pound from the rent so payable.—*MOODY v. WELLS (DEAN & CHAPTER)* (1856), 1 H. & N. 40; 25 L. J. Ex. 273; 27 L. T. O. S. 82; 20 J. P. 744; 156 E. R. 1110.

**121. Redemption of several tenements by one contract.—Separate charges.]—**A person having a partial interest redeemed the land tax on three several tenements, by one contract & at one price:—*Held*: the three charges were not consolidated so as to give him one aggregate charge on all tenements, but he acquired three separate charges on the three several tenements.—*COX v. COVENTON* (1862), 31 Beav. 378; 7 L. T. 78; 8 Jur. N. S. 1142; 10 W. R. 829; 54 E. R. 1185.

*Annotation*:—*Mentd.* *Dougherty v. Oates* (1900), 45 Sol. Jo. 118.

**122. Recovery of arrears of charge—Real Property Limitation Act, 1874 (c. 57), ss. 1, 8.]—**The lessee of premises redeemed the land tax charged thereon under Land Tax Redemption Act, 1802 (c. 116), which by sect. 123 provides that, where any person having any estate, other than an estate of inheritance, in any lands, tenements, or hereditaments redeems the land tax charged thereon, such lands, tenements, or hereditaments shall be chargeable for his benefit with the amount of the moneys paid as the consideration for the redemption of such land tax, & with the payment of a yearly sum of money by way of interest thereon, equal in amount to the land tax redeemed. In 1879 the lessee assigned to pltf. the benefit of the contract for redemption of the land tax. No yearly sum having been paid by way of interest on the money paid for redemption of the land tax since 1879, the pltf. sued deft., in whom the lease of the premises had become vested in 1885, to recover £9 as a yearly payment due Jan. 1, 1900, under Land Tax Redemption Act, 1802 (c. 116), s. 123, by way of interest on the money paid for redemption of the land tax:—*Held*: the case came either within sect. 1, or sect. 8 of Real Property Limitation Act, 1874 (c. 57), & therefore pltf.'s claim was barred.—*SKENE v. COOK*, [1902] 1 K. B. 682; 71 L. J. K. B. 446; 86 L. T. 319; 50 W. R. 500; 18 T. L. R. 431; 40 Sol. Jo. 350, C. A.

**SUB-SECT. 7.—RAISING OF REDEMPTION MONEY.**

See Land Tax Redemption Act, 1802 (c. 116), ss. 44, 67, 68, 81–84, 114, 118, 161, 162; Settled

Land Act, 1882 (c. 38), ss. 2, 3, 21, 32, 62; Finance Act, 1896 (c. 28), s. 33 (b).

**123. Money paid into court on sale of settled land —Tax previously redeemed by tenant for life—Recoupment of tenant for life.]—**Order made upon petition by tenant for life that a sum of money, which the deputy remembrancer had received for lands taken for the public service under 44 Geo. 3, c. 95, might be paid in part satisfaction of a sum of money previously paid by petitioner for the redemption of the land tax, he not having taken advantage of the clause in the redemption Act, which enabled him to sell part of the lands for that purpose, although the next in remainder was a minor.—*Re SHEPHARD* (1811), Wight. 131; 145 E. R. 1201.

**124. ———.]—**(1) Where an Act of Parliament establishing a railway co., authorised the co. to purchase lands of corpns., tenants for life, etc., & directed that the purchase-money should be applied in the redemption of the land tax upon other parts of the property unsold:—*Held*: a tenant for life, who had redeemed the land tax before the passing of the Act, might reimburse himself out of the proceeds of the lands purchased of him by the co.

(2) The costs of an application to the ct. under such an Act of Parliament, to have the purchase-money applied in the redemption of the land tax, will be allowed out of the purchase-money, although the Act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses.—*Re LONDON & BIRMINGHAM RY. CO.*, *Ex p. NORTHWICK* (1834), 1 Y. & C. Ex. 166; 160 E. R. 68.

*Annotations*:—*As to* (2) *Fold.* *Re Bothlem Hospital* (1875), L. R. 19 Eq. 457. *Restd.* *Re Liverpool & Manchester Railway Act, Ex p. Trafford* (1837), 2 Y. & C. Ex. 522; *Re Oakham Canal Co.* (1843), 1 L. T. O. S. 12. *Generally*, *Mentd.* *Cousens v. Harris* (1848), 17 L. J. Q. B. 273.

**125. Sale of lunatic's estate—Sanction of court.]—**Land tax on a lunatic's estate redeemed by order out of the produce of decaying timber, ordered to be cut for payment of debts under the master's report, that it was for his benefit. No equity for a charge in favour of the next of kin.—*Ex p. PHILLIPS* (1812), 19 Ves. 118; 34 E. R. 463, L. C. *Annotation*:—*Mentd.* *A-G v. Allesbury* (1885), 16 Q. B. D. 408.

**126. ———.]—***Re WADE*, No. 89, *ante*.

**127. Sale of entailed estate—Purchase by heir.]—***LAWRIE v. LAWRIE* (1814), 2 Dow, 556; 3 E. R. 965, H. L.

**128. — By tenant for life without impeachment for waste—Growing timber included.]—**Where a tenant for life, without impeachment of waste, makes an absolute sale & conveyance of land under Land Tax Redemption Act, 1802 (c. 116), s. 51, for the purpose of redeeming the land tax on other property, the growing timber, though not mentioned in the conveyance passes with the land; & the price of it, as well as that of the land, must be paid into the Bank of England under Land Tax Redemption Act, 1802 (c. 116), s. 98; although the price of the land without the timber makes up the sum for which the land tax is to be redeemed. *Semble*: if the price of the timber be paid by mistake to the tenant for life, & not into the Bank, the conveyance is void under Land Tax Redemption Act, 1802 (c. 116), s. 119. But, assuming this to be so, the case is within Land Tax Redemption Act, 1814 (c. 173), s. 12, & Land Tax Redemption Act, 1817 (c. 100),

**SECT. 7, SUB-SECT. 7.**

125 i. *Sale of lunatic's estate—Sanction of court.]—**WELD v. TEW* (1829), Beat. 266.—*IR.*

s. 25, & either clause will cure the defect.—*DOE d. BLEWITT v. PHILLIPS* (1841), 1 Q. B. 84; *Arn. & H.* 256; 4 Per. & Dav. 562; 10 L. J. Q. B. 68; 5 Jur. 745; 113 E. R. 1061.

*Annotation* :—*Expld. Whiddorne v. Ecclesiastical Comrs. for England* (1877), 7 Ch. D. 375.

**Sale of ecclesiastical property.]—See ECCLESIASTICAL LAW, Vol. XIX., pp. 499, 500, Nos. 3560–3565.**

**129. Sale to raise costs of previous sales for redemption.]—**A corp'n. named "The Warden & Poor of the Hospital of the Holy Trinity in Croydon of the Foundation of John Whitegift, Archbishop of Canterbury," conveyed land under the land tax redemption Acts by the name of the "Warden & Poor of the Hospital of the Holy Trinity in Croydon." The purchaser paid the vendors the purchase money in discharge of the costs of sales made by the vendors for the redemption of the land tax :—*Held* : (1) the variance in their name was not material : at all events this was a mistake or inadvertence cured by Land Tax Redemption Act, 1814 (c. 173), s. 11; (2) they might raise money by a later sale for the costs of former sales.—*CROYDON HOSPITAL v. FARLEY* (1816), 6 Taunt. 467; 2 Marsh. 174; 128 E. R. 1116.

*Annotation* :—*Refd. R. v. Haughley* (1833), 4 B. & Ad. 650.

**130. Effect of approval by land commissioner.]**

—The rector & lord of the manor of B. by one grant demised for three lives, at one aggregate holding, & at one undivided rent, three ancient tenements originally held of the manor under distinct grants & at distinct rents. The same rector afterwards disposed of the reversion in fee under the provisions of Land Tax Redemption Act, 1802 (c. 116) :—*Held* : though the grant for lives might be void unless sanctioned by a special custom in the manor, yet the purchaser of the reversion had a good title, the sale being approved of by the land tax comrs.—*DOE d. STRICKLAND v. WOODWARD* (1847), 1 Exch. 273; 17 L. J. Ex. 1; 154 E. R. 115.

**131. Purchase effected by fraud—Power of court to rectify.]—**The Legislature intended, by the Acts for the redemption of the land tax, to authorise all such sales for that purpose to be made by ecclesiastical persons, with the consent thereby required, as could have been made for any purpose, with the like consent, before the passing of the

restraining statutes; & before the restraining statutes a sale might have been made from a prebendary in his corporate character to a prebendary in his individual character. An objection to the validity of a sale under the land tax redemption Acts, upon the ground that the lands were not properly saleable, & apart from any question of fraud, were not properly sold under the Acts, is a legal objection; & there being no impediment to the trial of that question at law, a bill in equity on such a ground cannot be supported. But the confirming Land Tax Redemption Act, 1814 (c. 173), & Land Tax Redemption Act, 1817 (c. 100), have removed any objection to a sale & conveyance under the land tax redemption Acts, arising from the property so sold not having been originally saleable, or not having been properly sold, within the meaning & according to the directions of the Acts.

If it were shown that a purchase under the land tax redemption Acts had been effected by fraud the ct. would rectify it, notwithstanding the confirming statutes, for a purchase so effected would not acquire validity from those statutes.—*BEADEN v. KING* (1852), 9 Hare, 499; 22 L. J. Ch. 111; 68 E. R. 608.

*Annotation* :—*Consd. Whiddorne v. Ecclesiastical Comrs. for England* (1877), 7 Ch. D. 375.

#### SUB-SECT. 8.—EFFECT OF REDEMPTION.

**132. Redemption by mortgagee—Election by mortgagor—To take benefit.]—***KNOWLES v. CHAPMAN* (1815), 3 Seton's Judgments & Orders, 6th ed. 1960.

**133. Redemption after contract fixing rent—Claim for increased rent.]—**The Crown having redeemed the land tax since the above contract was entered into, C. claimed a proportional additional rent under Land Tax Redemption Act, 1802 (c. 116), s. 126 :—*Held* : the sect. did not apply.—*FAULKNER v. LEWELLIN* (1863), 9 L. T. 251; 11 W. R. 1055.

#### SUB-SECT. 9.—COSTS.

*See* COMPULSORY PURCHASE, Vol. XI., p. 262, Nos. 1780–1784.

## LAND TRANSFER.

*See* REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

## LAND VALUES.

*See* REVENUE.

## LANDING STAGES.

*See* FERRIES; WATERS AND WATERCOURSES.

# LANDLORD AND TENANT.

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D. Mortgagees. *See* MORTGAGE.

E. Assignees of and Persons Authorised to Receive Rent.

F. Receivers and Sequestrators.

G. Personal Representatives.

H. Co-Owners.

I. Where Reversion Settled. *See* SETTLEMENTS.

J. Other Cases.

SUB-SECT. 3. LIABILITY FOR RENT.

SUB-SECT. 4. PAYMENT AFTER TERM DETERMINED.

SUB-SECT. 5. MODE OF PAYMENT.

SUB-SECT. 6. PLACE OF PAYMENT.

SUB-SECT. 7. SECURITY FOR PAYMENT.

SUB-SECT. 8. RECOVERY OF RENT PAID.

SECT. 5. DEDUCTIONS FROM RENT AND SET-OFF.

SUB-SECT. 1. BY LESSEE.

A. In General.

B. Claims for Damages.

C. Debt due by Lessor.

(a) To Lessee.

(b) To Superior Landlord.

D. Payments to Mortgagees.

E. Payments in respect of Party Walls.

F. Rent Charges.

G. Expenditure on Repairs.

H. Other Payments.

SUB-SECT. 2. BY UNDERLESSEES.

SUB-SECT. 3. RATES, TAXES, ETC.

SUB-SECT. 4. AGRICULTURAL COMPENSATION.

SECT. 6. SUSPENSION OF RENT.

SUB-SECT. 1. BY EVICTION OF LESSEE.

A. In General.

B. What amounts to Eviction.

(a) In General.

(b) Eviction from Part of Premises.

(c) Acts of Strangers.

(d) In respect of Easements and Rights of Common.

(e) Acts of Law or State.

SUB-SECT. 2. BY EVICTION FROM PART OF PREMISES.

SUB-SECT. 3. BY EVICTION UNDER TITLE PARAMOUNT.

SUB-SECT. 4. ABANDONMENT OF PREMISES AND RE-LETTING.

SUB-SECT. 5. DESTRUCTION OF, OR DAMAGE TO PREMISES.

A. In General.

B. Destruction or Damage by Fire.

C. Other Cases.

SUB-SECT. 6. ALTERATION OF PREMISES.

SUB-SECT. 7. PREMISES UNFIT FOR INTENDED USE.

SUB-SECT. 8. MERGER.

SUB-SECT. 9. DURATION AND TERMINATION OF SUSPENSION.

SUB-SECT. 10. OTHER CASES.

SECT. 7. RELEASE OF RENT.

SECT. 8. ACCEPTANCE OF RENT.

SECT. 9. APPORTIONMENT AND SEVERANCE OF RENT.

SUB-SECT. 1. AS BETWEEN PERSONS ENTITLED.

A. In General.

B. Between What Persons.

C. Under Apportionment Act, 1834.

D. Under Apportionment Act, 1870.

SUB-SECT. 2. AS BETWEEN LANDLORD AND TENANT

A. In General.

B. By Statute.

C. On Surrender of Demised Premises.

D. On Assignment or Sub-Letting.

E. In Bankruptcy and Winding Up.

F. On Eviction of Tenant.

SUB-SECT. 3. SEVERANCE OF RENT.

- A. In General.
- B. On Division of Reversion.
- C. House and Chattels let at Single Rent.
- D. Other Cases.

SECT. 10. RECOVERY OF RENT.

SUB-SECT. 1. DISTRESS.

SUB-SECT. 2. ACTION FOR RENT.

- A. When Action lies.
- B. When Demand necessary.
- C. Whether Entry by Tenant necessary.
- D. By Whom Maintainable.
  - (a) Successors to Reversion.
  - (b) Assignee of Rent.
  - (c) Co-Owners.
    - i. Joint Tenants.
    - ii. Tenants in Common and Coparceners.
  - (d) Other Cases.
- E. Against Whom Maintainable.
  - (a) Lessee after Assignment.
  - (b) Assignee of Lease.
  - (c) Guarantor.
  - (d) Personal Representatives.
  - (e) Other Cases.
- F. Defences.
  - (a) Payment.
  - (b) Eviction.
  - (c) Release.
  - (d) Covenant Invalid or Unenforceable.
  - (e) Bond for Recovery of Debt.
  - (f) Other Defences.
- G. What may be Recovered.
- H. Counterclaim.
- I. Pleading.
- J. Practice.

SUB-SECT. 3. ACTION FOR USE AND OCCUPATION.

- A. Conditions Precedent to Action.
- B. Entry and Occupation.
  - (a) In General.
  - (b) What amounts to Occupation.
    - i. Occupation by Under-Tenant.
    - ii. Occupation by Co-Tenant.
    - iii. Other Cases.
- C. Relation of Landlord and Tenant.
  - (a) In General.
  - (b) When Relationship inferred.
  - (c) Tenant Holding over.
  - (d) Occupation by Substituted Tenant.
  - (e) Occupation in Anticipation of Lease.
  - (f) Effect of Express Demise.
  - (g) Purchaser allowed into Possession. *See SALE OF LAND*
- D. By Whom Maintainable.
  - (a) Necessity for Legal Estate.
  - (b) Other Cases.
- E. Occupation of Incorporeal Hereditaments.
- F. What may be Recovered.
  - (a) Amount.
  - (b) In respect of What Period.
  - (c) Rent in Advance.
- G. Defences.
  - (a) Eviction.
  - (b) Premises Unfit for Occupation.
  - (c) Other Defences.



H. Pleading.

I. Set-Off.

J. Practice.

K. Costs.

SUB-SECT. 4. RIGHT AFTER EXECUTION AGAINST TENANT.

SUB-SECT. 5. BY SET-OFF AND COUNTERCLAIM.

SUB-SECT. 6. LOSS OF RIGHT BY LAPSE OF TIME.

SECT. 11. CONFLICTING CLAIM TO RENT.

## PART XVI. RATES AND TAXES.

SECT. 1. LIABILITY IN ABSENCE OF AGREEMENT.

SUB-SECT. 1. RATES.

SUB-SECT. 2. TAXES.

A. Income Tax.

(a) Right to Deduct.

i. When Right Arises.

ii. How Exercised.

iii. How Lost.

(b) Amount Deducted.

(c) From What Deducted.

i. Rent.

ii. Payments Other than Rent.

(d) Proof of Payment.

B. Land Tax.

SECT. 2. COVENANTS FOR PAYMENT.

SUB-SECT. 1. GENERAL COVENANTS.

SUB-SECT. 2. ASSESSMENT INCREASED BY IMPROVEMENTS TO PREMISES.

SUB-SECT. 3. RATES.

SUB-SECT. 4. TAXES.

A. In General.

B. Income Tax.

C. Land Tax.

SUB-SECT. 5. TITHES.

SECT. 3. RECOVERY OF PAYMENT.

SUB-SECT. 1. BY TENANT.

SUB-SECT. 2. BY LANDLORD.

## PART XVII. ASSESSMENTS, CHARGES, OUTGOINGS, Etc.

SECT. 1. INTERPRETATION OF TERMS.

SUB-SECT. 1. ASSESSMENTS.

SUB-SECT. 2. CHARGES.

SUB-SECT. 3. DUTIES.

SUB-SECT. 4. IMPOSITIONS.

SUB-SECT. 5. OUTGOINGS.

SECT. 2. LIABILITY FOR PAYMENT.

SUB-SECT. 1. IN GENERAL.

SUB-SECT. 2. EXPENSES UNDER PARTICULAR STATUTES.

A. Metropolitan Management Acts.

B. Public Health Acts.

C. Factory and Workshop Acts.

D. Local Acts.

SUB-SECT. 3. LICENCE DUTIES.

## PART XVIII. REPAIRS.

SECT. 1. COVENANT TO REPAIR—RUNS WITH THE LAND AND WITH THE REVERSION.

SECT. 2. LIABILITY OF LANDLORD TO REPAIR.

SUB-SECT. 1. APART FROM COVENANT.

A. In General.

B. Under Statute.

SUB-SECT. 2. UNDER COVENANT.

- A. Nature of Covenant.
- B. Construction of Covenant.
- C. Notice to Repair.
- D. Breach of Covenant.
  - (a) In General.
  - (b) Measure of Damages.

SUB-SECT. 3. FULFILMENT OF CONDITIONS PRECEDENT TO LIABILITY OF TENANT.

SECT. 3. LIABILITY OF TENANT TO REPAIR.

SUB-SECT. 1. APART FROM COVENANT.

SUB-SECT. 2. UNDER COVENANT.

- A. In General.
- B. Commencement and Duration of Liability.
  - (a) In General.
  - (b) Fulfilment by Lessor of Conditions Precedent.
    - i. Lessor to Put Premises in Repair.
    - ii. Lessor to Provide Materials.
    - iii. Appointment of Surveyor of Repairs by Tenant.
  - (c) Covenant to Repair after Notice.
- C. What Property Included.
  - (a) In General.
  - (b) Buildings Erected Subsequent to Demise.
- D. Nature and Amount of Repair.
  - (a) Under General Covenant to Repair.
    - i. In General.
    - ii. Condition of Premises at Time of Demise.
    - iii. Age of Premises.
    - iv. Character and Locality of Premises.
    - v. Inherent Defect in Premises.
    - vi. Painting and Decorative Repair.
    - vii. Rebuilding.
    - viii. Repairs Amounting to Improvements.
    - ix. Exception of Wear and Tear.
  - (b) Under Particular Covenants.
    - i. To Leave Premises in Specified Condition.
    - ii. To Put in Repair.
    - iii. To Keep in Repair.
    - iv. To Rebuild.
- E. What Amounts to Breach.
- F. Remedies for Breach.
  - (a) By and Against Whom Enforceable.
    - i. By Whom.
    - ii. Against Whom.
  - (b) Forfeiture.
  - (c) Injunction.
  - (d) Specific Performance.
  - (e) Action for Damages.
    - i. In General.
    - ii. Defences.
    - iii. Practice and Procedure.
  - (f) Measure of Damages.
    - i. During Term.
    - ii. After Determination of Term.
    - iii. Action by Heir or Assignee of Reversion.
  - (g) Refusal to Renew.
- G. Excuses for Non-Performance.

SECT. 4. LANDLORD'S RIGHT OF ENTRY TO VIEW AND REPAIR.

## SECT. 5. LIABILITY FOR INJURIES DUE TO WANT OF REPAIR.

## SUB-SECT. 1. WANT OF REPAIR AMOUNTING TO PUBLIC NUISANCE.

## A. Liability of Tenant.

## B. Shifting of Liability to Landlord.

(a) Landlord under Covenant to Repair.

(b) Defect Existing When Premises Let or Re-Let.

(c) Knowledge of, or Notice to Landlord.

## C. Nuisance in respect of Public Health.

## SUB-SECT. 2. WANT OF REPAIR NOT AMOUNTING TO PUBLIC NUISANCE

## A. Landlord's Liability.

(a) No Covenant by Landlord to Repair.

(b) Express or Implied Covenant by Landlord to Repair.

(c) Common Staircase.

## B. Tenant's Liability.

## SECT. 6. BOUNDARIES, FENCES AND PARTY WALLS.

## SUB-SECT. 1. BOUNDARIES.

## SUB-SECT. 2. FENCES.

## SUB-SECT. 3. PARTY WALLS.

## SECT. 7. TENANT'S RIGHT TO TIMBER FOR REPAIRS.

## PART XIX. WASTE.

## SECT. 1. IN GENERAL.

## SECT. 2. WHAT IS WASTE.

## SUB-SECT. 1. VOLUNTARY WASTE.

## A. In General.

## B. Meliorating Waste.

## C. In Respect of Particular Properties.

(a) Agricultural Tenancies.

(b) Buildings.

(c) Ecclesiastical Property.

(d) Fixtures.

(e) Mines.

(f) Soil.

(g) Trees and Timber.

(h) Other Cases.

## SUB-SECT. 2. PERMISSIVE WASTE.

## SECT. 3. WHO IS LIABLE.

## SUB-SECT. 1. TENANT AT WILL.

## SUB-SECT. 2. TENANT AT SUFFERANCE.

## SUB-SECT. 3. TENANT FROM YEAR TO YEAR.

## SUB-SECT. 4. LESSEE FOR YEARS.

## A. In General.

## B. Duration of Liability.

## SUB-SECT. 5. OTHER PERSONS.

## SECT. 4. REMEDIES FOR WASTE.

## SUB-SECT. 1. INJUNCTION.

## SUB-SECT. 2. ACTION FOR DAMAGES IN NATURE OF ACTION FOR WASTE.

## A. In General.

## B. Damages.

## SUB-SECT. 3. ACTION FOR TRESPASS OR TROVER.

## SUB-SECT. 4. OTHER REMEDIES.

## PART XX. INSURANCE AND DAMAGE BY FIRE.

## SECT. 1. COVENANT TO INSURE.

## SUB-SECT. 1. NATURE OF COVENANT.

## SUB-SECT. 2. CONSTRUCTION OF COVENANT.

## SUB-SECT. 3. BREACH OF COVENANT.

## A. What amounts to Breach.

(a) Stipulations as to Office.

(b) Stipulations as to Names.

(c) Premises Uninsured or Underinsured.

- B. Evidence of Breach.
- C. Remedies for Breach.

- (a) Forfeiture.
  - i. Who may Claim.
  - ii. Waiver.
  - iii. Relief.
- (b) Damages.

SUB-SECT. 4. PAYMENT OR APPLICATION OF INSURANCE MONEY.

SECT. 2. DAMAGE BY FIRE.

SUB-SECT. 1. LIABILITY OF TENANT.

- A. In General.
- B. Under Covenant to Repair.
- C. Effect on Rent.

SUB-SECT. 2. LIABILITY OF LANDLORD.

PART XXI. ASSIGNMENT AND DEVOLUTION OF LEASES.

SECT. 1. RIGHT TO ASSIGN OR UNDERLET.

SUB-SECT. 1. IN GENERAL.

SUB-SECT. 2. RESTRICTION ON RIGHT.

- A. In General.
- B. What amounts to Breach.
  - (a) Of Covenant against Assignment.
    - i. In General.
    - ii. Equitable Assignment.
    - iii. Assignment of Part of Premises.
    - iv. Underlease.
    - v. Assignment on Dissolution of Partnership.
  - (b) Of Covenant not to Part with Possession.
  - (c) Of Covenant against Underletting.
  - (d) Of Covenant against Assignment or Underletting without Licence.
- C. Remedies for Breach.
  - (a) Re-Entry for Forfeiture.
  - (b) Damages.
  - (c) Injunction.
- D. Assignment subject to Landlord's Consent.
  - (a) Construction of Restriction.
    - i. In General.
    - ii. On Whom binding.
    - iii. "Respectable and Responsible Person."
    - iv. Unreasonable Withholding.
  - (b) Consent Conditional upon Payment of Fine.
  - (c) Application for Licence.
  - (d) Form of Licence.
  - (e) Costs of Licence.
  - (f) Effect of Unreasonable Withholding.
    - i. Right to Assign.
    - ii. Right to Declaratory Order.
    - iii. Whether Grant of Licence Enforceable.
    - iv. Where Lessor Expressly Covenants.
  - (g) Effect of Withholding on Agreements to Assign.
- E. Effect of Death of Lessee.
  - (a) Disposition by Will.
  - (b) Lease passing to Personal Representatives.
  - (c) Assignment by Personal Representatives.
- F. Assignment by Operation of Law.
  - (a) In General.
  - (b) Compulsory Purchase.
  - (c) Bankruptcy of Lessee.
  - (d) Winding Up of Tenant Company.
  - (e) Execution against Lessee.
  - (f) Death of Lessee.

- G. Application of Restriction.
- H. Restriction limited to Particular Persons.
- I. Effect of Assignment in Breach of Covenant.

## SECT. 2. MODE OF ASSIGNMENT.

### SUB-SECT. 1. REQUISITES OF VALID ASSIGNMENT.

- A. Statute of Frauds.
  - (a) What Contracts within Statute.
  - (b) Requirements as to Memorandum or Note.
  - (c) Operation of Statute.
- B. Necessity for Deed.

### SUB-SECT. 2. WHAT OPERATES AS ASSIGNMENT.

- A. In General.
- B. Underlease for Whole Term.
- C. Assignment in Execution.
- D. Assignment from Death of Assignor.
- E. Assignment of Personal Property.
- F. Other Cases.

## SECT. 3. WHAT PASSES ON ASSIGNMENT.

## SECT. 4. COVENANTS RUNNING WITH LAND.

## SECT. 5. AGREEMENTS TO ASSIGN.

## SECT. 6. PROOF AND INVESTIGATION OF TITLE. *See SALE OF LAND.*

## SECT. 7. REGISTRATION OF TITLE. *See SALE OF LAND.*

## SECT. 8. REGISTRATION OF DEED IN MIDDLESEX AND YORKSHIRE. *See SALE OF LAND*

## SECT. 9. STAMPS.

## SECT. 10. LIABILITIES OF LESSEE AND ASSIGNEE.

### SUB-SECT. 1. LIABILITIES OF LESSEE TO LESSOR.

- A. In General.
- B. Liability for Rent.
- C. Liability on Covenant to Repair.
- D. Liability when Assignee accepted as Tenant.

### SUB-SECT. 2. LIABILITIES OF LESSEE TO THIRD PARTIES.

### SUB-SECT. 3. LIABILITIES OF ASSIGNEE TO LESSOR.

- A. Who are liable as Assignees.
  - (a) In General.
  - (b) Assignee of Whole Term.
  - (c) Assignee of Part of Premises.
  - (d) Co-Owners.
  - (e) Under-Lessee.
  - (f) Equitable Assignee.
  - (g) Assignee by Estoppel.
  - (h) Assignee before Entry.
  - (i) Trustee.
  - (j) Cestui que trust.
  - (k) Mortgagee.
  - (l) Trustee in Bankruptcy.
  - (m) Personal Representative.
  - (n) Other Cases.
- B. Extent of Liability.
  - (a) In Covenant.
  - (b) For Rent Reserved.
  - (c) For Breach before Assignment.
  - (d) For Breach after Assignment.
    - i. In General.
    - ii. Assignment to Escape Liability.

### SUB-SECT. 4. ASSIGNOR'S RIGHT OF INDEMNITY AGAINST ASSIGNEE.

- A. Apart from Covenant.
  - (a) In General.
  - (b) By and against Whom Enforceable.
    - i. By Whom.
    - ii. Against Whom.
  - (c) Extent of Liability.

**B. Under Express Covenant.**

- (a) In General.
- (b) Construction of Covenant.
- (c) Right to Require Covenant.
- (d) By and against Whom Enforceable.
  - i. By Whom.
  - ii. Against Whom.
- (e) What may be Recovered.

**SUB-SECT. 5. LIABILITY OF LESSEE TO ASSIGNEE.**

- A. Covenants for Title.
- B. Payment of Rent up to Assignment.
- C. Other Cases.

**SECT. 11. ON DEATH OF TENANT.**

**SUB-SECT. 1. RIGHTS OR LIABILITIES OF PERSONAL REPRESENTATIVE.**

**SUB-SECT. 2. WHEN DECEASED ENTITLED CONCURRENTLY WITH OTHER TENANTS.**

**SECT. 12. BANKRUPTCY OR INSOLVENCY OF TENANT.**

**SECT. 13. WINDING UP OF LESSEE COMPANY.**

**PART XXII. ASSIGNMENT AND DEVOLUTION OF REVERSION.**

**SECT. 1. WHAT OPERATES AS ASSIGNMENT.**

**SECT. 2. WHO ARE ASSIGNEES.**

**SECT. 3. RIGHTS AND LIABILITIES OF SUCCESSORS.**

**SUB-SECT. 1. IN GENERAL.**

**SUB-SECT. 2. RIGHTS.**

- A. Rent.
- B. Benefit of Covenants and Conditions.
  - (a) In General.
  - (b) Necessity for Notice.
  - (c) Breach before Assignment.
  - (d) Enforcement by Personal Representatives.
  - (e) Pleading Assignee's Title.
- C. Severance of Reversion.
  - (a) Severance of Estate.
  - (b) Severance of Premises.
    - i. Enforcement of Covenant.
    - ii. Apportionment of Condition.

**SUB-SECT. 3. LIABILITIES.**

- A. In General.
- B. Notice of Lease.

**SECT. 4. RIGHTS AND LIABILITIES OF LESSOR AFTER ASSIGNMENT.**

**SUB-SECT. 1. RIGHTS.**

**SUB-SECT. 2. LIABILITIES.**

**PART XXIII. NOTICE TO QUIT.**

**SECT. 1. NECESSITY FOR.**

**SUB-SECT. 1. YEARLY TENANCY.**

**SUB-SECT. 2. TENANCIES AT WILL AND AT SUFFERANCE.**

**SUB-SECT. 3. TENANCY FOR A TERM CERTAIN.**

**SUB-SECT. 4. WEEKLY AND OTHER PERIODIC TENANCIES.**

**SECT. 2. LENGTH OF NOTICE—HOW REGULATED.**

**SUB-SECT. 1. BY TERMS OF TENANCY.**

**SUB-SECT. 2. BY CUSTOM.**

**SUB-SECT. 3. BY COMMON LAW.**

- A. Yearly Tenancies.
- B. Licences.
- C. Tenancy at Will.
- D. Weekly and Other Periodic Tenancies.

**SUB-SECT. 4. BY STATUTE.**

**SECT. 3. TIME FOR GIVING NOTICE.**



## SECT. 4. DATE OF EXPIRATION OF NOTICE.

SUB-SECT. 1. IN GENERAL.

SUB-SECT. 2. TENANCY COMMENCING ON FEAST-DAY.

SUB-SECT. 3. ASCERTAINMENT OF DATE OF COMMENCEMENT OF TENANCY.

A. In General.

B. Date Stated in Agreement.

C. Tenant Entering between Quarter Days.

D. Entry on Different Parts of Premises at Different Times.

E. Date for Quitting in Notice.

F. Tenant Holding Over.

SUB-SECT. 4. TIME FOR OBJECTION TO INSUFFICIENT NOTICE.

## SECT. 5. FORM AND CONSTRUCTION OF NOTICE.

SUB-SECT. 1. FORM OF NOTICE.

A. In General.

B. Necessity for Statement of Date of Expiration.

C. Necessity for Writing.

D. Notice to Quit on Contingency.

E. Notice as to Part of Premises.

F. Other Cases.

SUB-SECT. 2. CONSTRUCTION OF INCORRECT NOTICE.

## SECT. 6. WHO MAY GIVE NOTICE OR TO WHOM NOTICE MAY BE GIVEN.

SUB-SECT. 1. WHO MAY GIVE NOTICE.

A. In General.

B. Agents.

C. Receivers.

D. Co-Owners.

SUB-SECT. 2. TO WHOM NOTICE MAY BE GIVEN.

## SECT. 7. SERVICE OF NOTICE.

SUB-SECT. 1. IN GENERAL.

SUB-SECT. 2. HOW EFFECTED.

A. On Agent of Tenant.

(a) In General.

(b) Sufficiency of Service.

B. At Tenant's House.

C. Other Cases.

SUB-SECT. 3. TIME OF SERVICE.

SUB-SECT. 4. PROOF OF SERVICE.

## SECT. 8. WAIVER OF NOTICE.

SUB-SECT. 1. IN GENERAL.

SUB-SECT. 2. CONSENT OF PARTIES.

SUB-SECT. 3. WHAT AMOUNTS TO WAIVER.

A. In General.

B. Demand of Rent.

C. Distress.

D. Acceptance of Rent.

E. Second Notice.

F. Other Cases.

SUB-SECT. 4. EFFECT OF WAIVER.

## SECT. 9. EFFECT OF NOTICE.

## SECT. 10. PROOF OF NOTICE.

## SECT. 11. DISPENSING WITH NOTICE.

## PART XXIV. DETERMINATION OF TERM.

## SECT. 1. FORFEITURE.

SUB-SECT. 1. CONSTRUCTION OF FORFEITURE CLAUSES.

SUB-SECT. 2. RIGHT OF RE-ENTRY.

A. When Right Arises.

(a) In General.

(b) Breach of Condition on Which Term Granted.

i. In General.

ii. Non-Payment of Rent.

iii. No Sufficient Distress on Premises.

- (c) Breach of Negative Covenants.
- (d) Disclaimer of Title.
  - i. What Amounts to Disclaimer.
  - ii. From What Time Operative.
  - iii. Effect of Disclaimer—Notice to Quit.
- (e) On Bankruptcy.
- (f) On Winding Up.
- (g) On Execution.

B. Duration of Right.

C. Exercise of Right.

D. Waiver of Right.

SUB-SECT. 3. AVOIDANCE AT OPTION OF LESSOR.

SUB-SECT. 4. ENFORCEMENT.

A. By Whom Enforceable.

B. Re-Entry.

- (a) Necessity for.
- (b) What Amounts to.
  - i. In General.
  - ii. Actions for Recovery of Possession.
- (c) Effect of.

C. Breach of Covenant for Payment of Rent.

- (a) Demand for Payment.
  - i. Necessity for.
  - ii. Time of.
  - iii. Place of.
  - iv. From Whom Demanded.
  - v. Amount of.
- (b) Dispensing with Formal Demand.
  - i. By Agreement.
  - ii. By Statute.
- (c) Relief against Forfeiture.
  - i. Right to Relief.
  - ii. How Relief Claimed.
  - iii. Costs.
- (d) Rights of Underlessees.

D. Breaches of Covenant Other than for Payment of Rent.

- (a) Notice of Breach.
  - i. Necessity for.
  - ii. Form and Contents of.
  - iii. Length of.
  - iv. Service of.
- (b) Relief against Forfeiture.
  - i. Discretion of Court.
  - ii. In What Cases.
  - iii. Who may Claim Relief.
  - iv. Time for Claiming.
  - v. How Claimed.
  - vi. Terms of Relief.
  - vii. Effect of Relief.
- (c) Terms of Relief.
  - i. In General.
  - ii. Remedy for Past Breaches.
  - iii. Compensation.
  - iv. Costs.
- (d) Forfeiture on Assignment or Underletting.
- (e) Forfeiture on Bankruptcy.
- (f) Forfeiture on Taking into Execution Lessee's Interest.
- (g) Rights and Liabilities of Underlessees.

E. Rights and Liabilities of Underlessees.

- (a) Breach of Covenant for Payment of Rent.
  - i. In General.
  - ii. Terms of Relief.

- (b) Breaches of Covenant Other than for Payment of Rent.
  - i. In General.
  - ii. Terms of Relief.
  - iii. Forfeiture on Assignment and Underletting.

## SUB-SECT. 5. WAIVER OF FORFEITURE.

## A. What Amounts to Waiver.

- (a) In General.
- (b) Acceptance of Rent.
  - i. Due after Cause of Forfeiture.
  - ii. Due before Cause of Forfeiture.
  - iii. Where Cause of Forfeiture Continuing.
  - iv. Acceptance without Prejudice to Forfeiture.
- (c) Demand for Rent.
- (d) Distress for Rent.
- (e) Agreement for New Lease.
- (f) Tenant Encouraged to Spend Money.

## B. Extent of Waiver.

## C. Effect of Prior Election to Forfeit.

## D. Breach of Proviso Conditioning Term.

## SECT. 2. SURRENDER.

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A. In General.

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- (c) Landlord Contracting to Sell, etc. on Tenant Giving Notice to Quit.
- (d) Occupation Required by Landlord or his Family, etc.
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- (g) Assignment or Sub-Letting of Premises.
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B. Jurisdiction of Courts.

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<i>Aliens</i>	„ ALIENS.	<i>Injunction</i>	„ INJUNCTION.
<i>Allotments</i>	„ SMALL HOLDINGS.	<i>Land Values</i>	„ REVENUE.
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<i>Deeds</i>	„ DEEDS.	<i>Registration of Title</i>	„ SALE OF LAND.
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<i>Disclaimer</i>	„ BANKRUPTCY.	<i>Settled Land</i>	„ SETTLEMENTS.
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<i>Drainage</i>	„ AGRICULTURE; LAND IMPROVE- MENT; SEWERS AND DRAINS.	<i>Solicitors' Remuneration</i>	„ SOLICITORS.
<i>Easements</i>	„ EASEMENTS.	<i>Sporting Rights</i>	„ GAME.
<i>Ecclesiastical Corpora- tions</i>	„ ECCLESIASTICAL LAW.	<i>Summary Jurisdiction, Courts of</i>	„ MAGISTRATES.
<i>Ecclesiastical Lease</i>	„ ECCLESIASTICAL LAW.	<i>Title, Investigation of</i>	„ SALE OF LAND.
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<i>Fisheries</i>	„ FISHERIES.		



## Part I.—Relation of Landlord and Tenant.

### SECT. 1.—IN GENERAL.

**1. Meaning of "landlord" — Foundation in contract.]**—(1) Copyhold lands were devised to pltf. in trust for F. for life, but pltf. were never admitted to the copyhold. At the time of the death of testator the lands were in the possession of deft., to whom F., with the assent of one of pltf.s, afterwards re-let them in her own name. Pltf.s then gave notice to deft. to pay the rent to them:—*Held*: an action for use & occupation would not lie by pltf.s. against deft., because no contract could be implied between them, there having been an existing contract between deft. & F., & the occupation having been by permission of F.

(2) The word "landlord" does not mean the lord of the soil, but the person between whom & the tenant the relation of landlord & tenant exists (*BRAMWELL, B.*).—*CHURCHWARD v. FORD* (1857), 2 H. & N. 446; 26 L. J. Ex. 354; 5 W. R. 831; 157 E. R. 184.

*Annotations*:—*As to* (1) *Apld.* *Sloper v. Saunders* (1860), 29 L. J. Ex. 275. *Reid.* *Phillips v. Homfray* (1883), 24 Ch. D. 439; *A. G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. *Generally.* *Mentd.* *Howe v. Scarrott, Sharp v. Scarrott* (1859), 4 H. & N. 723.

**2. Evidence of relationship—Memorandum on margin of lease.]**—*COWNE v. GARMENT*, No. 1243, *post*.

**3. — Sufficiency of parol evidence.]**—(1) Where a witness stated that he let a house as agent to his father, who was present, & that the terms were reduced to writing, to prevent the possibility of mistake, & signed by the wife of the tenant, on purpose to bind her husband, the husband himself not being present, but that the entry was not signed by the witness nor his father, nor did his father's name appear at any part:—*Held*: this was neither a lease nor an agreement, but a mere memorandum, to which witness might refer to refresh his memory.

(2) Upon the witness saying that he had no memory of those things, but from the book, without which, from his own knowledge, he should not have been able to speak to the fact, but, on reading the entry, he had no doubt that the fact really happened:—*Held*: sufficient parol evidence of the demise.—*R. v. St. MARTIN'S, LEICESTER (INHABITANTS)* (1834), 2 Ad. & El. 210; 4 Nev. & M. K. B. 202; 2 Nev. & M. M. C. 472; 4 L. J. M. C. 25; 111 E. R. 81.

*Annotation*:—*As to* (1) *Reid.* *Hill v. Barry* (1842), 7 Jur. 10.

**4. — Necessity for production of written agreement.]**—First count, in case, for injuring pltf.'s reversion in land, by cutting & carrying away branches from trees growing on it. Second count, in trover, for the branches. Proof,

that pltf. demised the land to a tenant by a written agreement, not produced; & that deft. carried away some branches, the value of which was not shown:—*Held*: pltf. could not support the first count without producing the written agreement; but, on the second count, he was entitled to nominal damages.—*COTTERILL v. HOBBY* (1825), 4 B. & C. 465; 6 Dow. & Ry. K. B. 551; 3 L. J. O. S. K. B. 276; 107 E. R. 1133.

*Annotation*:—*Consd.* *Strother v. Barr* (1828), 5 Bing. 138.

**5. — — — — —.]**—Pltf. proved by parol that he was in possession of the close at the time of the trespass, July 16, under a written agreement from W., which was not produced. Deft. produced a lease of the same close from W., made & taking effect upon July 16:—*Held*: in order to entitle pltf. to more than nominal damages, he was bound to show the duration of his interest, which he could only do by the written instrument.—*TWYMAN v. KNOWLES* (1853), 13 C. B. 222; 22 L. J. C. P. 143; 17 Jur. 238; 138 E. R. 1183; *sub nom.* *INGRAM v. KNOWLES*, 20 L. T. O. S. 208.

*Annotation*:—*Consd.* *Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co.* (1887), 36 Ch. D. 113.

**6. — — — — —.]**—Parol evidence of the fact of tenancy is admissible, although the tenant hold under a written agreement. Evidence of occupation & payment of rent is sufficient evidence of tenancy.—*JENKINS v. HILL* (1854), 22 L. T. O. S. 274; 2 W. R. 268.

*— — — — —.]*—*See, further, EVIDENCE*, Vol. XXII., pp. 207, 208, 210, Nos. 1812–1819, 1831–1835.

**7. — Acknowledgment by wife.]**—*R. v. St. MARTIN'S, LEICESTER (INHABITANTS)*, No. 3, *ante*.

**8. — Without authority.]**—An acknowledgment of tenancy signed by a married woman:—*Held*: in the circumstances inadmissible on an issue on *non tenuit* in an action of replevin brought by the husband, there being no evidence of any authority in her to sign the paper.—*WALKER v. HARDCASTLE* (1845), 6 L. T. O. S. 98.

**9. — Occupation & payment of rent.]**—*JENKINS v. HILL*, No. 6, *ante*.

**10. Relationship legal not equitable.]**—The relation between landlord & tenant is legal & not equitable.—*COX v. BISHOP* (1857), 8 De G. M. & G. 815; 26 L. J. Ch. 389; 28 L. T. O. S. 301; 3 Jur. N. S. 499; 5 W. R. 437; 44 E. R. 604, L. J.

*Annotations*:—*Consd.* *Ramage v. Womack*, [1900] 1 Q. B. 116. *Reid.* *Torrington v. Lowe* (1868), L. R. 4 C. P. 26; *Wright v. Pitt* (1870), L. R. 12 Eq. 408; *Haywood v. Brunswick Bldg. Soc.* (1881), 8 Q. B. D. 403; *Frinary Holroyd & Healey's Breweries v. Singleton*, [1889] 1 Ch. 86; *Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391. *Mentd.* *Hand v. Blow*, [1901] 2 Ch. 721.

### PART I. SECT. 1.

**a. Evidence of relationship—Occupation & payment of rent.]**—Where a lessee paid no rent but agreed to pay all civil taxes & he & his assignee paid such taxes:—*Held*: such payments amounted to payment of rent, & deft. was a tenant of pltf.s.—*SULLIVAN v. SWEENEY* (1908), 4 E. L. R. 492.—*CAN.*

**b. — — — — —.]**—The recognition by the owner of lands of the interest of parties in possession by the receipt of rent from them constitutes a tenancy.—*SONET KOORER v. HIMMUT BAHADOO* (1876), 1 L. R. 1 Calc. 391; 25 W. R. 239; L. R. 3 Ind. App. 92.—*IND.*

**c. — — — — —.]**—*SWAN v. BRADLEY* (1852), 5 Ir. Jur. 67.—*IR.*

**d. — Agreement to work on shares.]**—Where under an agreement M. demised lands to F., & F. agreed to work the land & to pay to M. half the proceeds of the sale of all produce grown on the land:—*Held*: a tenancy was created.—*Ex p. FOSTER* (1903), 3 S. R. N. S. W. 645; 20 N. S. W. N. 228.—*AUS.*

**e. — — — — —.]**—A. was in possession of a close to work it for B. on shares:—*Held*: the agreement did not conclusively establish the relation of landlord & tenant.—*DACKSTEDER v. BAIRD* (1849), 5 U. C. R. 591.—*CAN.*

**f. — — — — —.]**—*OBERLIN v. MCGREGOR* (1876), 26 C. P. 460.—*CAN.*

**g. — — — — —.]**—*BAYNE v. LOVE* (1909), 7 C. L. R. 748.—*AUS.*

**h. — — — — —.]**—*RICE v. GEORGE* (1873), 20 Gr. 221.—*CAN.*

**i. — — — — —.]**—*ABBOTT v. DAHLE*, [1917] 1 W. W. R. 1393; 33 D. L. R. 207; 10 Alta. L. R. 460.—*CAN.*

**j. — — — — —.]**—*GIRDHAR MANORDAS v. DAYABHAI KALABHAI* (1882), 1 L. R. 8 Bom. 174.—*IND.*

**m. — — — — —.]**—The occupant of a house or other subject belonging to another is presumed to occupy as

**11. Alteration of relationship — By tenant's own act.**—*ARCHBOLD v. SCULLY*, No. 230, *post*.

**12. Whether existing between tenants in common.**—Mere occupation by one of several tenants in common of an estate, if unaccompanied by exclusion, does not make him liable for rent to his co-tenants.—*M'MAHON v. BURCHELL* (1846), 2 Ph. 127; 1 Coop. temp. Cott. 457; 8 L. T. O. S. 289; 41 E. R. 889.

*Annotations* :—*Consd. Henderson v. Eason* (1851), 17 Q. B. 701; *Kennedy v. De Trafford*, [1897] A. C. 180. *Mentd.* *Irvine v. Kirkpatrick* (1850), 16 L. T. O. S. 529; *Lee v. Egremont*, *Egremont v. Lee* (1852), 5 De G. & Sm. 348.

**13. —**—Although the ct. has jurisdiction, after a decree in a partition suit, to grant an injunction restraining a tenant in common in possession from committing destructive waste, it will not interfere to restrain a tenant in common in possession merely from farming contrary to the custom of the country as between landlord & tenant, that relation not existing between him & the other tenants in common.—*BAILEY v. HOBSON* (1869), 5 Ch. App. 180; 39 L. J. Ch. 270; 22 L. T. 594; 18 W. R. 124, L. J.

Capacity of co-owners to grant & take leases, *see* Part III., Sect. 1, sub-sect. 4, *post*.

Action for rent by co-owners, *see* Part XV., Sect. 10, sub-sect. 2, D. (c), *post*.

**14. Nature of tenancy — More than a contract.**—It is not correct to speak of their tenancy agreement as a contract & nothing more. A term of years was created by it & vested in applt. (*LUSH, J.*).—*LONDON & NORTHERN ESTATES CO. v. SCHLESINGER*, [1916] 1 K. B. 20; 85 L. J. K. B. 369; 114 L. T. 74; 32 T. L. R. 78; 60 Sol. Jo. 223.

*Annotations* :—*Appld.* *Whitehall Court v. Ettlinger*, [1920] 1 K. B. 680. *Refd.* *Matthey v. Curling*, [1922] 2 A. C. 180. *Mentd.* *Halsey v. Lowenfeld*, [1916] 1 K. B. 143; *Tingley v. Müller*, [1917] 2 Ch. 144.

**15. —**—The agreements contained in the leases are not only contracts, they also create an estate by demise for a term of years (*LORD READING, C.J.*).—*WHITEHALL COURT, LTD. v. ETTLINGER*, [1920] 1 K. B. 680; 89 L. J. K. B. 126; 122 L. T. 540; 36 T. L. R. 80; 64 Sol. Jo. 147.

*Annotation* :—*Refd.* *Matthey v. Curling*, [1922] 2 A. C. 180.

## SECT. 2.—HOW CREATED OR ARISING.

### SUB-SECT. 1.—BY CONTRACT.

**Agreements for leases.**—*See* Part II., *post*.

**Capacity of parties to make & take leases.**—*See* Part III., Sect. 1, *post*.

**Leases.**—*See* Part III., *post*.

**Under-leases.**—*See* Part IV., *post*.

**Licences.**—*See* Part VI., *post*.

**Particular tenancies.**—*See* Part VIII., Sects. 1-6, *post*.

**16. Intention of giving & taking possession — Sufficiency of words used.**—*MORGAN d. DOWDING v. BISSELL*, No. 298, *post*.

**17. —**—Any words which express the intent of giving possession for a certain time may, in construction of law, amount to a lease (*PARKE, J.*).—*DOE d. PRITCHARD v. DODD* (1833), 5 B. & Ad. 689; 2 Nev. & M. K. B. 838; 110 E. R. 945.

**18. Room hired for deposit of goods—Key kept by tenant.**—Where A. hired a room in the house of B. at 2s per week, for the purpose of depositing goods for safety, & kept the key of a padlock by which the room door was fastened, & the goods were stolen by one of B.'s family:—*Held*: B. could not be sued as bailee for the value of the goods stolen.

The relation of these parties was that of landlord & tenant (*per CUR.*).—*PEERS v. SAMPSON* (1824), 4 Dow. & Ry. K. B. 636; *sub nom.* *BEERS v. SAMPSON*, 2 L. J. O. S. K. B. 212.

**19. Kiln hired for burning clay—At payment for each burning.**—The pauper went into the service of B., & was to make & burn pots, to do which he was to have the use of the kiln, etc. B. was to keep the kiln & shods in repair, etc., & the pauper resided in a cottage which he rented of B. This agreement was put an end to, & a second agreement entered into, by which the pauper was to pay to B. £8 after each burning for the use of the kiln, etc. B. was to keep the kiln, etc., in repair, & the pauper was to dig the clay & to do as he liked with the ware:—*Held*: upon the construction of the second agreement the pauper must be considered as standing in the relation of tenant to B. of the potkiln, etc.; & being a tenement of the value of £10, gave a settlement.—*R. v. IKEN (INHABITANTS)* (1834), 2 Ad. & El. 147; 4 Nev. & M. K. B. 117; 2 Nev. & M. M. C. 420; 4 L. J. M. C. 27; 111 E. R. 57.

**20. Hire of trade implements—Deductions for trade charges.**—Pltf., a frame-work knitter, worked as a weaver of gloves for deft., in frames provided by deft., at an agreed gross price per dozen pairs. Deft. was a subcontractor, furnishing the work, by agreement, to a master manufacturer, who found machinery & materials. Deft. settled with pltf. weekly for the work done, deducting out of the gross price per dozen certain charges, which were according to the known custom of the trade: a frame rent per week, a payment per week for use of deft.'s premises to work in, standing room for the frame, deft.'s trouble & loss of time in procuring materials & conveying them to pltf., deft.'s responsibility to the master manufacturer under whom he contracted for the work, superintendence of the work, sorting the goods when made, & delivering them to the master manufacturer:—*Held*: there was not in this case any demise of a "tenement".—*CHAWNER v. CUMMINGS* (1846), 8 Q. B. 311; 15 L. J. Q. B. 101; 6 L. T. O. S. 364; 10 J. P. 229; 10 Jur. 454; 115 E. R. 893.

*Annotations* :—*Mentd.* *Ingram v. Barnes* (1857), 7 E. & B. 115; *Homer v. Taunton* (1860), 29 L. J. Ex. 318; *Archer v. James* (1862), 2 B. & S. 61; *Howlett v. Allen*, [1892] 2 Q. B. 662; *Abram Coal Co. v. Southern* (1903), 19 T. L. R. 679; *Williams v. North's Navigation Collieries* (1889), Ltd., [1906] A. C. 136.

**21. Building contract—Builder to find tenants for houses built—& pay rent till tenants found.**—Where a contract was made by pltf. & one H., that H., "should build certain houses on pltf.'s land, & procure tenants for the same at a given rate, & himself pay the rent till he so procured tenants, from the Michaelmas then next ensuing":—*Held*: under the contract, no tenancy was created between pltf. & H.—*TAYLOR v. JACKSON* (1846), 2 Car. & Kir. 22.

tenant, &, though no direct obligation to pay rent is proved, is bound to pay the annual value of the subjects to the proprietor.—*GLEN v. ROY* (1882), 10 R. (Cl. of Sess.) 239; 20 Sc. L. R. 165.—*SCOT.*

*n.*—*Telephone service.*—The contract for a telephone service between

the city & a subscriber is one of bailment, & the relationship between them is one of landlord & tenant.—*EDWARDS v. EDMONTON* (1915), 8 W. W. R. 441; 25 D. L. R. 825.—*CAN.*

### PART I SECT. 2, SUB-SECT. 1.

*a.* Offer to rent lime kiln.—*Entry*

*before acceptance*—*Ratification by owner.*—Deft. wrote to pltf. who was owner of a lime kiln, offering to rent the kiln from him, &, receiving no answer, entered upon the premises & burnt lime. Pltf. afterwards came upon the property & assented to deft. going into possession, & offered to

**Sect. 2.—How created or arising: Sub-sects. 1 & 2, A. & B.]**

**22. Tenement let for three months—At yearly rent—Payable monthly.]—**By agreement, dated Dec. 2, 1859, a cottage was let by A. to B. for three months from Dec. 25, 1859, at the yearly rent of £18, the first monthly payment to be made on Jan. 25, 1860; three months' notice from either party to the other to be a sufficient notice to quit. B. having occupied the cottage for eighteen months under this agreement:—**Held:** he gained a settlement by renting a tenement for one whole year, within 6 Geo. 4, c. 57, s. 2.—**WILLESDEN OVERSEERS v. PADDINGTON OVERSEERS** (1863), 3 B. & S. 593; 27 J. P. 324; 11 W. R. 425; 122 E. R. 223; *sub nom.* R. v. **WILLESDEN (CHURCHWARDENS & OVERSEERS)**, 32 L. J. M. C. 109; 9 Jur. N. S. 874; *sub nom.* **PADDINGTON (CHURCHWARDENS) v. WILLESDEN (CHURCHWARDENS)**, 1 New Rep. 435; 7 L. T. 784.

**Annotations:—***Consd.* **Hastings Union v. St. James, Clerkenwell** (1865), L. R. 1 Q. B. 38. *Refd.* R. v. **St. Giles Parish, Cripplegate** (1863), 3 New Rep. 153.

**23. Sale of premises—Admission by purchaser of tenancy—For purpose of securing due performance of agreement of sale.]—**Where, in a contract of sale, it was provided that the intended purchaser should be considered as a tenant to the vendor, at a rent equal to the amount of the interest on the purchase-money, with a power of distress:—**Held:** this was not a lease but a contract of sale.—**HOPE v. BOOTH** (1830), 1 B. & Ad. 498; 9 L. J. O. S. K. B. 21; 109 E. R. 872.

**Annotation:—***Mentd.* **Re Peters** (1845), 5 L. T. O. S. 222.

**24. ———.]—**An agreement for the sale of a public-house contained the following stipulation, " & inasmuch as it is intended that E., the purchaser, shall be let into immediate possession of the hereditaments hereby agreed to be sold, & for the purpose of securing the due performance of the several agreements herein contained, he, the said E., hereby admits himself to be a tenant from week to week to S., the vendor, of the hereditaments hereby agreed to be sold, at the weekly rent of £80, payable in advance":—**Held:** this created the relation of landlord & tenant between S. & E., & gave a right to distrain.—**YEMAN v. ELLISON** (1867), L. R. 2 C. P. 681; 36 L. J. C. P. 326; 17 L. T. 65.

**25. Room let with power — Rent subject to deductions.]—**A., the owner of some lace machines, hired a portion of a room in a factory, which was lighted, heated, & supplied with steam power by the lessor. The portion of the room was divided from the rest of the room by a partition, & A. kept the key of the door. A. paid a yearly rent which included the use of the portion of the room, the steam power & the lighting, & heating; but it was subject to deductions in case the steam power should be stopped for a certain time:—**Held:** the relation of landlord & tenant subsisted between A. & the lessor, so as to entitle the latter to distrain for rent.—**SELBY v. GREAVES** (1868), L. R. 3 C. P. 594; 37 L. J. C. P. 251; 19 L. T. 186; 16 W. R. 1127.

**Annotations:—***Consd.* **Marshall v. Schofield** (1882), 52 L. J. Q. B. 58; *Re Wilson, Ex p. Watkins* (1887), 57 L. T. 201. *Distd.* **Rendell v. Roman** (1893), 9 T. L. R. 192. *Consd.* **British Electric Traction Co. v. I. R. Comrs.**, [1902] 1 K. B. 441. *Mentd.* *Re Douglas, Ex p. Ryder* (1871), 6 Ch. App. 413.

**26. Sufficiency of consideration — Peppercorn rent.]—****BARKER v. KEETE** (1678), 1 Freem. K. B.

249; 1 Mod. Rep. 262; 2 Mod. Rep. 249; 89 E. R. 179; *sub nom.* **ANON.**, 2 Vent. 35.

**Annotations:—***Refd.* **Hadfield's Case** (1873), L. R. 8 C. P. 306. *Mentd.* *Re Hawkins, Ex p. Official Receiver*, [1892] 1 Q. B. 890.

**27. ——— Natural affection.] — HARRIS v. TREMENHEERE**, No. 1398, *post*.

**28. ——— Money consideration unnecessary — Acceptance of relationship of landlord & tenant.]—**A. agreed, in writing, to let to B. certain premises at a rent of £36, payable quarterly; & not to raise the rent or give B. notice to quit so long as he continued to pay the rent when due. A., who had only a leasehold interest to expire in 1881, had also agreed verbally with B. to let him remain in the premises for such term of years, not exceeding A.'s term therein, as B. might desire to continue tenant thereof. A railway co. contracted to purchase the interest of B. in the premises, which he described as "held for any term at tenant's option, but not beyond the term & interest of A., which term will expire in 1881." The co. disputed B.'s title to the interest described, & paid the purchase-money into ct.:—**Held:** the relation of landlord & tenant made B. a purchaser for valuable consideration to the extent of his lease; Stat. Frauds was no bar in equity to B.'s claim; B. was not a mere tenant from year to year, but had a right to retain possession as long as his landlord's interest existed & to enforce that right in equity; & he was entitled to the purchase-money.—*Re KING'S LEASEHOLD ESTATES, Ex p. EAST OF LONDON RY. CO.* (1873), L. R. 16 Eq. 521; 29 L. T. 288; 21 W. R. 881.

**Annotations:—***Consd.* **Kusel v. Watson** (1879), 11 Ch. D. 129; **Cheshire Lines Committee v. Lewis** (1880), 50 L. J. Q. B. 121. *Refd.* **Wood v. Beard** (1876), 2 Ex. D. 30.

## SUB-SECT. 2.—BY ATTORNMENT.

### A. In General.

See Law of Property Act, 1925 (c. 20), s. 151.

**29. Definition — Substitution of landlord by tenant.]—**A. demises by deed from A. to B. A sequestration issues out of Chancery against A. B. signs an unstamped paper, purporting that he attorns & becomes tenant to the sequestrators, to hold on such terms as may be afterwards agreed on:—**Held:** (1) the sequestrators could not maintain use & occupation against B. because an attornment infers a continuance of a subsisting tenancy, which there was by deed; (2) the sequestrators had no estate to which an attornment would apply; (3) the instrument, if it had any operation, would operate as a new demise, & could not be read without a stamp. A tenant who attorns to a party from whom he did not receive the possession, is not estopped from showing want of title in such party. An attornment only puts the party in the same situation as the original landlord, & gives him no better right. If the landlord is entitled to possession, the party to whom the attornment is made is entitled to possession. Sequestrators from the Ct. of Ch. take no estate. They receive money, to be applied as the ct. shall direct. Sequestrators are not entitled to take a surrender.

The attornment is the act of the tenant's putting one person in the place of another as his landlord. The tenant who has attorned continues to hold upon the same terms as he held of his former landlord (**HOLROYD, J.**).—**CORNISH v. SEARELL**

purchase the lime burnt from him at a fixed rate per barrel:—**Held:** the original contract was not terminated

premises was consummated by ptfr. coming upon the property & assenting to deft. dealing with it.—**MCLACHLAN**

**v. KENNEDY** (1889), 21 N. S. R. 271.—**CAN.**

(1828), 8 B. & C. 471; 1 Man. & Ry. K. B. 703; 6 L. J. O. S. K. B. 254; 108 E. R. 1118.

*Annotations:—As to (1) Rehd. Jolly v. Arbutnot (1859), 4 De G. & J. 224; Carlton v. Bowcock (1884), 51 L. T. 659. As to (3) Consd. Doe v. Linsey v. Edwards (1836), 5 Ad. & El. 95. Rehd. Doe v. Boulter (1837), 1 Nev. & F. K. B. 650; Doe v. Wright v. Smith (1838), 3 Ad. & El. 255; Morton v. Woods (1869), L. R. 4 Q. B. 293.*

**30. Necessity for attornment—Before condition enforceable—By assignee of reversion—No attornment to intermediate assignee.]—MALLORY'S CASE, No. 31, *post*.**

**31. — Prior to levy for distress — By lord by escheat—Death of grantee before attornment & without heir.]—(1) A reservation in a lease for years, of rent during the term to one or his successors, is good; & the rent shall continue during the whole term.**

**(2) The grantee or assignee by fine shall not take advantage of a condition without attornment, notwithstanding the stat. 32 Hen. 8, c. 34.**

**(3) Though the grantee, or assignee by fine, had no attornment, yet his grantee having attornment may take advantage of a condition.**

**(4) An attornment in law shall not place the feoffee in a better situation than his feoffor was: otherwise of an express attornment. But if the conusee of a reversion by fine dies before attornment without heir, the lord by escheat may distrain without attornment. Though the re-entry of the lessee makes an attornment in law, the feoffee, without notice of the feoffment given to the lessee, cannot make a demand of rent for entry for condition broken. So the bargainee of a reversion shall not take benefit of a condition on a demand of rent, without giving notice to the lessee of the bargain & sale. The lessee shall not be by the law misconsuant of feoffments made on the lands, is to be intended as to distress, action of debt, & action of waste.—MALLORY'S CASE (1601), 5 Co. Rep. 111 b; 77 E. R. 228; *sub nom.* PAIRN v. MALORY, Cro. Eliz. 832.**

*Annotations:—As to (1) Rehd. Hewet v. Painter (1611), 1 Bulst. 174; Bland's Case (1632), Godb. 448; Sacheverell v. Froggatt (1671), 2 Saund. 367. As to (2) Rehd. Scaltock v. Harston (1875), 1 C. P. D. 106. As to (4) Rehd. Finch's Case (1607), 6 Co. Rep. 63 a; Molineux v. Molineux (1607), Cro. Jac. 144; Frances's Case (1609), 8 Co. Rep. 89 b; Blucke v. Mole (1661), 1 Lev. 40; Long v. Buckeridge (1718), 1 Stra. 106; Scaltock v. Harston (1875), 1 C. P. D. 106. Generally, *Mentd.* Tracey v. Dutton (1621), Cro. Jac. 617; Williams v. Fry (1672), 3 Keb. 19; Wood v. Leadbitter (1845), 13 M. & W. 838.*

**32. —.]—A., in 1861, granted an underlease to B. for twenty-one years from Michaelmas, 1861, at the yearly rent of £50. In 1864 he granted an underlease of the same premises to C. for twenty-one years from Michaelmas, 1863, at the same rent. B. never attorned to C.:—*Held*: inasmuch as there was no attornment, the demise to C. did not pass the reversion to him, but only an *interesse termini*; & in order to establish C.'s underlease, a surrender by B. to A., & not to C., was the effectual & proper course.—EDWARDS v. WICKWAR (1866), L. R. 1 Eq. 403; 35 L. J. Ch. 309; 12 Jur. N. S. 158; 14 W. R. 363.**

*Annotation:—Expld. Horn v. Beard, [1912] 3 K. B. 181.*

**33. —.]—By 4 & 5 Ann. c. 3, s. 9, all grants or conveyances by fine or otherwise of any manors or rents or of the reversion or remainder of any messuages or lands shall be good & effectual to all intents & purposes without any attornment of the tenants of any such manors or of the land out of which such rent shall be issuing or of the particular tenants upon whose particular estates**

any such reversions or remainders shall & may be expectant or depending as if their attornment had been had & made. By s. 10 it is provided that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the conusee or grantee.

Certain owners of land made a lease to deft. for three years. They then assigned their reversion. The assignees of the reversion made a lease to pltf. to take effect in *presenti* for twenty-one years. A quarter's rent being unpaid by deft.:—*Held*: by 4 & 5 Ann. c. 3, pltf. could sue deft. before attornment for the quarter's rent.—HORN v. BEARD, [1912] 3 K. B. 181; 81 L. J. K. B. 935; 107 L. T. 87, D. C.

*Annotation:—Consd. Cole v. Kelly, [1920] 2 K. B. 106.*

—.]—*Sec. now, Law of Property Act, 1925 (c. 20), s. 151 (1).*

**Validity of attornment.]—See, now, Law of Property Act, 1925 (c. 20), s. 151 (2).**

**34. In what cases applicable—Consecutive leases by landlord—Sale of reversion during term of first lease—Attornment by second lessee.]—Lessor makes a second lease, & before the first expires levies a fine; attornment by the first lessee to the conusee is sufficient.**

The fine passed but one reversion & that expectant upon one particular estate & consequently there could be but one attornment, viz. from the first lessee & not from the second (*per cur.*).—GWAM & WARD v. ROE (1700), 1 Salk. 90; 91 E. R. 84; *sub nom.* QUARN v. ROE, Skin. 387.

*Annotation:—Rehd. Long v. Buckeridge (1718), 1 Stra. 106.*

**35. — Only to transfer inter vivos—Not to devise or descent.]—DOE v. WRIGHT v. SMITH, No. 60, *post*.**

**36. Sufficiency of title—Assignees of bankrupt lessee—Compulsory attornment.]—Deft., a lessee, desiring to secure his premises for himself at the end of his lease, & being a bkpt. without a certificate, procured a friend to take the conveyance as trustee for him. This conveyance showed the legal estate to be outstanding in a person who could not be found. Deft. continued to occupy; pltf., the creditors' assignees, becoming aware of the circumstances, induced the trustee to convey his interest to them, & forced deft. to attorn to them & brought ejectment:—*Held*: pltf. in above circumstances had a sufficient title.—COOPER v. LANDS (1866), 14 L. T. 287; 14 W. R. 610.**

#### *B. What Amounts to Attornment.*

**37. Application for new lease.]—ROCHESTER'S (BP.) CASE (1572), 4 Leon. 23; 74 E. R. 702; *sub nom.* ANON., 3 Leon. 17.**

**38. Acknowledgment of party as landlord—Acknowledgment to stranger.]—ROCHESTER'S (BP.) CASE (1572), 4 Leon. 23; 74 E. R. 702; *sub nom.* ANON., 3 Leon. 17.**

**39. Payment of rent—After adverse possession—No consent or knowledge of landlord.]—Where rent is paid by succeeding tenants after an adverse possession of twenty-three years, it does not amount to an attornment, unless the consent or at least the knowledge of the landlord can be shown.—MEREDITH v. GILPIN (1818), 6 Price, 146; 146 E. R. 768.**

*Annotations:—Rehd. Nesbitt v. Mablethorpe U. D. C., [1918] 2 K. B. 1. Mentd. Oxenden v. Palmer (1831), 2*

#### PART I. SECT. 2, SUB-SECT. 2.—B.

*p. Payment of rent.]—THOMPSON v. BENNETT (1867), 17 C. P. 380.—CAN.*



**Sect. 2.—How created or arising: Sub-sect. 2, B., C., D., E., F. & G.; sub-sect. 3 & 4. Sect. 3: Sub-sect. 1, A.]**

B. & Ad. 236; Doe d. Higgs v. Cockell (1835), 5 L. J. M. C. 81; Doe v. Murrell (1837), 1 Jur. 593; Fowler v. Port (1837), 7 C. & P. 792; Doe d. Boulthbee v. Adderley Doe d. Batchelor v. Bowles (1838), 8 Ad. & El. 502.

See Law of Property Act, 1925 (c. 20), s. 151 (2).

**40. — After expiry of lessor's title.—After notice of adverse claim.]—**Payment of rent by a lessee to a lessor after the lessor's title has expired, & after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knows the precise nature of the adverse claim, or the manner in which the lessor's title has expired.—FENNER v. DUPLOCK (1824), 2 Bing. 10; 9 Moore, C. P. 38; 2 L. J. O. S. C. P. 102; 130 E. R. 207.

**Annotations:—**Apld. Gregory v. Doidge (1826), 3 Bing. 474. Distd. Cooper v. Blandy (1834), 1 Bing. N. C. 45. Apprd. Serjeant v. Nash, Field, (1903) 2 K. B. 304. Rejd. Jew v. Wood (1841), Cr. & Ph. 185; Claridge v. McKensie (1842), 4 Scott, N. R. 796; Accidental Death Insce. v. Mackenzie (1861), 5 L. T. 20.

**41. — To successors of landlord.—Overseers.]—**ESKDALE v. SOPWITH, No. 219, *post*.

**42. — To assignor of whole term.]—**Where a lease has been assigned, payment of a quarterly instalment by the assignee pursuant to agreement, does not operate as an attornment.—HAZELDINE v. HEATON (1883), Cab. & El. 40.

**43. —.]—**ESKDALE v. SOPWITH, No. 219,

#### C. Effect of Attornment.

See, now, Law of Property Act, 1925 (c. 20), s. 151.

**44. On new landlord — No greater rights than former landlord.—Express attornment & attornment in law distinguished.]—**MALLORY'S CASE, No. 31, *ante*.

**45. — —.]—**CORNISH v. SEARELL, No. 29, *ante*.

**46. — Right to sue for rent.]—**Grantee of a rent reserved on a lease for years may bring debt against the lessee after attornment.—GOODWIN v. PARKER (1670), Freem. K. B. 1; T. Jo. 1; 89 E. R. 1.

**Annotation:—**Rejd. Brownlow v. Hewley (1696), 1 Ld. Raym. 82.

**47. — No attornment pleaded.]—**In debt for rent by the bargainee of a reversion, the omitting to state attornments in the declaration is aided by the verdict.—HITCHIN v. STEVENS (1682), 2 Show. 233; T. Raym. 487; T. Jo. 232; 89 E. R. 909; *sub nom.* STEVENS v. HITCHINS, T. Jo. 217.

**Annotations:—**Rejd. Vandeput v. Lord (1718), 1 Stra. 78; Sweetapple v. Jesse (1833), 5 B. & Ad. 27. *Mentd.* Frederick v. Lookup (1767), 4 Burr. 2019; Rushton v. Aspinall (1781), 2 Doug. K. B. 678.

**48. On tenant.—Subsistence of tenancy on same terms.]—**CORNISH v. SEARELL, No. 29, *ante*.

**49. — Claim by title paramount.—Suspension of lease.—Pending satisfaction of paramount claim.]—**A. granted two several rentcharges to the lessors of pltf. with powers of distress & entry in default of payment, & then made a lease for years to deft. The grantee of the second rentcharge, which was in arrear, recovered in ejectment against deft. who thereupon attorned tenant to him. Afterwards, the grantee of the

first rentcharge, also making a claim for arrears, A. & the two grantees referred the matter to an arbitrator, who made his award that the arrears due to the first grantee should be first satisfied. This award having been served upon deft. he declared in writing, "that he had attorned to & become the tenant" of the first grantee, to whom also he paid rent:—*Held*: a tenancy from year to year was created between them, & the right of deft. under his lease was suspended until the payment of such arrears.—DOE d. CHAWNER v. BOULTER (1837), 6 Ad. & El. 675; 1 Nev. & P. K. B. 650; Will. Woll. & Dav. 333; 6 L. J. K. B. 179; 112 E. R. 260.

**Annotation:—***Mentd.* Doe d. Butler v. Kensington (1846), 8 Q. B. 429.

See Law of Property Act, 1925 (c. 20), s. 151 (1) (b).

**50. Evidence of landlord's title.]—**GRAVENOR v. WOODHOUSE, No. 159, *post*.

**51. — Against future occupiers.—Though not claiming under tenant.]—**E., being in occupation of land, signed an instrument, whereby he recited that he was tenant of the land; that L. claimed the fee, & had entered; that E. did thereby attorn to L., & become tenant to him from the preceding Michaelmas for such part as was in his occupation, at the rent under which E. now occupied, & that he had that day paid L. a shilling in part of his rent:—*Held*: (1) this was an attornment, but not an agreement requiring a stamp, though no title was shown *aliunde* in L.; (2) it was evidence of L.'s ownership at the time of the attornment, against future occupiers, though such occupiers did not claim through E. The land was copyhold.—DOE d. LINSEY v. EDWARDS (1836), 5 Ad. & El. 95; 2 Har. & W. 139; 6 Nev. & M. K. B. 633; 5 L. J. K. B. 238; 111 E. R. 1102.

**Annotation:—***As to* (1) Distd. Doe d. Wright v. Smith (1838), 8 Ad. & El. 255.

**As estoppel.]—**See Sect. 3, sub-sect. 1, F., *post*.

#### D. Attornment Clause in Mortgage.

See MORTGAGE.

#### E. Attornment to Receiver.

See, now, Law of Property Act, 1925 (c. 20), s. 151; & generally, RECEIVERS.

**52. Creates tenancy by estoppel.—Only between tenant & receiver.—Not between tenant & legal owner.]—**An attornment by a tenant of land to a receiver appointed by the Ct. of Ch. to collect the rents, & payment of rent to such receiver, create a tenancy by estoppel between the tenant & receiver but do not enure to enable the person who is found ultimately to have the legal title to the land to treat the tenant as his tenant, & to distrain for rent.—EVANS v. MATHIAS (1857), 7 E. & B. 590; 26 L. J. Q. B. 309; 29 L. T. O. S. 209; 3 Jur. N. S. 793; 119 E. R. 1364.

**53. — Receivership deed.]—**By a receivership deed the mtgor. attorned as tenant from year to year to the receiver, & there was a proviso, that if default should be made in payment of the mtge. money, or interest, at the times appointed, the mtgee. might enter & avoid the tenancy created by the attornment. There was also a proviso, that nothing therein contained should lessen the rights, powers or remedies of the mtgee. under the mtge. On the mtgor. being found

#### PART I. SECT. 2, SUB-SECT. 2.—C.

**50 1. Evidence of landlord's title.]—**Deft., who had mortgaged the demised premises to E., claimed as landlord, under a lease alleged to have been made

by him subsequent to the mtge., three quarters' rent, which had been paid by the tenant to E.:—*Held*: the evidence set out in the report of the case showed that E. was the original

& actual lessor, or, at all events, that previous to the payment of the rent avowed for, the tenant had attorned to E. with deft.'s consent.—MCLENNAN v. HANNUM (1880), 31 C. P. 210.—CAN

**bkpt. :—Held :** the relation of landlord & tenant had been created between the receiver & mtgor. by the receivership deed, & the receiver was entitled to distrain & take the goods which had belonged to the mtgor. on the mtgd. premises.—**JOLLY v. ARBUTHNOT** (1859), 4 De G. & J. 224; 28 L. J. Ch. 547; 33 L. T. O. S. 263; 23 J. P. 677; 5 Jur. N. S. 689; 7 W. R. 532; 45 E. R. 877, L. C.

**Annotations :—***Folld. Morton v. Woods* (1869), L. R. 4 Q. B. 293. *Reid. Hampson v. Fellows* (1868), 37 L. J. Ch. 694; *Re Kitchin, Ex p. Punnett* (1880), 16 Ch. D. 226; *Re Threlfall, Ex p. Queen's Benefit Bldg. Soc.* (1880), 16 Ch. D. 274; *Kearsley v. Phillips* (1883), 11 Q. B. D. 621. *Mentd. Re Roberts, Ex p. Hill* (1877), 6 Ch. D. 63.

**54. Attornment by order of court—Occupation rent.]—**The owner of an estate subject to charges was made deft. to the suit in respect thereof, was compelled to attorn to a receiver appointed in the cause, & a reference was directed to the Master to fix an occupation rent.—**EVERETT v. BELDING** (1852), 22 L. J. Ch. 75; 20 L. T. O. S. 136; 1 W. R. 44.

**55. ———.]—***Re BURCHNALL, WALKER v. LACEY* (1893), 38 Sol. Jo. 59.

**56. Right of receiver to distrain.]—****JOLLY v. ARBUTHNOT**, No. 53, *ante*.

#### *F. Attornment to Sequestrator.*

**57. Estate of sequestrator.]—****CORNISH v. SEARELL**, No. 29, *ante*.

#### *G. Stamps.*

**58. Necessity for stamp—Agreement amounting only to attornment.]—****DOE d. LINSEY v. EDWARDS**, No. 51, *ante*.

**59. ———.]—**An instrument in these terms, "I hereby certify that I remain in the house No. 3, Swinton Street, belonging to W. G., on sufferance only, & agree to give him immediate possession at any time he may require":—**Held :** not to amount to an agreement for a tenancy, so as to require a stamp.—**BARRY v. GOODMAN** (1837), 2 M. & W. 768; *Murp. & H.* 124; 6 L. J. Ex. 188; 150 E. R. 967.

**60. ———.]—**(1) S. being in possession of lands, B. brought ejectment against him, & recovered; but, at S.'s request, forbore taking possession. It was proposed that S. should take a lease; but before this was done B. died, having devised the lands to T. S. then signed a paper, reciting the above facts, stating that he thereby attorned tenant to T. of the said lands, then in his, S.'s possession, & adding: " & I do become tenant thereof to T. from," etc. "last past":—**Held :** this instrument did not require to be stamped as an agreement, though it was not strictly an attornment, no attornment being necessary where the new landlord comes in as devisee of the old.

"Attornment" . . . relates to cases of transfer & not to those of devise or descent. To an heir or devisee attornment is unnecessary (**LORD DENMAN, C.J.**).

(2) Pltf. gave deft. notice that he might inspect, & would be required to admit, on trial, a "counter-

part of lease" from T. to S., dated, etc.; & a judge, on summons, made an order, by consent, for admitting same. The instrument produced on the trial was in the form of a demise from T. to S. of the date specified, & was indorsed "counterpart," but was executed by landlord as well as tenant. No proof was given that any original or duplicate lease had or had not existed. The stamp was sufficient for a counterpart, but not for a lease. Deft. having consented to admit a counterpart of lease, corresponding in date & parties with that produced, could not now contend that the instrument produced was a lease, & therefore improperly stamped. & this, whether before such consent he had actually inspected the document mentioned in the notice, or not.—**DOE d. WRIGHT v. SMITH** (1838), 8 Ad. & El. 255; 3 Nev. & P. K. B. 335; 1 Will. Woll. & H. 429; 7 L. J. Q. B. 158; 2 Jur. 854; 112 E. R. 835. **Annotation :—***As to (2) Reid. Vane v. Whittington* (1843), 7 Jur. 95.

**61. ——— Agreement containing terms of new contract.]—****CORNISH v. SEARELL**, No. 29, *ante*.

**62. ———.]—**Pltf. in ejectment having adduced oral evidence of the terms of deft.'s tenancy under him, deft. put in the following memorandum, signed by himself: July 13, 1838. I acknowledge that I have held the estate," etc., "as tenant to T. F.," pltf., "at a yearly rent of £80, from July 4, 1837, the rent to be paid quarterly: & I further acknowledge to stand indebted to the said T. F. in £80 for the first year's rent, which was due July 4, instant. I have, on the signing hereof, paid the attorney of T. F. 6d. in part of the rent so due":—**Held :** this paper was not a mere acknowledgment or attornment, but a contract or evidence of a contract & inadmissible without a stamp.—**DOE d. FRANKIS v. FRANKIS** (1840), 11 Ad. & El. 792; 3 Per. & Dav. 565; 9 L. J. Q. B. 177; 4 Jur. 626; 113 E. R. 615.

**Annotations :—***Distd. R. v. St. James's, Westminster* (1852), 18 L. T. O. S. 222. *Reid. Semple v. Steinhil* (1853), 8 Exch. 622.

**Stamps generally.]—***See* REVENUE.

#### SUB-SECT. 3.—BY MORTGAGE.

*See* MORTGAGE.

#### SUB-SECT. 4.—BY ESTOPPEL.

*See* Sect. 3, *post*.

### SECT. 3.—ESTOPPEL AS BETWEEN LANDLORD AND TENANT.

#### SUB-SECT. 1.—TENANT ESTOPPED FROM DENYING LANDLORD'S TITLE.

##### *A. In General.*

**Estoppel generally.]—***See* ESTOPPEL, Vol. XXI., pp. 136 *et seq.*

**63. General rule—Tenant estopped.]—**In an action of debt for rent reserved upon a lease

#### PART I. SECT. 3, SUB-SECT. 1.—A.

**63 i. General rule—Tenant estopped.]—****DOE d. SANDS v. PHILLIPS** (1840), 1 Kerr. 86.—**CAN.**

**63 ii. ———.]—**A tenant cannot during his continuance of the possession dispute the title of the landlord under whom he came into possession.—**ANLEY v. LONGMIRE** (1843), 3 Kerr, 321.—**CAN.**

**63 iii. ———.]—****HUGHES v. HOLMES** (1848), 6 N. B. R. (1 All.) 12.—**CAN.**

**63 iv. ———.]—****DOE d. RADEN-HURST v. MOLEAN** (1849), 6 U. C. R. 330.—**CAN.**

**63 v. ———.]—****RUSSELL v. GRAM** (1849), 6 U. C. R. 497.—**CAN.**

**63 vi. ———.]—****DOE d. SIMPSON**

**v. MOLLOY** (1849), 6 U. C. R. 302.—**CAN.**

**63 vii. ———.]—****FRONTENAC LENOX & ADDINGTON MUNICIPAL COUNCIL v. CHESTNUT** (1851), 9 U. C. R. 365.—**CAN.**

**63 viii. ———.]—****HALLOCK v. WILSON** (1857), 7 C. P. 28.—**CAN.**

**63 ix. ———.]—****DAVEY v. CAMERON** (1857), 14 U. C. R. 483.—**CAN.**



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where the title of the land is not in question, deft. is estopped from saying the lease is not a good one.—**MONROE v. KERRY** (1710), 1 Bro. Parl. Cas. 67; 1 E. R. 421, H. L.

64. ———.]—I am still of opinion that *nil habuit*, etc., is a bad plea in this case [of replevin] & that the tenant is estopped by 11 Geo. 2, c. 19, to call upon the landlord to show his title in reply (**CLIVE, J.**).—**SYLLIVAN v. STRADLING** (1764), 2 Wils. 208; 95 E. R. 769.

**Annotations:—****Expld.** Gravenor v. Woodhouse (1822), 1 Bing. 38. **Refd.** Rogers v. Pitcher (1815), 6 Taunt. 202; Taylor v. Zamira (1818), 6 Taunt. 524; Parry v. House (1817), Holt, N. P. 489; Alchorne v. Gomme (1824), 2 Bing. 54; Curtis v. Spitty (1834), 1 Bing. N. C. 15.

65. ———.]—Upon *non est factum* in covenant, the lessee in possession being deft. shall not controvert the title of pltf. his lessor to demise.—**FRIEND v. EASTABROOK** (1777), 2 Wm. Bl. 1152; 96 E. R. 679.

**Annotation:—****Refd.** Pluck v. Digges (1831), 5 Bl. N. S. 31.

66. ———.]—The ct. will not endure a lessee to defend, alone, an ejectment against his landlord or those claiming under him on a supposed defect of title.—**DRIVER d. OXENDEN v. LAWRENCE** (1779), 2 Wm. Bl. 1259; 96 E. R. 742.

67. ———.]—If both lessee & lessor sign a lease, the former is estopped to plead *nil habuit in tenementis* to an action of debt for rent by the lessor.—**WILKINS v. WINGATE** (1794), 6 Term Rep. 62; 101 E. R. 436.

**Annotations:—****Refd.** Gibson v. Kirk (1841), 1 Q. B. 850. **Mentd.** King v. Fraser (1805), 6 East, 348; Curtis v. Spitty (1834), 1 Bing. N. C. 15; Alington v. Booth (1856), 3 Jur. N. S. 50.

68. ———.]—Under the issue of *riens en arriere* in replevin, pltf. cannot controvert the holding as claimed by deft. in his avowry.—**HILL v. WRIGHT** (1798), 2 Esp. 669, N. P.

69. ———.]—In ejectment brought upon the joint demise of several trustees of a charity, it is not enough for deft. who had paid one entire rent to the common clerk of the trustees, to show that the trustees were appointed at different times, as evidence that they were tenants in common; for as against their tenant, his payment of the entire rent to the common agent of all is, at all events, sufficient to support the joint demise, without making it necessary for them to show their title more precisely.—**DOE d. CLARKE v. GRANT** (1810), 12 East, 221; 104 E. R. 80.

70. ———.]—A third person cannot defend as landlord upon the trial of an ejectment, where it appears that the tenant in possession came in as tenant to lessor of pltf., & paid rent to him, under an agreement that has expired.

It has been ruled often that neither the tenant nor any one claiming by him, can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord (**DAMPIER, J.**).—**DOE d. KNIGHT v. SMYTHE (LADY)** (1815), 4 M. & S. 347; 105 E. R. 862.

**Annotations:—****Apld.** Doe d. Manton v. Austin (1832), 9 Bing. 41; Doe d. Bullen v. Mills (1834), 2 Ad. & El. 17.

63 x. ———.]—**RENAUDS v. OFFITT** (1857), 15 U. C. R. 221.—**CAN.**

63 xi. ———.]—**BALDWIN v. BURD** (1861), 10 C. P. 511.—**CAN.**

63 xii. ———.]—**JONES v. TODD** (1862), 22 U. C. R. 37.—**CAN.**

63 xiii. ———.]—**TODD v. CAMERON** (1864), 2 E. & A. 434.—**CAN.**

63 xiv. ———.]—**CHRISTIE v. CLARK** (1866), 16 C. P. 544.—**CAN.**

63 xv. ———.]—**CROW v. LOWDEN** (1875), 2 R. & C. 78.—**CAN.**

63 xvi. ———.]—**DAUPHINAIS v. CLARK** (1885), 3 Man. L. R. 225.—**CAN.**

63 xvii. ———.]—**WHITE v. NEIL** (1885), 11 S. C. R. 587.—**CAN.**

63 xviii. ———.]—**DOWNY v. CROWELL** (1892), 24 N. S. R. 318.—**CAN.**

63 xix. ———.]—**SIVRET v. YOUNG** (1906), 38 N. B. R. 571.—**CAN.**

63 xx. ———.]—**KLINCK v. GREER** (1910), 14 W. L. R. 282; 3 Sask. L. R. 157.—**CAN.**

**Refd.** Doe d. Johnson v. Baytop (1835), 3 Ad. & El. 168; Doe d. Willis v. Birchmore (1839), 9 Ad. & El. 663; Doe d. Higginbotham v. Barton (1840), 11 Ad. & El. 807; **Claridge v. McKENZIE** (1842), 4 Scott. N. R. 796; **Stainton v. Chadwick** (1851), 3 Mac. & G. 575; **Clarke v. Arden** (1855), 16 C. B. 227; **Re Emery & Barnett** (1858), 4 C. B. N. S. 423; **Tadman v. Henman**, [1893] 2 Q. B. 168.

71. ———.]—A lessee by executing a lease is estopped from disputing the title of either of the lessors.—**WOOD v. DAY** (1817), 7 Taunt. 646; 1 Moore, C. P. 389; 129 E. R. 257.

**Annotations:—****Refd.** Doe d. Morecroft v. Meux (1825), 7 Dow. & Ry. K. B. 98; Baylis v. Le Gros (1858), 4 C. B. N. S. 537.

72. ———.]—**GRAVENOR v. WOODHOUSE**, No. 159, *post*.

73. ———.]—**PHIPPS v. SCULTHORPE**, No. 199, *post*.

74. ———.]—**ALCHORNE v. GOMME**, No. 133, *post*.

75. ———.]—**DANCER v. HASTINGS**, No. 969, *post*.

76. ———.]—**SEYMOUR v. FRANCO**, No. 211, *post*.

77. ———.]—It has been said that it is not competent to a lessee to disaffirm his lessor's title. That is true but the converse is also true that a lessor ought not to impugn the title of his lessee (*per CUR.*).—**GOLEBORN v. ALCOCK** (1829), 2 Sim. 552; 57 E. R. 894.

78. ———.]—The production of the counterpart of an old lease, coupled with evidence of the payment of rent to the lessee by his under-tenants for a number of years, is sufficient evidence of the lessee's interest under such lease.

The case seems to me to fall within the general rule that a tenant shall not be allowed to dispute the title of the landlord under whom he comes into possession (**TINDAL, C.J.**).—**DOE d. MANTON v. AUSTIN** (1832), 9 Bing. 41; 2 Moo. & S. 107; 1 L. J. C. P. 152; 131 E. R. 529.

**Annotations:—****Refd.** *Re Emery & Barnett* (1858), 4 C. B. N. S. 423; *Accidental Death Insce. v. Mackenzie* (1861), 5 L. T. 20. **Mentd.** *Eliot v. Bristol Corp.* (1894), 71 L. T. 659.

79. ———.]—[It is] the established rule of law that the tenant so long as he remains in possession shall never be allowed to dispute the title of the landlord from whom such possession was received. . . . [But the rule] could not apply to the case where the tenant had been actually turned out of possession & kept out a considerable time, & afterwards entered under a new agreement *bona fide* entered into with a different person (**TINDAL, C.J.**).—**HOPCRAFT v. KEYS** (1833), 9 Bing. 613; 2 Moo. & S. 760; 131 E. R. 744.

**Annotation:—****Refd.** *Jew v. Wood* (1841), Cr. & Ph. 185.

80. ———.]—**DOE d. WHEBLE v. FULLER**, No. 228, *post*.

81. ———.]—Where A. took a lease in writing in his own name of certain premises, & subsequently occupied part only, & paid rent for so much as he occupied to B., as whose agent he in fact took the lease:—**Held:** B. might distrain for the part so occupied, & A. was precluded in replevin from disputing his title.—**CLARK v.**

63 xxi. ———.]—**WOODS v. OPSAL**, [1918] 1 W. W. R. 985.—**CAN.**

63 xxii. ———.]—**DUTCZYNSZYN v. IARSON & CHINDBERG**, [1923] 4 D. L. R. 1210; 3 W. W. R. 923.—**CAN.**

63 xxiii. ———.]—**AVERY v. KENT** (1923), 1 Nfld. L. R. 337.—**NFLD.**

63 xxiv. ———.]—**GANPAT RAY v. MULTAN** (1916), 1 L. R. 38 All. 226.—**IND.**

63 xxv. ———.]—**DOUGHERTY v. LOGIE** (1919), 40 N. L. R. 13.—**S. AF.**

WATERLOW (1838), 8 C. & P. 365; 2 Mood. & R. 87, N. P.

82. ———.]—DOE d. WILLIS v. BIRCHMORE, No. 237, *post*.

83. ———.]—AGAR v. YOUNG, No. 137, *post*.

84. ———.]—DOE d. HILL v. FRY (1845), 6 L. T. O. S. 83.

85. ———.]—A. agreed to purchase land of B. but, before the conveyance to him, conveyed by lease, & release to C. C. employed D. to build upon the land, & being pressed by D. for money, deposited with him, as a security, his conveyance from A. In ejectment by A. against D.:—*Held*: D. having come into possession under C. could not dispute C.'s title.—DOE d. JAMES v. ARNOLD (1852), 18 L. T. O. S. 285.

86. ———.]—HAWKSBEET v. HAWKSBEET, No. 180, *post*.

87. ———.]—To the extent of the term the tenant has accepted he shall not deny the title of the landlord but at the expiration of the lease the estoppel also terminates (POLLOCK, C.B.).

The doctrine which prevents a party from denying his landlord's title is peculiar to the action of ejectment (POLLOCK, C.B.).—WATSON v. LANE (1856), 11 Exch. 769; 25 L. J. Ex. 101; 26 L. T. O. S. 260; 4 W. R. 293; 156 E. R. 1042.

*Annotations*:—*Reid*. Delaney v. Fox (1857), 2 C. B. N. S. 768; Hodgson v. McCreagh (1923), 93 L. J. Ch. 339.

88. ———.]—LANGFORD v. SELMES, No. 1442, *post*.

89. ———.]—A tenant is estopped at law from disputing his landlord's title, although that title be merely equitable, & therefore, at law a nullity (BLACKBURN, J.).—BOARD v. BOARD (1873), L. R. 9 Q. B. 48; 43 L. J. Q. B. 4; 20 L. T. 459; 22 W. R. 206.

*Annotations*:—*Mentd*. Paine v. Jones (1874), L. R. 18 Eq. 320; Dalton v. Fitzgerald, [1897] 2 Ch. 86; *Re* Anderson, Pegler v. Gillatt, [1905] 2 Ch. 70; *Re* Coole, Coole v. Flight, [1920] 2 Ch. 536.

90. ———.]—So long as the lease remains in force & the tenant has not been evicted from the land, he is estopped from denying that his lessor had a title to that land (LORD BLACKBURN).—CLARK v. ADIE (No. 2) (1877), 2 App. Cas. 423; 46 L. J. Ch. 598; 37 L. T. 1; 26 W. R. 47, H. L.; *affg*. S. C. *sub nom*. ADIE v. CLARK (1876), 3 Ch. D. 134, C. A.

*Annotations*:—*Reid*. Elliot v. Bristol Corp'n. (1894), 71 L. T. 659. *Mentd*. Gosnell v. Bishop (1888), 4 T. L. R. 397; Crosthwaite v. Steel (1889), 6 F. P. C. 190; Ashworth v. Law (1890), 7 R. P. C. 231; Jandus Arc Lamp & Electric Co. v. Johnson (1900), 17 R. P. C. 361; Van Berkel v. Booth, [1906] 23 R. P. C. 573; Gold Ore Treatment Co. of Western Australia v. Golden Horseshoe Estates Co. (1919), 36 R. P. C. 95.

91. ———.]—TADMAN v. HENMAN, No. 234, *post*.

92. ———.]—SERJEANT v. NASH, FIELD & CO., No. 140, *post*.

93. Simoniocal presentation by landlord.]—In an action for use & occupation by an incumbent against a tenant of the glebe lands, who has paid him rent, def't. cannot give evidence of a simoniocal presentation of pl'tf., in order to avoid his title.—COOKE v. LOXLEY (1792), 5 Term Rep. 4; 101 E. R. 2.

*Annotations*:—*Expld.* & *Apld.* Hodson v. Sharpe (1808), 10 East, 350. *Reid*. Brooksby v. Watts (1815), 2 Marsh. 38.

94. By aid of process of law—Interpleader.]—Tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger under a title adverse to that of the landlord.—DUNGEY v. ANGOVE (1794), 2 Ves. 304; 30 E. R. 644, L. C.

*Annotations*:—*Apprvd.* & *Distd.* Clarke v. Byne (1807), 13 Ves. 383. *Reid*. Johnson v. Atkinson (1796), 3 Anst. 798;

Bowyer v. Pritchard (1822), 11 Price, 103; Stephens v. Callanan & Salway (1823), 13 Price, 153; Cook v. Rosalyn (1859), 1 Giff. 167. *Mentd.* Gore v. Bowser (1855), 3 W. R. 430; Andrews v. Barnes (1888), 39 Ch. D. 133.

———.]—*See, generally*, INTERPLEADER, Vol. XXIX., pp. 446 *et seq*.

95. ———.]—Injunction—To restrain distress or ejectment.]—A lessee proceeded against by ejectment, & who has received notice from a claimant disputing his landlord's title, not to pay him any more rent; & has been threatened with a distress by his landlord if he does not, cannot sustain an injunction in equity to restrain either the ejectment or the distress; for he is not permitted by such means to bring his landlord's title into dispute.—HOMAN v. MOORE (1817), 4 Price, 5; 146 E. R. 376.

*Annotation*:—*Mentd.* Watson v. Lane (1856), 25 L. J. Ex. 101.

96. ———.]—Interrogatories.]—The ct. will not grant an order for interrogatories to enable a tenant, withholding possession of demised premises after the determination of the tenancy, to defend an action of ejectment brought by his landlord, by interrogating pl'tf. for the purpose of proving that the interest of the latter was leasehold, & has also expired.—WALLEN v. FORREST (1872), L. R. 7 Q. B. 239; 41 L. J. Q. B. 96; 26 L. T. 290.

———.]—*See, generally*, DISCOVERY, Vol. XVIII., pp. 218, 219, Nos. 1649–1667.

97. Landlord claiming by title paramount.]—If B. claiming under A. let lands for a year to C. & die, & A. afterwards bring an ejectment against C. C. cannot dispute the title of A.—BARWICK d. RICHMOND (YORKS) CORPN. v. THOMPSON (1798), 7 Term Rep. 488; 101 E. R. 1002.

*Annotation*:—*Distd.* Doe d. Egremont v. Langdon (1848), 12 Q. B. 711.

98. Lessor a lessee from Crown—Grant alleged to be void.]—A. who claims to hold lands under B. as a security for a debt cannot defend an ejectment against the assignees of B. after his bkpy., on the ground that the grant under which B. derives his title from the Crown is void.—DOE d. BIDDLE v. ABRAHAMS (1816), 1 Stark. 305, N. P.

99. Possession relinquished by tenant—Entry under new agreement.]—HOPCRAFT v. KEYS, No. 79, *ante*.

100. Acceptance of new lease—Implied surrender of old.]—When lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not the power to make the new lease; & as the lessor could not grant the new lease until the prior one had been surrendered, the acceptance of such new lease is of itself a surrender of the former one. Such surrender is the act of the law, & takes place independently of, & even in spite of, the intention of the parties.—LYON v. REED (1844), 13 M. & W. 285; 13 L. J. Ex. 377; 3 L. T. O. S. 302; 8 Jur. 762; 153 E. R. 118.

*Annotations*:—*Consd.* Nickells v. Atherstone (1847), 10 Q. B. 944. *Expld.* Wallis v. Hamdy, [1893] 2 Ch. 75.

*Reid*. Doe d. Hill v. Fry (1845), 6 L. T. O. S. 83; Cannon v. Hartley (1850), 9 C. B. 634; Mines Royal Societies v. Maguay (1854), 10 Exch. 489; Davidson v. Gent (1857), 1 H. & N. 744; R. v. Tyrone J.J. (1860), 2 L. T. 639; Grimwood v. Moss (1872), L. R. 7 C. P. 360; Phillips v. Miller (1875), L. R. 10 C. P. 420; Fenner v. Blake, [1900] 1 Q. B. 426; Serjeant v. Nash (1903), 80 L. T. 112. *Mentd.* Ward v. Lumley (1860), 29 L. J. Ex. 322; Oastler v. Henderson (1877), 2 Q. B. D. 575.

101. Possession obtained by stratagem.]—In an action for an illegal distress for rent, def't.'s agent had let the premises to an agent of one under whom as landlord pl'tf. claimed; such taking was a stratagem to obtain possession of the premises the agent had given up the premises to his principal immediately after he had obtained possession of them; & the principal had put pl'tf. into possession;

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no portion of the rent beyond the deposit on the letting had been paid; & the title of pltf.'s landlord was better than that of deft. — **Held:** pltf. was estopped from denying that he was tenant to deft. — **FARNHAM v. THORN** (1850), 15 L. T. O. S. 343.

**102. Inclosure of waste by tenant—Surrender of premises by tenant—Title of landlord to inclosure.]**—Where a tenant of premises from year to year incloses part of the waste opposite to the demised premises, & holds the same together for more than twenty years, paying no additional rent:—**Held:** such tenant on giving up possession of the demised premises is estopped from disputing his landlord's title to the encroachments made by him from the waste. — **ANDREWS v. HAILES** (1853), 2 E. & B. 349; 1 C. L. R. 1034; 22 L. J. Q. B. 409; 21 L. T. O. S. 151; 17 Jur. 621; 1 W. R. 366; 118 E. R. 797.

**Annotations:—****Expld.** Doe d. Croft v. Tidbury (1854), 14 C. B. 304; A.-G. v. Tomline (1877), 5 Ch. D. 750. **Held.** Kingsmill v. Millard (1855), 11 Exch. 313; Berney v. Bickmore (1863), 8 L. T. 353; Latouche v. Pennick & Sloan (1865), 13 L. T. 151; A.-G. v. Tomline (1880), 15 Ch. D. 150; Nesbitt v. Mablethorpe U. D. C., [1918] 2 K. B. 1.

**103. Applicable to ejectment.]—****WATSON v. LANE**, No. 87, ante.

**104. — & trespass.]**—The rule by which a tenant is estopped from denying the title of the landlord who let him into possession is applicable in an action of trespass as well as in ejectment.

An eviction by title paramount puts an end to the estoppel: but *semble*: it must be an actual & not a mere constructive eviction. — **DELANEY v. FOX** (1857), 2 C. B. N. S. 768; 26 L. J. C. P. 248; 29 L. T. O. S. 212; 21 J. P. 710; 140 E. R. 618.

**Annotations:—****Held.** Accidental Death Inacc. v. Mackenzie (1861), 5 L. T. 20; Underhay v. Head (1887), 58 L. T. 457. **Mentd.** Reece v. Strousberg (1885), 54 L. T. 133.

**105. Demise by joint tenant.]—****COWPER v. FLETCHER**, No. 915, post.

**106. Bankruptcy of landlord.]—**Pltf. in 1887 granted a lease of certain premises to deft. The premises had belonged to pltf. since 1884. In 1885 pltf. was adjudicated a bkpt., & his discharge was granted conditionally upon his paying his creditors five shillings in the pound, which had not been paid. Pltf. sued deft. for arrears of rent under the lease, & deft. applied for security for costs of the action, or that the trustee in bkpcy. should be joined as pltf. — **Held:** the fact that pltf. was an undischarged bkpt. was not a sufficient ground for ordering him to give security for costs; & in this action deft. was estopped from setting up pltf.'s bkpcy. for any purpose. — **COOK v. WHELLOCK** (1890), 24 Q. B. D. 658; 59 L. J.

Q. B. 329; 62 L. T. 675; 38 W. R. 534; 6 T. L. R. 314, C. A.

**Annotations:—****Held.** Lloyd v. Hatherly Station Brick Co. (1901), 85 L. T. 158. **Mentd.** Blackett v. Blackett & Frail (1902), 18 T. L. R. 443.

**B. Landlord Having no Interest at Time of Demise.**

**107. Whether tenant estopped.]—****MARTAIN v. HARDY** (1555), 2 Dyer, 122 b; 73 E. R. 268.

**Annotation:—****Expld.** Cooke v. Blake (1847), 1 Exch. 220.

**108. —.]—****PALMER v. EKINS**, No. 205, post.

**109. —.]—****ALCHORNE v. GOMME**, No. 133, post.

**110. —.]—**A. in May, 1823, demised premises to B. for eighty years, with a proviso for re-entry in case the lessee, his exors., etc., should exercise or carry on, or permit to be exercised or carried on, the business, amongst others, of a victualler or publican. B., in Nov. 1823, mortgaged to C., & in June, 1829, the mtge. term was assigned to D., & ultimately became vested in E. After B. had assigned to C., & when he had no reversion, but a mere equity of redemption, he, by indenture, granted an underlease for seventy-six years to F., with a proviso for re-entry similar to that contained in the original lease from A. Some of the meane assignments were made subject to this underlease.

In ejectment by the legal representatives of E. for a breach of the covenant in the original lease, in using the premises as a public-house or beer-shop:—**Held:** (1) the underlease granted by B. operated merely as a demise by estoppel, inasmuch as he had not at the time of making it, or since, any legal interest; (2) the lessors of pltf., or the persons under whom they claimed, not being parties to the underlease, or to any of the assignments which recognised & referred to it, were not bound by any covenants contained therein; (3) the payment to, & acceptance by, E. of rent under the underlease by B. to F., merely created a tenancy from year to year; & such tenancy was well determined by a notice to quit served upon the attorney of the administratrix of the person who had paid the rent to the lessors of pltf., & under whom deft. claimed. — **DOE d. PRIOR v. ONGLEY** (1850), 10 C. B. 25; 20 L. J. C. P. 26; 15 L. T. O. S. 434; 138 E. R. 11.

**111. —.]—****CUTHBERTSON v. IRVING**, No. 264, post.

**112. — Landlord never in possession.]—**A tenant who has agreed in writing to hold premises at a certain rent may allege that the party with whom he made the agreement never had any interest in the premises, if such party was never in possession. Otherwise he cannot. — **CHITTLE v. POUND** (1701), 1 Ld. Raym. 746; 91 E. R. 1400.

**103.1. Applicable to ejectment.]—****MOHESU CHUNDER BISWAS v. GOOROFFERAD BOSE** (1883), Marsh. 377; 2 Hay, 473.—**IND.**

**q. Where title recited in lease.]—****Held:** defts. were not estopped by the lease under which they claimed from denying the power of the lessor to lease, for the recitals professed to show what title he had. — **LYSTER v. KIRKPATRICK** (1866), 26 U. C. R. 217.—**CAN.**

**r. Tenant setting up title in Crown.]—**Deft. denied pltf.'s title & pleaded title in the Crown & a lease or licence from the Crown:—**Held:** pltf. had no title, & deft. co. was not estopped from disputing pltf.'s claim of title. — **CARROLL v. EMPIRE LIMESTONE CO.** (1919), 45 O. L. R. 121; 48 D. L. R. 44; 15 O. W. N. 386.—**CAN.**

**t. —.]—****SMITH v. GREEN** (1903), 22 N. Z. L. R. 976.—**N.Z.**

**PART I. SECT. 3, SUB-SECT. 1.—B.**

**107.1. Whether tenant estopped.]—**Where a person is in possession of land under a good title, but, through the mutual mistake of himself & another person claiming title thereto, he accepts a lease from the latter of the lands in dispute, he is not thereby estopped from setting up his own title in an action by the lessor to obtain possession of the land. — **R. v. HALL** (1898), 6 Exch. C. R. 145.—**CAN.**

**107.ii. —.]—****AMRU v. RAMAKRISHNA SASTRI** (1879), I. L. R. 2 Mad. 226.—**IND.**

**107.iii. —.]—**R., who had possession, but no title, let lands by parol to deft. for a term of two years, within

which period R. by deed assigned the lands to pltf., who, before the expiration of the two years, demanded possession from deft. & brought an ejectment against him:—**Held:** deft. was estopped from denying the title of R., under whom pltf. derived. — **WARD v. RYAN** (1875), I. R. 10 C. L. 17.—**IR.**

**107.iv. —.]—****WOGAN v. DOYLE** (1883), 12 L. R. Ir. 69.—**IR.**

**107.v. — Effect of fraud.]—**A. being in possession without title, B. represented himself to him as owner, when he was not. A., by writing, agreed to lease from B. for five years. This writing was signed by A. alone:—**Held:** in the circumstances A. could dispute B.'s title on the grounds of fraud & misrepresentation. — **LYNETT v. PARKINSON** (1850), 1 C. P. 144.—**CAN.**

**113. — Fraudulent conveyance to landlord.—Title in third party.]**—In an action of replevin, the landlord's title, under which the tenant has gained possession of the premises, cannot be disputed, although the tenant is prepared with evidence to show, that the premises have been fraudulently conveyed to the landlord, & that the actual title is vested in another person. The plea of *nil habuit*, etc., cannot be pleaded, nor can evidence be given which amounts to it.—**PARRY v. HOUSE** (1817), Holt, N. P. 489, N. P.

**114. — Estate only equitable.]**—To an action by a lessor for a breach of covenant on an indenture of lease in not repairing, etc., the lessee cannot plead in bar that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of *nil habuit in tenementis*. But, *semble*: the lessee is not estopped from showing that the lessor was only seized in right of his wife for her life, & that she died before the covenant broken, because an interest passed by the lease.—**BLAKE v. FOSTER** (1800), 8 Term Rep. 487; 101 E. R. 1505.

*Annotations:—***Consd. Hill v. Saunders** (1825), 4 B. & C. 520; **Pluck v. Digges** (1831), 5 Bl. N. S. 31.

**115. — —.]**—A person who has occupied premises, & paid rent to the apparent proprietor as his landlord, cannot, when sued by him for the use & occupation, allege that he has only the equitable estate, or that he is entitled only as co-exor. with others who do not join in the action. Although *pltf.* at the trial discloses that fact in proving his own case.—**DOLBY v. ILES** (1840), 11 Ad. & El. 335; 3 Per. & Dav. 287; 9 L. J. Q. B. 51; 4 Jur. 432; 113 E. R. 443.

*Annotation:—***Consd. Standen v. Christmas** (1847), 10 Q. B. 135.

**116. — —.]**—**BOARD v. BOARD**, No. 89, *ante*.

**117. — Landlord seised in right of wife.]**—**BLAKE v. FOSTER**, No. 114, *ante*.

**118. — —.]**—By marriage settlement real estates were conveyed to trustees in trust to permit the wife to receive the rents to her sole use independently of her husband. After the marriage the husband let the premises to tenants, speaking of them as property in which his wife was interested. The wife received the rents during her life:—*Held*: it was a question of fact in what character the husband let the premises, whether as agent for the trustees or as dealing with his wife's property; & after the death of the wife the tenants were not estopped from denying that the husband had any interest, unless it was found that he let in his own name.—**HOWE v. SCARROTT, SHARP v. SCARROTT** (1859), 4 H. & N. 723; 28 L. J. Ex. 325; 157 E. R. 1026.

**119. — Admission of interest by tenant.]**—*Deft.* in Mar. 1832, took certain premises from F. & B., "agents for the trustees of the joint estate of T. & S. B." Upon trial of an action for use & occupation brought by *ptfs.* "as trustees of the joint estate of T. & S. B." against *deft.*, it appeared by *ptfs.*' own evidence, that in 1831, they were trustees for the estate of S. B. only:—*Held*: *deft.* was estopped to take advantage of this discrepancy, having in 1832 taken the premises of *ptfs.* as trustees of the joint estate.—**FLEMING v. GOODING** (1834), 10 Bing. 549; 4 Moo. & S. 455; 3 L. J. C. P. 214; 131 E. R. 1008.

**120. — Admission of want of title—Answer in Chancery.]**—Ejectment for two stamping mills,

on the demise of C. H. The mills had been let to a mining co. by C. H. from year to year, & notice to quit had been given by him to the co. On the day of the demise in the declaration C. H. was a partner in the co. & *deft.*, who was another partner, defended on behalf of the co. At the trial it was ruled that *deft.* was estopped from disputing the title of C. H., although C. H. had admitted in an answer in Chancery, which was in evidence, that he had no legal title:—*Held*: (1) *deft.* was estopped from disputing C. H.'s title, notwithstanding C. H. was a partner with him in the co.; & (2) C. H. being a member of the co. was no objection to an ejectment brought on a demise by him.—**FRANCIS v. DOE d. HARVEY** (1838), 4 M. & W. 331; 1 Horn & H. 302; 8 L. J. Ex. 280; 150 E. R. 1455, Ex. Ch.; *previous proceedings, sub nom.* **DOE d. HARVEY v. FRANCIS** (1837), 2 Mood. & R. 57, N. P.

*Annotation:—*As to (1) **Apld. Doe d. Bailey v. Foster** (1840), 3 C. B. 215.

**121. — Title only as co-executor—Other executors not parties.]**—**DOLBY v. ILES**, No. 115, *ante*.

—As against assignee of landlord.]—See Nos. 205–208, *post*.

#### C. Defect in Title Apparent.

**122. Whether tenant estopped.]**—When a parsonage is appropriated to a bishop, living the incumbent, a lease by the bishop before the incumbent's death is void. *Semble*: a lease by indenture cannot operate by estoppel, where it appears by recital that the lessor has no estate.—**BLACKMORE v. CUMBERFORD** (1680), 1 Freem. K. B. 527; 89 E. R. 305.

**123. —.]**—**DOE d. BAILEY v. FOSTER**, No. 331, *post*.

**124. — Equitable title.]**—Declaration that, by indenture between *ptfs.* & A., since deceased, of first part, B. therein described as guardian of C. & D. minors & devisees under the will of E., deceased, of second part, & *deft.* of third part, after reciting that the parties of the first part & B. in right aforesaid, were the owners of the closes, etc., therein-after described, subject to mtge. for £3,500, the interest whereof was payable half-yearly at the office of W., & had agreed to let the same to *deft.* On general demurrer:—*Held*: the recitals showed the lessors to have had only an equitable title, & the facts being disclosed on the face of the lease, neither party was estopped from denying that the lessors had a legal reversion.—**PARGETER v. HARRIS** (1845), 7 Q. B. 708; 15 L. J. Q. B. 113; 5 L. T. O. S. 346; 10 Jur. 260; 115 E. R. 656.

*Annotations:—***Refd. Magnay v. Edwards** (1853), 13 C. B. 479; **Rowbotham v. Wilson** (1857), 8 E. & B. 123; **Jolly v. Arbutnot** (1858), 28 L. J. Ch. 274; **Cuthbertson v. Irving** (1860), 6 H. & N. 135; **Morton v. Woods** (1868), 37 L. J. Q. B. 242.

**125. — —.]**—A lease, granted under a power contained in a settlement, recited the title of the lessor, & showed that he had only an equitable interest. A right of re-entry for a breach of the covenants in the lease was reserved to the lessor & his assigns:—*Held*: the lessee was not estopped from disputing the title of the lessor so disclosed in the lease.—**GREENAWAY v. HART** (1854), 14 C. B. 340; 2 C. L. R. 370; 23 L. J. C. P. 115; 23 L. T. O. S. 174; 18 Jur. 449; 2 W. R. 702; 139 E. R. 140.

*Annotation:—***Refd. Yellowly v. Gower** (1856), 11 Exch. 274.

#### PART I. SECT. 3, SUB-SECT. 1.—C.

**122.1. Whether tenant estopped.]**—Where a tenant derived his possession

from acts of his landlord & has acknowledged his tenancy by payment of rent, he is estopped from disputing his landlord's title, even though such

title on the face of the lease appears to be defective.—**JONES v. JONES** (1911), 11 S. K. N. S. W. 70; 23 N. S. W. W. N. 12.—**AUS.**



**Sect. 3.—Estoppel as between landlord and tenant:**  
*Sub-sect. 1, C., D. & E.]*

**126. — Prior lease.]—**Pltf. granted to deft. a lease of certain premises for twenty-one years from Sept. 29, 1854, "subject nevertheless to an indenture of lease bearing date Oct. 19, 1847, & made between D. of the first part, J. D. & B. D. of the second part, & K. of the third part, whereby the said premises were demised to K. for a term of twenty-one years, determinable & subject to the covenants & agreements therein mentioned." Def. having paid rent under his lease. In an action of ejectment for breaches of covenant:—*Held*: deft. was estopped from setting up the prior lease.—*DUKE v. ASHBY* (1862), 7 H. & N. 600; 31 L. J. Ex. 168; 8 Jur. N. S. 236; 10 W. R. 273; 158 E. R. 610.

**127. — Want of legal estate in reversion.]—**As from the recitals in the assignment it appeared that the mtgor. had no legal estate in the reversion, the assignee was not estopped from setting up such want of legal title in the mtgor. as a defence to the action.

An estoppel arises when a man by his own averments in a deed is shut out from showing what the real state of affairs is at the time of making the deed. A deed cannot operate by estoppel if it shows the real state of things existing at the time it was made (*MARTIN, B.*).—*SAUNDERS v. MERRYWEATHER* (1865), 3 H. & C. 902; 35 L. J. Ex. 115; 30 J. P. 265; 11 Jur. N. S. 655; 13 W. R. 814; 159 E. R. 790.

*D. Where Title of Landlord Determined.*

**128. Tenant not estopped.]—**Tenant may show his landlord's title at an end, in ejectment brought against him by the landlord.—*DOE d. JACKSON v. RAMSBOTHAM* (1815), 3 M. & S. 516; 105 E. R. 704.

*Annotations:—Distd.* *DOE d. COLEMER v. WHITROE* (1822), Dow. & Ry. N. P. 1. *Refd.* *Gravenor v. Woodhouse* (1822), 1 Bing. 38.

**129. —.]—**A deft. in ejectment, who has paid rent to the lessor of pltf., may show that his landlord, pending the term, sold his interest in the premises.—*DOE d. LOWDEN v. WATSON* (1817), 2 Stark. 230, N. P.

*Annotations:—Refd.* *Claridge v. Mackenzie* (1842), 4 Mu. & G. 143. *Mentd.* *Fox v. Waters* (1840), 12 Ad. & El. 43.

**130. —.]—***DOE d. COLEMER v. WHITROE*, No. 146, *post*.

**131. —.]—***NEAVE v. MOSS*, No. 147, *post*.

**132. —.]—**Covenant for non-payment of rent, stating that pltf. & his wife, since deceased, demised certain premises to deft. for years, *reddendum* to pltf. & his wife £24 *per annum* & a covenant to pay the rent to pltf. & his wife. Averment that on, etc., the wife died, & that afterwards, to wit, on, etc., £24 of the rent aforesaid became due & in arrear to pltf. By the lease set out on *oyer* it appeared that the *reddendum* was to the husband & wife, & the heirs of the wife, & the covenant to pay rent was in the same form. Plea, that the premises were the estate of the wife, & that pltf. had nothing in them but in right of his wife; that on, etc., she died without issue, leaving J. A. her heir, whereupon all the estate of pltf. ceased, & J. A. threatened to enter & eject deft., unless he attorned, whereby he was compelled to attorn, & become tenant to J. A.:—

*Held*: plea was good, for some interest having passed by the lease from pltf. & his wife, it could not work by estoppel, & deft. was therefore entitled to show that pltf.'s interest had ceased.—*HILL v. SAUNDERS* (1825), 4 B. & C. 529; 7 Dow. & Ry. K. B. 17; 4 L. J. O. S. K. B. 2; 107 E. R. 1157.

*Annotation:—Mentd.* *Jones v. Clarke* (1842), 3 Q. B. 194.

**133. —.]—**I think this is an extremely clear case. The rule applicable to it has been long since established, viz. that a tenant cannot dispute the title of his landlord at the time of the demise, although he may show that such title had afterwards determined; & that rule has never been disputed or departed from (*BEST, C.J.*).—*ALCHORNE v. GOMME* (1824), 2 Bing. 54; 9 Moore, C. P. 130; 2 L. J. O. S. C. P. 118; 130 E. R. 225.

*Annotations:—Distd.* *Hill v. Saunders* (1824), 2 Bing. 112. *Refd.* *Dyer v. Bowley* (1824), 2 Bing. 94; *Gravenor v. Woodhouse* (1824), 9 Moore, C. P. 148; *Gregory v. Doldge* (1826), 11 Moore, C. P. 394. *Mentd.* *Pope v. Biggs* (1829), 9 B. & C. 245; *Johnson v. Jones* (1839), 9 Ad. & El. 809.

**134. —.]—**Deft., after being let into possession of certain premises by P., & paying rent to him, paid one quarter's rent to pltf. to whom P. had agreed to demise the premises for a long term. In an action by pltf. for the succeeding quarter's rent:—*Held*: deft. might show that the agreement between P. & pltf. was put an end to, & the rent had been paid to P.—*BROOK v. BIGGS (OR BRIGGS)* (1836), 2 Bing. N. C. 572; 1 Hodg. 462; 2 Scott, 803; 5 L. J. C. P. 143; 132 E. R. 223.

**135. —.]—**The law is, that if a person takes possession of premises as tenant to another, the tenant acknowledges his landlord's title to the demised premises, & cannot afterwards be allowed to dispute it unless it be expired (*TINDAL, C.J.*).—*DOE d. COLNAGH v. BLUCK* (1838), 8 C. & P. 464, N. P.

**136. —.]—***DOE d. HIGGINBOTHAM v. BARTON*, No. 212, *post*.

**137. —.]—**Where, in an action by a landlord against his tenant for use & occupation, the tenant offers in evidence a document showing that the landlord's title has ceased, the document is admissible, because the property has passed to another who has a right to sue him for the same use & occupation. But when it appears, that, under the document in question, the property would have passed from pltf. before the time of the use & occupation for which he sued, the document is not admissible, on the usual legal maxim, that a tenant cannot deny his landlord's title.

A tenant may not deny his landlord's title.—*AGAR v. YOUNG* (1841), Car. & M. 78, N. P.

**138. —.]—**A tenant, sued for use & occupation of premises by the landlord of whom he took them on lease, is at liberty to show that the latter's title expired during the tenancy, even though the tenant continued to enjoy or occupy the premises for the whole term, without being subjected to any eviction from the real owner.—*MOUNTNOY v. COLLIER* (1853), 1 E. & B. 630; 22 L. J. Q. B. 124; 20 L. T. O. S. 277; 17 J. P. 132; 17 Jur. 503; 1 W. R. 179; 118 E. R. 573.

*Annotations:—Follid.* *Serjeant v. Nash, Field* (1903), 72 L. J. K. B. 630. *Refd.* *Re Emery & Barnett* (1858), 4 C. B. N. S. 423; *R. v. Birmingham Overseers* (1861), 1 B. & S. 763. *Mentd.* *Leidemann v. Schultz* (1853), 14 C. B. 38; *Foster v. Smith* (1856), 18 C. B. 156; *Schroder v. Ward* (1863), 13 C. B. N. S. 410; *Howorth v. Sutcliffe*, [1895] 2 Q. B. 358.

ing that pltf.'s title had expired.—*ROBERTSON v. BANNERMAN* (1859), 17 U. C. R. 508.—*CAN.*

**138 III. —.]—***PATTERSON v. SMITH* (1877), 42 U. C. R. 1.—*CAN.*

**PART I. SECT. 3, SUB-SECT. 1.—D.**

**128 i. Tenant not estopped.]—***DOE d. MARR v. WATSON* (1847), 4 U. C. R. 398.—*CAN.*

**128 II. —.]—**Land had been

granted to pltf.'s wife, & during her lifetime he had allowed deft. to occupy. She afterwards died without having had children, & pltf. brought ejectment:—*Held*: he could not recover, for deft. was not estopped from show-

139. —.]—LANGFORD v. SELMES, No. 144 post.

140. —.]—It is clear law that though a tenant cannot deny the title of his landlord to deal with the premises, he may prove that the title has determined (COLLINS, M.R.).—SERJEANT v. NASH, FIELD & Co., [1903] 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510, C. A. Annotation:—*Reid*. Works Comrs. v. Hull, [1922] 1 K. B. 205.

141. After expiration of tenancy.]—In ejectment by landlord against tenants, whose lease is expired, the latter is not barred from showing that his landlord's title is expired.—ENGLAND d. SYBURN v. SLADE (1792), 4 Term Rep. 682; 100 E. R. 1243.

Annotations:—*Distd.* Doe d. Colemere v. Whitroe (1822), Dow. & Ry. N. P. 1. *Fold.* Fennor v. Duplock (1824), 2 Bing. 10. *Consd.* Doe d. Palmer v. Andrews (1827), 4 Bing. 348; Claridge v. Mackenzie (1842), 4 Man. & G. 143. *Reid.* Gravenor v. Woodhouse (1822), 1 Bing. 38; Phillips v. Robinson (1827), 4 Bing. 106; Doe d. Hammond v. Cook (1829), 6 Bing. 174; Pluck v. Digges (1831), 5 Bl. N. S. 31; M'Queen v. Meade (1873), 28 L. T. 768. *Mentd.* Wilson v. Allen (1820), 1 Jac. & W. 611.

142. — Life tenancy of landlord.]—(1) A lessee for years covenanted to pay the rent to the lessor, his heirs & assigns, & also to deliver up possession of the demised premises at the expiration of the term, to the lessor, his heirs & assigns. In an action of ejectment brought by the devisee of the lessor against the assignee of the lessee, after the expiration of the term, to recover possession of the premises:—*Held*: the assignee was not estopped by such covenant by showing that the lessor was only tenant for life of the premises demised.

(2) A judgment recovered by deft. in a former ejectment, is admissible in evidence against the lessor of pltf. on the trial of a second ejectment, where the lessor of pltf. & deft. are the same parties.—DOE d. STRODE v. SEATON (1835), 2 Cr. M. & R. 728; Tyr. & Gr. 19; 1 Gale, 303; 5 L. J. Ex. 73; 150 E. R. 308.

Annotations:—*As to* (1) *Consd.* Weeks v. Birch (1893), 69 L. T. 759. *As to* (2) *Reid.* Barrs v. Jackson (1842), 1 Y. & C. Ch. Cas. 585.

143. Prior renunciation of landlord's title—Necessity for.]—In an action for use & occupation, where deft. has come in under pltf., he cannot show that pltf.'s title had expired, unless he solemnly renounced pltf.'s title at the time & commenced a fresh holding under another person.—BALLS v. WESTWOOD (1809), 2 Camp. 11, N. P.

Annotations:—*Distd.* Neave v. Moss (1823), 1 Bing. 360. *Consd.* Doe d. Palmer v. Andrews (1827), 4 Bing. 348; Doe d. Manton v. Austin (1832), 2 Moo. & S. 107; Claridge v. Mackenzie (1842), 4 Man. & G. 143. *Dbtd.* Mountney v. Collier (1853), 1 E. & B. 630.

144. Fresh tenancy with adverse claimant—Necessity for.]—BALLS v. WESTWOOD, No. 143, ante.

—.]—A. pays rent to B., a termor by whom A. was not originally let into possession, A.'s possession having been derived from C., under a demise from E., a prior owner of the term. After the expiration of the term, A., not knowing that the term had expired, enters into a parol agreement with B. for a tenancy, & under such agreement, pays rent to B. A. is not estopped from showing that B.'s title had expired. Such agreement is not equivalent to a fresh letting into possession.—

141 l. After expiration of tenancy.]—Deft. in Dec. 1863, took a lease for five years from H. After expiration of the lease H. conveyed the land to K., to whom deft. paid rent. K. in Dec. 1876, conveyed to pltf., who brought an action of ejectment. Deft. disputed the title of H., the original

lessor:—*Held*: deft. was estopped.—MCKINNON v. MCKINNON (1878), 2 P. E. I. 279.—CAN.

a. Claim by title paramount.]—The rule that a tenant, who has been evicted by title paramount, is not estopped in an action for rent from

CLARIDGE v. MACKENZIE (1842), 4 Man. & G. 143; 4 Scott, N. R. 796; 11 L. J. C. P. 72; 134 E. R. 50.

146. Against reversioner of tenant for life—Having same interest.]—A tenant may show his landlord's title at an end, in ejectment brought against him by the landlord, but where ejectment was brought by the reversioner whose interest was the same as that of the tenant for life, & the tenant had paid rent to the reversioner:—*Held*: he could not show that the reversioner's interest was at an end; but he might show some prior title in the person under whom he claimed to hold.—DOE d. COLEMERE v. WHITROE (1822), Dow. & Ry. N. P. 1.

Annotation:—*Consd.* Doe d. Egremont v. Langdon (1848), 12 Q. B. 711.

147. Claim by title paramount—Acquiescence of landlord.]—In 1784, a tenant for life, who had a power to lease for twenty-one years, leased for fifty-three years to deft. who, in 1813, nine years after the death of tenant for life, underlet to pltf., ten years after the death of tenant for life, the remainderman, after giving to pltf. & deft. notice to quit, granted pltf. a new lease, & received the rent thereon for six years; at the end of which time deft. who had acquiesced in the transaction, during the interval, distrained on pltf. for six years' rent:—*Held*: after this acquiescence, pltf. might, in an action of replevin, plead non tenuit to deft.'s avowry under the lease which pltf. accepted from him in 1813.

It is perfectly true that a tenant cannot be permitted to impeach the validity of his landlord's title but he may show that it has expired (PARK, J.).—NEAVE v. MOSS (1823), 1 Bing. 360; 8 Moore, C. P. 389; 2 L. J. O. S. C. P. 25; 130 E. R. 145.

148. Admission by landlord.]—G. demised premises to D., who entered & paid him rent. During the term, a third party, T. disputed G.'s title, & they agreed to be bound by the opinion of a barrister, who decided in T.'s favour. G. thereupon delivered up the title deeds, & permitted T.'s attorney to tell D., the tenant, that he must, in future, pay the rent to T. as his landlord. D. then paid rent accordingly; but G. afterwards distrained upon him for the same rent. On replevin, avowry, & plea in bar stating above facts:—*Held*: G.'s claim of title as landlord to D. had expired; his conduct amounted to an admission of that fact; & D. was not estopped from alleging it. & G. was estopped from setting up his relation of landlord against D., having himself induced D. to pay rent to another person.—DOWNS v. COOPER (1841), 2 Q. B. 250; 1 Gal. & Dav. 573; 11 L. J. Q. B. 2; 6 Jur. 622; 114 E. R. 100.

Annotation:—*Reid.* Roberts v. Shallers (1858), 1 F. & F. 139.

#### E. Tenant claiming Title in Himself.

149. Whether tenant estopped.]—ANON. (1586), Gouldsb. 53; 75 E. R. 990.

150. —.]—Tenant cannot set up a title against his landlord.—WILSON v. TOWNSHEND (LORD) (1795), 2 Ves. 693; 30 E. R. 840, L. C.

Annotations:—*Mentd.* Robinson v. Wheelwright (1856), 6 De G. M. & G. 535; Warren v. Rudall, Ex p. Godfrey (1860), 1 John. & H. 1; Aston v. Wood (1874), 43 L. J.

disputing his landlord's title, applies where the tenant yields possession under pressure although the eviction is not actually compelled by force or litigation.—CLARKE v. SPINKS (1906), 6 S. R. N. S. W. 653; 23 N. S. W. W. N. 210.—AUS.



**Sect. 3.—Estoppel as between landlord and tenant**  
**Sub-sect. 1, E., F., G., H. & I. (a).]**

Ch. 715; *Re Vardon's Trusts* (1884), 28 Ch. D. 124; *Re Chesham, Cavendish v. Dacre* (1886), 31 Ch. D. 466; *Harle v. Jarman* (1896), 13 R. 610.

**151. — Lease of herbage & pannage.]—**A man seised of lands in fee took a lease by indenture of the herbage & pannage of the same land:—*Held*: no estoppel to him to claim the freehold.—*PLEADAL'S CASE* (1579), 2 Leon. 159; 74 E. R. 441.

*Annotations*:—*Consd.* *Cowper v. Fletcher* (1865), 6 B. & S. 464. *Refd.* *Rawlins's Case* (1588), 4 Co. Rep. 52A; *Sutton's Case* (1589), Cro. Eliz. 140. *Mentd.* *R. v. Ingersall* (1593), Cro. Eliz. 309; *Magrath v. Hardy* (1838), 4 Bing. N. C. 782.

**152. — During currency of tenancy—Existence of tenancy established.]—**Evidence of the existence of a tenancy is conclusive in favour of the landlord's title; & after such evidence, to the satisfaction of a jury, the tenant cannot be allowed to prove even a title in himself to the premises in question, during any part of the time covered by the tenancy.—*DOE d. HUMPHREYS v. HAWKES* (1826), 4 L. J. O. S. K. B. 216.

**153. — While possession retained.]—**Upon an information to set aside a lease for ninety-nine years of charity lands, defts., the lessees, set up a title adverse to the lease:—*Held*: there was no ground for the defence; but the ct. was of opinion, that, if the merits had been otherwise, defts. were estopped, & could not dispute the title, while they retained the possession.—*A. G. v. HOTHAM (LORD)* (1827), 3 Russ. 415; 38 E. R. 631, L. C.

**154. — After expiration of tenancy.]—**Where a person, having possession of land under a good title became tenant, & paid rent to a stranger:—*Held*: he was not estopped after his tenancy was determined & before he had given up possession of the premises, from setting up his own prior title in an action of ejectment by his lessor.—*ACCIDENTAL DEATH INSURANCE CO. v. MACKENZIE* (1861), 5 L. T. 20; 9 W. R. 783.

**155. — Claim by occupancy.]—***HAWKSBE v. HAWKSBE*, No. 180, *post*.

**156. — Entry by leave of party in possession.]—**Lessor of pltf. being in possession of a house & premises, deft. asked leave to get vegetables in the garden; & having obtained the keys for this purpose, fraudulently took possession of the house, & set up a claim of title:—*Held*: having entered by leave of the party in possession, she could not defend an ejectment, but was bound to deliver up the premises before she proceeded to contest the title.

A mere licensee is, in this respect, on the same footing as a tenant.—*DOE d. JOHNSON v. BAYTUP* (1835), 3 Ad. & El. 188; 1 Har. & W. 270; 4 Nev. & M. K. B. 837; 4 L. J. K. B. 263; 111 E. R. 384.

*Annotations*:—*Consd.* *Doe d. Bailey v. Foster* (1846), 3 C. B. 215; *Accidental Death Insee. v. Mackenzie* (1861), 5 L. T. 20; *Ford v. Agor* (1863), 2 New Rep. 366. *Expd.* *Tadman v. Henman*, [1893] 2 Q. B. 168. *Refd.* *Doe d. Poole v. Errington* (1836), 2 Har. & W. 448.

**157. — Possession through former tenant of landlord—Attornment of such tenant—Attornment obtained by fraud.]—**(1) An agreement to let certain premises for a specific period at a sum of

£10 does not require a stamp, inasmuch as the matter of it cannot be looked upon as of the value of £20 or upwards, within Stamp Act, 1815 (c. 134), sched. part 1. The subject matter of such an agreement is the rent not the value of the occupation.

(2) In ejectment, the lessor of pltf. claimed as devisee of A., deft. claimed as heir at law of A., but had come into possession by agreement with B., who was originally tenant to A., but had attorned to the lessor of pltf.:—*Held*: deft. was estopped from disputing the title of the lessor of pltf. *Semble*: *aliter* if B. had attorned to the lessor of pltf. in consequence of a fraudulent misrepresentation by him.—*DOE d. MARLOW v. WIGGINS* (1843), 4 Q. B. 367; 3 Gal. & Dav. 504; 12 L. J. Q. B. 177; 7 Jur. 529; 114 E. R. 937.

*Annotations*:—*As to* (2) *Consd.* *Swinfen v. Bacon, Swinfen v. Lewis* (1861), 5 L. T. 83; *Carlton v. Bowcock* (1884), 51 L. T. 659. *Refd.* *Accidental Death Insee. v. Mackenzie* (1861), 5 L. T. 20.

**158. — —.]—**Where A. mortgaged land, of which B. was in possession, to C., & B. acquired title to the land, as against the mtgor., by adverse possession for twenty years, & then sold to F. in fee, & by agreement continued in possession as tenant to F., & C., who claimed under a mtge. in respect of which interest had been paid within twenty years from the time of action brought, paid B. £5 to give up possession:—*Held*: C. was not estopped in ejectment brought by F. from setting up his title acquired through the mtge.—*FORD v. AGER* (1863), 2 H. & C. 279; 2 New Rep. 366; 32 L. J. Ex. 269; 8 L. T. 546; 9 Jur. N. S. 804; 11 W. R. 1073; 150 E. R. 117.

*Annotation*:—*Mentd.* *Hemming v. Blanton* (1873), 42 L. J. C. P. 168.

**F. After Attornment by Tenant.**

**159. Whether tenant estopped.]—**Avowants proved an attornment made by pltf., after ejectment brought against him seven years before the commencement of the replevin suit, during which seven years it did not appear that rent had been demanded. Pltf. offered to prove a feoffment to himself by the person under whom avowants claimed, & certain letters from that person containing expressions adverse to avowants' claim; which evidence having been rejected, on the ground that pltf. could not be permitted to dispute his tenancy after an attornment, the ct. granted a new trial.

Of the general rule of law, that a tenant shall not be allowed to question the title of his landlord where he has originally received possession from him & has paid him rent, there is no doubt. It always furnishes a strong *prima facie* case: but to the generality of this rule there are exceptions; for, although on the one hand the general rule is most wise & politic, in not allowing a tenant lightly to use to his landlord's detriment that title the possession of which he has entrusted to him, so on the other it is most just so far to guard the tenant, that he may not be carelessly put into the hazardous situation of paying his rent twice over, & being put to the trouble & expense of an action to recover that which he may have been compelled to pay.

Payment of rent, in all cases, furnishes a strong

**PART I. SECT. 3, SUB-SECT. 1.—E.**

**158 I. Whether tenant estopped—Possession through former tenant of landlord.]—**Deft. obtained possession of land from pltf.'s tenant, by representing that he had the title to it, & threatening to eject the tenant:—*Held*: deft. was estopped from disputing the landlord's title, & setting

up an adverse title in himself.—*DOE d. BLISS v. ESTEY* (1857), 3 All. 489.—*CAN.*

**PART I. SECT. 3, SUB-SECT. 1.—F**

**159 I. Whether tenant estopped.]—**The rule as to a tenant not being permitted to deny the landlord's title applies only where the tenant obtained possession from the landlord. Where a person

having been in possession is persuaded to attorn under circumstances which do not warrant it, he may show that the rent was paid without sufficient ground.—*DAUPHINAIS v. CLARK* (1885), 3 Man. L. R. 225.—*CAN.*

**159 II. —.]—***LAL MAHOMED v. KALLANUS* (1885), 1 L. R. 11 Cal. 519.—*IND.*

presumption against the tenant, & it is always a good *prima facie* case for the landlord: but that is also open to explanation; for where it has been paid under a misrepresentation, the tenant is not estopped from resisting further payment, after discovery of the mistake (PARK, J.).—GRAVENOR v. WOODHOUSE (1822), 1 Bing. 38; 7 Moore, C. P. 289; 130 E. R. 16; *subsequent proceedings* (1824), 2 Bing. 71.

*Annotations*.—*Consd.* Cornish v. Searell (1828), 8 B. & C. 471; Cooper v. Blandy (1834), 3 L. J. C. P. 274. *Estd.* Doe d. Linsey v. Edwards (1836), 6 Nev. & M. K. B. 633; Downs v. Cooper (1841), 2 Q. B. 256; Mountney v. Collier (1853), 17 Jur. 503.

160. —[—]—CORNISH v. SEARELL, No. 29, *ante*.

161. — *Adverse claim by third party.*—[N., having no title to certain premises, let them by parol, & received rent. Afterwards another claimant, B., demanded the rent; & N., being satisfied with B.'s title, informed his tenant, in B.'s presence, that he had given up the premises to B. who was now the landlord, & that the rent was thenceforth to be paid to B. The tenant acquiesced; & when B. demanded the next quarter's rent, paid part of it on account:—*Held*: the tenant could not afterwards set up the title of a third claimant who had demanded rent, but had taken no step to eject him; no deception by any of the parties having been suggested.—HALL v. BUTLER (1839), 10 Ad. & El. 204; 2 Per. & Dav. 374; 8 L. J. Q. B. 239; 113 E. R. 78.

*Annotation*.—*Expld.* Jew v. Wood (1841), Cr. & Ph. 185.

162. — *Attornment in ignorance of disputed title.*—[Pltf. who had occupied lands under A., upon A.'s death entered into an agreement to pay rent to deft., & paid 1s. as an acknowledgment of his title, being ignorant that it was disputed. It turning out afterwards that deft. had no claim to the property:—*Held*: pltf. might dispute deft.'s title in a plea of *non tenuit* in replevin.—GREGORY v. DOIDGE (1826), 3 Bing. 474; 11 Moore, C. P. 394; 4 L. J. O. S. C. P. 159; 130 E. R. 596.

*Annotations*.—*Consd.* Doe d. Plevin v. Brown (1837), 7 Ad. & El. 447; Jew v. Wood (1841), Cr. & Ph. 185. *Fold.* Claridge v. Mackenzie (1842), 4 Man. & G. 143. *Refd.* Doe d. Linsey v. Edwards (1836), 6 Nev. & M. K. B. 633.

163. — *Interpleader by tenant.*—[Upon the death of a landlord, the tenant, in ignorance of the rights of the parties, attorned & paid rent to A., who claimed as devisee. The right of A. to the property was afterwards disputed by B., the heir:—*Held*: the tenant might maintain a bill of interpleader against A. & B.—JEW v. WOOD (1841), Cr. & Ph. 185; 10 L. J. Ch. 261; 5 Jur. 954; 41 E. R. 461, L. C.

*Annotations*.—*Mentd.* Crawford v. Fisher (1842), 1 Hare, 436; Watts v. Hammond (1855), 25 L. T. O. S. 39; Meador v. Talbot (1857), 27 L. J. Ch. 165.

164. *Attornment by former tenant.*—[DOE d. MARLOW v. WIGGINS, No. 157, *ante*.

165. *Attornment obtained by misrepresentation or fraud.*—[WILLIAMS v. BARTHOLOMEW, No. 188, *post*.

—[—]—DOE d. MARLOW v. WIGGINS, No. 157, *ante*.

### G. Estoppel by Deed.

See ESTOPPEL, Vol. XXI., pp. 249, 256, 262, 267, 275, 281, Nos. 743-747, 750, 803-805, 831, 832, 867, 924, 969-973, 976.

### H. Estoppel by Verbal or Written Statement.

*Verbal statements.*—[See ESTOPPEL, Vol. XXI., pp. 310, 311, 313, Nos. 1140-1142, 1152.

*Written statements.*—[See ESTOPPEL, Vol. XXI., pp. 319-324, Nos. 1187-1213.

### I. Admission of Landlord's Title—What Amounts to.

#### (a) Payment of Rent.

167. *Evidence of landlord's title—Prima facie evidence.*—[Payment of rent is *prima facie* evidence of title in the landlord.—DOE d. CLUN (BAILIFF & BURGESS) v. CLARKE (1809), Peake, Add. Cas. 239, N. P.

168. —[—]—[In an action by the reversioners of a copyhold estate, for an injury to their reversion, pltf. proved the payment to them of rent by the tenant; deft. proved the surrender to & admittance of third parties to the estate in 1821:—*Held*: the payment of rent was sufficient *prima facie* evidence of the reversion being in pltf. & the surrender proved by deft. did not cast the *onus* of proof upon pltf. to show a reconveyance of the estate to them.—DAINTY v. BROCKLEHURST (1848), 3 Exch. 207; 18 L. J. Ex. 57; 12 L. T. O. S. 293; 154 E. R. 817.

169. — *Rebuttable.*—[In replevin proof of payment of rent to the avowant is *prima facie* evidence that he is the owner of the land.

But in a case where pltf. did not originally receive the possession of the land from the avowant, it is competent to pltf. to rebut the title of the avowant by showing that he paid rent under circumstances which did not entitle the avowant to the rent, & such evidence may be given on the issue *non tenuit modo et forma*.—ROGERS v. PITCHER (1815), 6 Taunt. 202; 1 Marsh. 541; 128 E. R. 1012.

*Annotations*.—*Refd.* Taylor v. Zamina (1816), 6 Taunt. 524; Doe v. Buddon (1822), 1 Dow. & Ry. K. B. 243; Gravenor v. Woodhouse (1822), 1 Bing. 38; A. & G. v. Hatham (1823), Turn. & J. 269; Gregory v. Doidge (1826), 3 Bing. 474; Harris v. Booker (1827), 6 L. J. O. S. C. P. 92; Cornish v. Searell (1828), 8 B. & C. 471; Cooper v. Blandy (1834), 1 Bing. N. C. 45; Allason v. Stark (1838), 1 Per. & Dav. 183; Jew v. Wood (1841), Cr. & Ph. 185; Claridge v. Mackenzie (1842), 4 Scott, N. R. 796; Doe d. Lord v. Crago (1848), 6 C. B. 90; Carlton v. Bowcock (1884), 51 L. T. 659.

170. —[—]—[GRAVENOR v. WOODHOUSE, No. 159, *ante*.

171. —[—]—[T. holding pictures of P., as a security for an alleged debt, hired rooms of pltf. in which to deposit them. P. having died, defts., his administrators, contested T.'s claim by a suit in Chancery. Pending the suit, in order to prevent the pictures from being distrained, they petitioned the ct. to satisfy pltf.'s rent out of certain funds paid into ct. in the course of the cause. T.'s claim having been disallowed by the ct., the pictures were ordered to be delivered to

### PART I. SECT. 3, SUB-SECT. 1.—L. (a).

167 i. *Evidence of landlord's title—Prima facie evidence.*—[A tenant let into possession by a person claiming rent cannot dispute the title of such person; nor if let into possession by a third person, & having acknowledged the title & agreed to pay rent to pltf., can he afterwards compel him to prove his title.—SMITH v. MODERLAND (1862), 11 C. P. 387.—CAN.

167 ii. —[—]—[After a conveyance of land made by a person of unsound mind, a tenant for years of the land paid rent to the grantee:—*Held*: after the death of the tenant, his widow was estopped by the payment of rent from denying the title of the grantee.—DOE d. HICKMAN v. KING (1868), 1 Han. 330.—CAN.

167 iii. —[—]—[BANK OF MONTREAL v. GILCHRIST (1881), 6 A. R. 659.—CAN.

167 iv. —[—]—[VARSHDEV DAJI v. BABAJI RANU (1871), 8 Bom. A. C. 175.—IND.

169 i. — *Rebuttable.*—[BANEK MADHUB GHOSE v. THAKOOR DOSH MUNDUL (1866), B. L. R. Sup. Vol. 588; 6 W. R. (Act X.) 71.—IND.

169 ii. —[—]—[JESING-BHAI v. HATAJI (1879), 1 L. R. 4 Bom. 79.—IND.

**Sect. 3.—Estoppel as between landlord and tenant:**  
**Sub-sect. 1, I. (a), (b), (c) & (d).]**

defts., who, in order to obtain them, paid rent to the time of delivery:—*Held*: these circumstances did not constitute defts. tenants to pltf.

There are cases in which such an implication [of the existence of a tenancy] would arise from the payment of rent but every such implication is liable to be rebutted. . . . The mere payment of rent will not of itself constitute a tenancy (*BEST, C.J.*).—*STRAHAN v. SMITH* (1827), 4 Bing. 91; 12 Moore, C. P. 289; 5 L. J. O. S. C. P. 95; 130 E. R. 703.

172. ————]—*KNIGHT v. COX*, No. 180, *post*.

173. ————]—Where the only evidence of a tenancy is payment of rent, the person paying is in all cases at liberty to explain the payment, & to show on whose behalf it was received.—*DOE d. HARVEY v. FRANCIS* (1837), 2 Mood. & R. 57, N. P.; *subsequent proceedings*, *sub nom. FRANCIS v. DOE d. HARVEY* (1838), 4 M. & W. 331, Ex. Ch.

*Annotation*:—*Reid. Doe d. Bailey v. Foster* (1846), 3 C. B. 215.

174. ————]—**Payment to agent of landlord—Principal not disclosed.**—The payment of rent by a tenant to an authorised agent, who pays over the rent to his principal, is evidence as against the tenant of the principal's title, although the agent do not disclose his principal's name at the time.

Where A. had paid rent to B., the agent of C. & D., & the property for which the rent was paid was subsequently conveyed to C. & E., & A. still paid the rent to B., but was not informed by the latter of the change, & B. paid over the rent to C. & E.:—*Held*: the payment so made was some evidence of the title of C. & against E. to the property, & under such circumstances, there was no necessity in an action of replevin by A. against parties claiming under C. & E. for the proof of the conveyance to C. & E.—*HITCHINGS v. THOMPSON* (1850), 5 Exch. 50; 19 L. J. Ex. 146; 155 E. R. 20.

*Annotations*:—*Consol. A.-G. v. Stephens* (1855), 6 De G. M. & G. 111. *Reid. Carlton v. Bowcock* (1884), 51 L. T. 659.

175. ————]—Where pltf. in ejectment claimed that deft. was estopped by payment of rent from disputing his title:—*Held*: deft., who alleged receipt of rent by pltf. as collector, was entitled to defend on the merits in the ordinary course & the ct. was wrong in allowing judgment to be signed by pltf. under R. S. C., Ord. 14.—*JONES v. STONE*, [1894] A. C. 122; 63 L. J. P. C. 68; 70 L. T. 174; 6 R. 437, P. C.

176. ————]—Deft. enclosed a small piece of waste land by the side of a public highway, & occupied it for thirty years without paying any rent; at the expiration of that time, the owner of the adjoining land demanded 6d. rent, which deft. paid on three several occasions. In ejectment:—*Held*: this, in the absence of other evidence, was conclusive to show that the occupation of deft. began by permission, & entitled pltf. to a verdict.—*DOE d. JACKSON v. WILKINSON* (1824), 3 B. & C. 413; 5 Dow. & Ry. K. B. 273; 107 E. R. 787.

*Annotations*:—*Reid. Doe d. Thompson v. Clark* (1828), 8 B. & C. 717; *Hodgson v. Hooper* (1860), 3 E. & E. 149.

177. ————]—*DOE d. GRUBB v. GRUBB*, No. 202, *post*.

178. ————]—*COOPER v. BLANDY*, No. 223, *post*.

179. ————]—*DOE d. NICHOLL v. BOWER*, No. 198, *post*.

180. ————]—A. B. having been in possession

of a dwelling-house from 1822, without paying any rent for the same, by his will, dated in 1837, devised the same upon trusts for sale, for the benefit of his wife for life, & afterwards for his children. A. B. died in 1837, & his widow took out letters of administration, with the will annexed, & entered into possession of the house, a portion of which she let in 1850 to C. D., the eldest son of A. B. as a weekly tenant. The widow died in 1852, & thereupon C. D. claimed the house as occupant, contending that A. B. had not at his death a devisable interest in it:—*Held*: it must be taken that the widow had been in possession under the will, & C. D. was her tenant; & therefore, C. D. could not claim as occupant.

Deft. having paid rent to her [the widow] must be regarded as her tenant . . . deft. could not be allowed to say that he had acquired a title by occupancy when he had got into possession as tenant of the widow (*WOOD, V.-C.*).—*HAWKSBEET v. HAWKSBEET* (1853), 11 Hare, 230; 23 L. J. Ch. 521; 68 E. R. 1259.

*Annotations*:—*Mentl. Paine v. Jones* (1874), L. R. 18 Eq. 320; *Dalton v. Fitzgerald*, [1897] 2 Ch. 86.

181. ————]—*DUKE v. ASHBY*, No. 126, *ante*.

182. ————]—If a man pays rent to the landlord on the footing of accepting a term & the liabilities under it, & the landlord accepts the rent on those conditions, then such a person might be estopped from denying that he has become tenant to the landlord on those conditions. But the terms of payment of the rent in this case fall short of showing that deft. meant to stand for all purposes in the shoes of the original lessee. The landlord has his rights against B. on his covenants, but not against deft., unless deft. has taken the lease by assignment or has estopped himself from denying that he is assignee of the term. There is nothing here to show any such estoppel (*BOWEN, L.J.*).—*TICHBORNE v. WEIR* (1892), 67 L. T. 735; 8 T. L. R. 713; 4 R. 26, C. A.

*Annotations*:—*Mentl. Re Jolly, Gathercole v. Norfolk*, [1900] 1 Ch. 292; *Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391; *Re Atkinson & Horsell's Contract*, [1912] 2 Ch. 1.

183. ————]—*JUMP v. PAYNE*, No. 106, *post*.

184. **Payment after expiration of landlord's title—Notice of adverse claim to tenant.**—*FENNER v. DUPLOCK*, No. 40, *ante*.

185. **Demise by two persons—Payment of moiety of rent to heir of survivor—Tenancy in common.**—Where a demise is made by two persons with a reservation of rent to themselves & their heirs, payment by the lessee of a moiety of a half year's rent to the heirs of the survivor affords evidence of pltf.'s treating the estate of the lessors as a tenancy in common so as to estop him from afterwards contending that the estate was a joint tenancy.—*BROWN v. WARD* (1852), 19 L. T. O. S. 49.

186. **Payment under threat of distress.**—Payment of rent under a distress is not a conclusive admission of title in the distrainer but may be rebutted by showing that he never had any title. Pltf. claimed as extrix. & devisee of the administratrix of one of three lessors & showed that rent had been paid by deft., the lessee, to her testatrix & to herself on two occasions after distress:—*Held*: this *prima facie* case was answered by showing that one of the other lessors was still living.—*KNIGHT v. COX* (1856), 18 C. B. 645; 27 L. T. O. S. 187; 20 J. P. 744; 139 E. R. 1523; *sub nom. COX v. KNIGHT*, 25 L. J. C. P. 314.

*Annotation*:—*Reid. Carlton v. Bowcock* (1884), 51 L. T. 659.

187. **Payment to assignee of landlord—Fraud or misrepresentation by assignee.**—Where a per-

son claiming to be assignee of the reversion receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but where there is no fraud or misrepresentation, such payment is *prima facie* evidence of title, & the tenant can only defeat that title by showing that he paid the rent in ignorance of the true state of the title, & that some third person is the real assignee of the reversion & entitled to maintain ejectment. Hence, in an action for rent by the alleged assignee of the reversion, where rent had been paid by the tenant to the agent of the alleged assignee, it was held to be no defence for the tenant merely to show that the alleged assignee had no title to the reversion.—*CARLTON v. BOWCOCK* (1884), 51 L. T. 659.

**188. Payment under mistake of law.]**—If A., tenant for life subject to forfeiture remainder over to B., leased to G. for a term, & afterwards apprehending that he had forfeited, acquiesced in B.'s claiming & receiving the rent from G., his exor. might, on showing that he acquiesced under a false apprehension, recover from G. the amount of the rent erroneously paid to B.

Every tenant is bound by his attornment; deft. might have pleaded that he did not hold as tenant to D., & if D. had said "You have attorned to me," deft. might have answered "I did that on your misrepresentation, who claimed as remainderman," & might have shown that M. B. was still alive & entitled (*BULLER, J.*).—*WILLIAMS v. BARTHOLOMEW* (1798), 1 Bos. & P. 326; 126 E. R. 930.

*Annotations:*—*Apld.* *Gregory v. Doidge* (1826), 3 Bing. 474. *Refd.* *Rogers v. Pitcher* (1815), 6 Taunt. 202; *Claridge v. McKenzie* (1842), 4 Scott, N. R. 796; *Doed. Lord v. Crago* (1848), 6 C. B. 90.

**189. —.]**—Defts. & their predecessors had for some years paid rent to pltf. in the belief that they were bound to do so under a licence from pltf.:—*Held*: this, being a voluntary payment made under a supposed legal liability, created in law no obligation at all, & defts. were not estopped from setting up their title under the conveyance.—*BATTEN POOLL v. KENNEDY*, [1907] 1 Ch. 256; 76 L. J. Ch. 162.

**190. Payment under mistake of fact.]**—*DOE d. HIGGINBOTHAM v. BARTON*, No. 212, *post*.

**Attornment & payment of rent.]**—*See* Part I., Sect. 3, sub-sect. 1, F., *ante*.

#### (b) Submission to Distress.

**191. Evidence of title.]**—If the occupier of a house submits to a distress for rent stated in the notice of distress to be due from him as tenant to the distrainer, this is an acknowledgment of the tenancy.—*PANTON v. JONES* (1813), 3 Camp. 372, N. P.

*Annotation:*—*Apld.* *Cooper v. Blandy* (1834), 1 Bing. N. C. 45.

**192. — Tenant estopped—Landlord in fact without title.]**—*COOPER v. BLANDY*, No. 223, *post*.

**193. — Prima facie evidence only.]**—*KNIGHT v. COX*, No. 186, *ante*.

#### (c) Former Legal Proceedings.

**194. Arbitrator's award.]**—Where the lessor of pltf. & deft. in ejectment had before referred their right to the land to an arbitrator who had awarded in favour of the lessor, the award concludes deft. from disputing the lessor's title in an

action of ejectment.—*DOE d. MORRIS v. ROSSER* (1802), 3 East, 15; 102 E. R. 501.

*Annotation:*—*Refd.* *Thorpe v. Eyre* (1834), 1 Ad. & El. 926.

**195. Judgment.]**—In an action of replevin between the assignees of a bkpt., who was formerly tenant to A., & the bailiff who distrained, one issue is, whether the assignees are tenants to A. A verdict against the assignee, on this issue, is afterwards conclusive as to the tenancy of the assignees in an action brought by A. for rent.—*HANCOCK v. WELSH & COOPER* (1816), 1 Stark. 347, N. P.

**196. — For previous arrears of rent.]**—Deft. continued to pay the rent. After a while deft. got in arrear & on four different occasions was sued by pltf. to recover the quarter's rent; & four different times it appears deft. had submitted to judgment against him for the quarter's rent sought to be recovered. That seems to me to create a tenancy by estoppel (*DAY, J.*).—*JUMP v. PAYNE* (1899), 68 L. J. Q. B. 607.

**Subsequent action for mesne profits.]**—*See* ESTOPPEL, Vol. XXI., pp. 145, 171, Nos. 86, 87, 262, 263.

**197. Answer in Chancery.]**—*DOE d. WHITLEY v. HUGHES* (1850), 15 L. T. O. S. 89.

**198. Admission made as witness.]**—Deft. was let into possession of certain premises by A. & paid rent to A. who gave receipts for it as "for self & C." After these receipts were given, deft. still continued in possession & corresponded with A. as his landlord upon certain matters connected with the premises. Upon one occasion of his being examined as a witness upon an inquisition deft. deposed that he was tenant to A. In an action of ejectment to recover possession of the premises:—*Held*: there was evidence upon which the jury might find that he had admitted himself to be tenant to A. so as to entitle pltf. to succeed upon a demise by A.—*DOE d. NICHOLL v. BOWER* (1852), 18 L. T. O. S. 221.

#### (d) Other Cases.

**199. Entry into possession—Offer to pay rent.]**—Deft. applies for leave to take the premises, & upon obtaining the landlord's consent, does take them, & agrees to stand in H.'s shoes; & besides that, he offers to pay rent: this is more than sufficient to create a tenancy; & being once a tenant, it is not competent to him to dispute his landlord's title (*LORD ELLENBOROUGH, C.J.*).—*PHIPPS v. SCULTHORPE* (1817), 1 B. & Ald. 50; 106 E. R. 19.

*Annotations:*—*Refd.* *Mathews v. Sawell* (1818), 2 Moore, C. P. 262; *Thomas v. Cook* (1818), 2 B. & Ald. 119; *DOE d. Huddleston v. Johnston* (1825), M'Cle. & Yo. 141; *Hyde v. Moakes* (1832), 1 L. J. K. B. 71; *Beard v. Davidson* (1843), 1 L. T. O. S. 616.

**200. — After contract to purchase lease—Part payment of purchase-money.]**—A party contracted for the purchase of the benefit of an agreement for the lease of a public-house, & also of the stock & goodwill; he entered into possession before the lease had been granted, paid part of the purchase-money & mortgaged his interest:—*Held*: after this mode of dealing he was not entitled to call for the production of the lessor's title, or for evidence that the lease was made in conformity with the power under which it was granted.—*HAYDON v. BELL* (1838), 1 Beav. 337; 2 Jur. 1008; 48 E. R. 970.

#### PART I. SECT. 3, SUB-SECT. 1.—I. (d).

**b. Entry into possession.]**—Parties entering upon land precluded from denying the title of the party by whose permission they enter.—*LAKEVIEW CO. v. MOORE* (1903), 36 N. S. R. 333.—*CAN.*



**Sect. 8.—Estoppel as between landlord and tenant:**  
**Sub-sect. 1, I. (d), & J.]**

**201. Payment of rent into court.]**—Payment of money into ct., upon a special contract, admits the contract, & concludes deft. from impeaching its existence. Where a declaration by landlord against tenant, averred, that deft. became tenant to pltf. of certain messuages, etc., from year to year, under a certain rent, payable half yearly, & that deft. undertook & promised that he would, during the continuance of the tenancy, keep the messuages, etc., in repair, & would, during the continuance of the said tenancy, pay rent; & alleged as breaches, in the first count, that the premises were not kept in tenantable repair; & in the second, first, non-repair, & second, non-payment of rent; & deft. having pleaded the general issue, & paid into ct. half a year's rent under the second breach:—*Held*: such payment admitted the whole of the contract.—*DYER v. ASHTON* (1822), 1 B. & C. 3; 2 Dow. & Ry. K. B. 19; 1 L. J. O. S. K. B. 8; 107 E. R. 2.

**202. Submission to entry by landlord.]**—In 1804, there were acts done of a decisive & unequivocal character, for in that year the elder brother demanded & received rent from the tenant, & not only made an entry upon the land, but was allowed to mark & cut down trees, which he afterwards sold for his own benefit. These were acts done by a person claiming to be landlord, & the submission to them by the tenant was an acknowledgment on his part of the title of claimant (LORD TENTERDEN, C.J.).—*DOE d. GRUBB v. GRUBB* (1830), 10 B. & C. 816; 5 Man. & Ry. K. B. 666; 8 L. J. O. S. K. B. 321; 109 E. R. 652.

**203. Agreement to purchase while in possession.]**—A. being in possession of land, agreed by writing that H. should sell & he, A., should purchase the land for an estate *pur autre vie*: that A. "shall be entitled to the possession or to the rents" "on or from this day:" H. to make a good title in twenty-one days: if the purchase should not be completed by a day named, A. to pay interest. The purchase was not completed: but A. continued to hold. H. gave A. notice to quit, in the ordinary form of notice to tenant from year to year:—*Held*: in the absence of any evidence as to the right of possession in A., H. on these facts, might recover against A., in ejectment.—*DOE d. BORD v. BURTON* (1851), 16 Q. B. 807; 17 L. T. O. S. 62; 15 Jur. 990; 117 E. R. 1091.

**204. Payment of ground rent & collection of rents.—On behalf of such person who might in law be entitled thereto.]**—The assignee of a lease granted by pltf. died intestate, leaving no estate other than the lease. Deft., her son, who had collected the rents of the demised premises on his mother's behalf during her lifetime, continued to collect them after her death, & after paying the ground rent in her name to pltf., he handed the balance to his sister. After his sister's death deft. still continued to collect the rents & to pay the ground rent in his mother's name to pltf., retaining the surplus for such person or persons as might in law be found entitled thereto. Shortly after deft.'s sister's death pltf. became aware for the first time of the death of deft.'s mother, the assignee of the lease, & after some correspondence with deft. they entered into possession of the premises & sought to make him personally liable for breach of the repairing covenant contained in the lease on the ground that he had intermeddled with the lease & had become an *exor. de son tort*:—*Held*: deft. was not liable by privity of estate as the lease was never vested in him, & he had

not so acted as to make himself liable by estoppel.—*STRATFORD-UPON-AVON CORPN. v. PARKER*, [1914] 2 K. B. 562; 83 L. J. K. B. 1309; 110 L. T. 1004; 58 Sol. Jo. 473, D. C.

**J. In Whose Favour Estoppel Operates.**

**205. Assignee of landlord.—Denial of lessor's interest at time of lease.]**—A lessee by indenture cannot plead even against an assignee any thing which is tantamount to pleading that the lessor had no interest in the premises when he made the lease. In an action of covenant such plea is bad upon a general demurrer if the declaration shows that the lease was by indenture, & will not prevent pltf. from having judgment. A plea that the lessor made a conveyance in fee before the lease, with a traverse that he was afterwards seised in fee, is tantamount to pleading that he had no interest in the premises when he made the lease.—*PALMER v. EKINS* (1728), 2 Ld. Raym. 1550; 1 Barn. K. B. 103; 11 Mod. Rep. 407; 2 Stra. 817; 92 E. R. 505.

*Annotations*.—*Distd.* Carvick v. Blagrove (1820), 1 Brod. & Bing. 531. *Refd.* Pluck v. Digges (1831), 5 Bl. N. S. 31; Cardwell v. Lucas (1836), 2 M. & W. 111; Cuthbertson v. Irving (1860), 6 H. & N. 135. *Mentd.* Gibson v. Minet (1791), 1 Hy. Bl. 569; Beckett v. Bradley (1844), 7 Man. & G. 994; Lush v. Russell (1850), 19 L. J. Ex. 244.

**206. ———.]**—In an action of covenant for rent on an indenture brought by the assignees of the lessor, a bkpt., the lessee cannot plead that the lessor *nil habuit in tenementis*.—*PARKER v. MANNING* (1798), 7 Term Rep. 537; 101 E. R. 1119.

*Annotations*.—*Apld.* Taylor v. Needham (1810), 2 Taunt. 278. *Refd.* Pluck v. Digges (1831), 5 Bl. N. S. 31; Webb v. Austin (1844), 7 Man. & G. 701.

**207. ———.]**—In covenant for non-payment of rent, on an indenture, by the assignee of the lessor against lessee, the declaration alleged, that the lessor was possessed for the remainder of a term of twenty-two years, commencing from Dec. 25, 1797, & that on Mar. 7, 1811, he, by indenture, demised to deft. to hold from Dec. 20 then last past.

Plea, that the lessor was not at the time of making the indenture, possessed for the residue of the said term *modo et forma*:—*Held*: such plea was good on general demurrer, as the averment in the declaration was material & traversable.—*CARVICK v. BLAGRAVE* (1820), 1 Brod. & Bing. 531; 4 Moore, C. P. 303; 129 E. R. 827.

*Annotations*.—*Apld.* Seymour v. Franco (1828), 7 L. J. O. S. K. B. 18. *Consd.* Webb v. Austin (1844), 7 Man. & G. 701; Cuthbertson v. Irving (1859), 4 H. & N. 742. *Mentd.* Lush v. Russell (1850), 5 Exch. 203.

**208. ———.]**—*CUTHBERTSON v. IRVING*, No. 264, *post*.

**209. ———.] Assignment of greater interest than tenant's.]**—A. hired apartments by the year of B.; B. afterwards let the entire house to C., who sued A. in an action for use & occupation for the hire of the apartments:—*Held*: A. could not impeach C.'s title.—*RENNIE v. ROBINSON* (1823), 1 Bing. 147; 7 Moore, C. P. 539; 1 L. J. O. S. C. P. 30; 130 E. R. 60.

*Annotations*.—*Refd.* Phillips v. Pearce (1826), 8 Dow. & Ry. K. B. 43; Cooper v. Blandy (1834), 3 L. J. C. P. 274; Rayson v. Adcock (1863), 7 L. T. 747.

**210. ———.] Denial of derivative title from lessor.]**—Land belonging to a parish was occupied by A., & he paid rent to the churchwardens. They executed a lease of the same land for a term of years to B., & gave A. notice of the lease. In an action for use & occupation by B. against A.:—*Held*: A. was not estopped by having paid rent to the churchwardens from disputing B.'s title, & that the latter could not derive a valid title

from the churchwardens.—**PHILLIPS v. PEARCE** (1826), 5 B. & C. 433; 8 Dow. & Ry. K. B. 43; 108 E. R. 162.

**Annotation**.—**Reid. Doe d. Higgs v. Cockell** (1834), 6 C. & P. 525.

**211.** ———.]—Although the lessee, when sued in covenant by the lessor, cannot dispute the lessor's title, yet, when sued by the assignee of the lessor, he may deny that the lessor had such a title as could pass the right of action to the assignee.—**SEYMOUR v. FRANCO** (1828), 7 L. J. O. S. K. B. 18.

**212.** ———.]—M., being seised in fee of land, mortgaged to O., but remained in possession, & afterwards demised part for a term to B., who also entered; after which M. mortgaged to H. H. after this received rent from B., & demised the other part to A. Afterwards B. & A. on notice from O. paid O. rent. H. then brought ejectment, after notice to quit, against B. & A.:—**Held**: B. & A. might both show, in defence, the first mtge. to O., O.'s notice to them, & their payment of rent to O. For although B. could not dispute M.'s title at the time of the demise, he might show that H. had no derivative title from M., & he was not precluded by having paid to H. under a mistake of the facts. A., by showing that M., at the time of the demise to him, was only mtgor. in possession, did not impugn M.'s right to confer upon him, by the demise a legal title to the possession, but might show that M. had since been treated as a trespasser by the mtgee. so as to determine M.'s right; & O.'s notice to the tenant to pay him the rent might, if received in evidence, tend to show that by so doing, O. treated the mtgor. as a trespasser.—**DOE d. HIGGINBOTHAM v. BARTON** (1840), 11 Ad. & El. 307; 3 Per. & Dav. 194; 9 L. J. Q. B. 57; 4 Jur. 432; 113 E. R. 432.

**Annotations**.—**Appld. Claridge v. Mackenzie** (1842), 4 Man. & G. 143. **Distd. Gouldsworth v. Knights** (1843), 11 M. & W. 337. **Consd. Dolaney v. Fox** (1857), 2 C. B. N. S. 768; **Serjeant v. Nash, Field**, [1903] 2 K. B. 304. **Reid. Mountney v. Collier** (1853), 17 J. P. 132; **Cuthbertson v. Irving** (1859), 4 H. & N. 742; **Hickman v. Machin** (1859), 4 H. & N. 716; **White v. Greenish** (1861), 11 C. B. N. S. 209; **Underhay v. Read** (1887), 58 L. T. 457; **Nesbitt v. Mablethorpe U. C.**, [1918] 2 K. B. 1.

**213.** ———.]—A declaration in covenant by devisee of the reversion against lessee, alleged that the reversion of & in the demised premises belonged to the lessor & his heirs. Plea, that the reversion of & in the demised premises did not belong to the lessor & his heirs. Replication by way of estoppel that the lease was an indenture executed by defts., & that he entered & enjoyed the demised premises by virtue of the indenture; that it did not appear by the indenture that the lessor was not seised in fee, or that he had any estate or interest other than a fee simple; nor did the indenture contain anything to show that the reversion did not belong to the lessor & his heirs. On demurrer to the replication:—**Held**: the plea was good, under C. L. P. Act, as traversing a material allegation in the declaration also, that the replication was bad, since the lessor might have had a term of years, or an estate for life, or *pour autre vie*.—**WELD v. BAXTER** (1856), 1 H. & N. 568; 26 L. J. Ex. 112; 28 L. T. O. S. 176; 3 Jur. N. S. 91; 5 W. R. 113; 156 E. R. 1328, Ex. Ch.

**Annotation**.—**Reid. Hickman v. Machin** (1859), 4 H. & N. 716.

**214.** ———. **Assignment in fraud of creditors.**]—A. demised a house & lands to B. & afterwards, being embarrassed, assigned the premises, & all his personal estate to C. A. told B. that he had assigned the premises, & requested

him to give to C. an acknowledgment, whereupon B. gave C. a shilling, & subsequently agreed with C. to give up possession to him of the house & lands respectively at the usual times, receiving an allowance for his improvements. Afterwards, & while the premises were still in B.'s occupation, A. became bkpt., & C. brought ejectment. The assignees under A.'s commission defended as landlords, & contended that the assignment to C. was invalid, A. having become bkpt. when he made it:—**Held**: the acknowledgments above mentioned did not estop B. or the assignees as representing him, from contesting C.'s title on the above ground; such acknowledgments having been made in consequence of A.'s representations, in which he suppressed the facts rendering the assignment invalid.—**DOE d. PLEVIN v. BROWN** (1837), 7 Ad. & El. 447; 2 Nev. & P. K. B. 592; Will. Woll. & Dav. 677; 8 L. J. Q. B. 49; 112 E. R. 538.

**Annotations**.—**Reid. Jew v. Wood** (1841), Cr. & Ph. 185; **Accidental Death Insee. v. Mackenzie** (1861), 5 L. T. 20.

**215.** ———. **Fraud or misrepresentation by assignee.**]—**CARLTON v. BOWCOCK**, No. 187, *ante*.

**216.** ———. **Purchaser—Sale by mortgagor—With consent of mortgagees.**]—**WEBB v. AUSTIN**, No. 256, *post*.

**217.** ———. **Tenant sub-lessee.**]—In an ejectment by the assignee of a lessee of a term against the assignee of a sub-lessee of the same term, less ten days, holding over after the expiration of his term, the writ was issued before the expiration of claimant's term, but at the time of the trial both claimant's & deft.'s term had expired; there was no affirmative evidence that claimant had no other title besides the term which had expired, or that he did not continue as tenant by sufferance to his superior landlord:—**Held**: deft. ought to have given up possession at the expiration of his term, & was estopped from disputing claimant's title, which, except as against his superior landlord, must be taken to be good, & claimant was entitled to a writ of possession under the provisions of 15 & 16 Vict. c. 76, s. 180.—**GIBBINS v. BUCKLAND** (1863), 1 H. & C. 736; 1 New Rep. 370; 32 L. J. Ex. 156; 8 L. T. 87; 9 Jur. N. S. 207; 11 W. R. 380; 158 E. R. 1080; *subsequent proceedings, sub nom. BUCKLAND v. GIBBINS*, 1 New Rep. 505, 541, L. C.

**Annotations**.—**Appld. Knight v. Clarke** (1885), 15 Q. B. D. 294. **Reid. Buckland v. Gibbins** (1863), 32 L. J. Ch. 392, n.

**218. Successors of landlord—Landlord corporate body—Churchwardens.**]—By Poor Relief Act, 1818 (c. 12), s. 17, all buildings, lands, etc., purchased or taken on lease by the churchwardens & overseers of the poor of any parish under that Act are to be conveyed to such churchwardens & overseers in trust for the parish, & they are empowered to hold the same in the nature of a body corporate.

Where it appeared that the tenant, having originally taken a lease from certain old trustees, held over from year to year till new trustees were appointed by assignment from the old body, he will be estopped from disputing the title of the new trustees, as he would have been that of the old body.—**GOULDSWORTH v. KNIGHTS** (1843), 11 M. & W. 337; 12 L. J. Ex. 282; 8 J. P. 8; 152 E. R. 833.

**Annotations**.—**Consd. Webb v. Austin** (1844), 7 Man. & G. 701; **A.-G. v. Stephens** (1855), 1 K. & J. 724. **Reid. Pargeter v. Harris** (1845), 7 Q. B. 708; **Hickman v. Machin** (1859), 4 H. & N. 716; **Cuthbertson v. Irving** (1860), 6 H. & N. 135. **Mentd. Doe d. Edney v. Benham, Doe d. Edney v. Billett** (1845), 7 Q. B. 978; **Ritchings v. Cordingley** (1868), L. R. 3 A. & E. 113; **R. v. White** (1883), 11 Q. B. D. 309.



**Sect. 3.—Estoppel as between landlord and tenant:**  
*Sub-sect. 1, J. & K.; sub-sect. 2, A. & B. (a).]*

**219. — Overseers.]**—Certain overseers let a parish tenement to B. in 1870. In 1876 the then overseers, being different persons, gave B. notice to quit, & afterwards applied to the county court under Poor Relief Act, 1818 (c. 12), s. 17, for an order to deliver up possession. Payment of rent to pltf.'s was proved, but B. set up as a defence that no meeting of ratepayers under Union & Parish Property Act, 1835 (c. 67), s. 3, had authorised the letting or the notice to quit:—*Held*: these objections were properly overruled, & the payment of rent being an attornment, the order was properly made.—*ESKDALE v. SOPWITH* (1877), 41 J. P. 326.

**220. — Heir of co-parcener.]**—Where a person entitled as coparcener to a portion of the rents & profits of land makes a lease of the whole, under which the tenant enters & pays rent as for the whole until the lessor's death, the tenant is estopped from denying that the heir & privy in blood to the lessor is entitled to the whole of the land.

H., J., & M., three brothers, were entitled as coparceners in gavelkind to a garden & messuage. H. being in possession made a lease of the whole to deft., who entered & paid rent to H., as for the whole, up to the latter's death. J. having also died M. claimed the land as heir-at-law of his brothers, H. & J., & of his father. Def't., except as to one-third of the property, H.'s share, set up Stat. Limitations, 1833 (c. 27), under which he claimed to be entitled to the shares of J. & M., to which they had made no claim for over twelve years:—*Held*: def't. would have been estopped from denying the title of H. to the whole of the land, & was equally estopped from denying that of M., the heir & privy in blood to H.—*WEEKS v. BIRCH* (1893), 69 L. T. 759; 10 T. L. R. 28, D. C.

**K. What Persons bound by Estoppel.**

**221. Party claiming under tenant.]**—*DOE d. KNIGHT v. SMYTHE (LADY)*, No. 70, *ante*.

**222. —]**—A. having, without title, entered upon land & built a cottage, afterwards accepted a lease by indenture from B., C. claiming the land as his own, paid to A. £20 to give up the possession to him. In ejectment by B. against C.:—*Held*: A. had estopped himself from controverting the title of B., & C. was bound by the estoppel, as having come in under, & received the possession from B.—*DOE d. BULLEN v. MILLS* (1834), 2 Ad. & El. 17; 4 Nev. & M. K. B. 25; 4 L. J. K. B. 10; 111 E. R. 7; *previous proceedings*, 1 Mood. & R. 385, N. P.

*Annotations:—Distd. Ford v. Ager* (1863), 2 H. & C. 279. *Reid. Doe d. Johnson v. Baytop* (1835), 3 Ad. & El. 188; *Re Emery v. Barnett* (1858), 27 L. J. C. P. 216.

**223. —]**—Pltf. came into occupation under one who had paid rent upon distress by def't.:—*Held*: after proof of this fact, pltf. was estopped to dispute def't.'s title to the rent, notwithstanding def't. inadvertently put in evidence a document which showed that pltf.'s predecessor occupied under a lease to which def't. was in law a stranger.

As a general rule it is not competent to a tenant, after submitting to a distress, or payment of rent, to dispute his landlord's title. There are exceptions to that rule, but this is not one of them (*BOSANQUET, J.*).—*COOPER v. BLANDY* (1834), 1

Bing. N. C. 45; 4 Moo. & S. 562; 3 L. J. C. P. 274; 131 E. R. 1034.

*Annotations:—Consd. Accidental Death Insee. v. Mackenzie* (1861), 5 L. T. 20; *Carlton v. Bowcock* (1884), 51 L. T. 659.

**224. —]**—*DOE d. WILLIS v. BIRCHMORE*, No. 237, *post*.

**225. —]**—*BENNETT v. LEVITT* (1857), 30 L. T. O. S. 101.

**226. — Assignee of lease.]**—Where a tenant has, on coming into possession under an assignment, had notice that the lease was held under any particular person, to whom the former tenant has paid rent, the title of this person cannot be contested in an action of replevin.—*JOHNSON v. MASON* (1794), 1 Esp. 89, N. P.

*Annotation:—Mentd. Whyman v. Garth* (1853), 8 Exch. 803.

**227. — —]**—An assignee of a lease by indenture is estopped by the deed which estops his assignor.—*TAYLOR v. NEEDHAM* (1810), 2 Taunt. 278; 127 E. R. 1084.

*Annotations:—Consd. Cooke v. Blake* (1847), 1 Exch. 220. *Reid. Seymour v. Franco* (1828), 7 L. J. O. S. K. B. 18; *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278; *Magnay v. Edwards* (1853), 1 C. L. R. 141.

**228. — Underlessee.]**—Previous to 1812, a person built a house on a piece of waste ground, & before he acquired a title to it, gave up possession to the tenant of the adjoining land, who held under a lease granted in 1812. The latter let the premises to def't.:—*Held*: in ejectment by the landlord of the adjoining land against def't., the latter was estopped from denying the title of the tenant, & the tenant from disputing that of the landlord.—*DOE d. WHEBLE v. FULLER* (1835), Tyr. & Gr. 17.

**229. — —]**—Lessor of pltf. in ejectment proved a conveyance of the land to himself fifty years before the action brought: he had not occupied; but a person who had occupied proved payment of rent by himself to lessor of pltf., within thirty-three years of the action brought, at which time H. came into occupation. No lease to H. was shown. It was proved that, within twenty years before action brought, H., being in possession, declared that he was then paying rent to the lessor of pltf.; & that afterwards, & before action brought, def't. had said that he was tenant to H. H. died before the trial:—*Held*: pltf. was not barred by Real Property Limitation Act, 1833 (c. 27), s. 2, payment of rent being duly proved, by H.'s admission, so as to satisfy sect. 8, & def't. being bound by the evidence which was good as against H.—*DOE d. SPENCER (EARL) v. BECKETT* (1843), 4 Q. B. 601; 12 L. J. Q. B. 236; 114 E. R. 1024; *sub nom.* *DOE d. BELL v. BECKETT*, 1 L. T. O. S. 143; 7 Jur. 532.

**230. — —]**—Where a lease, renewable for ever, had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed, but the owner in fee of the lands, the tenants, & their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed:—*Held*: no one of them could subsequently set up in equity claims adverse to the several characters they bore under such lease & sub-lease.—*ARCHBOLD v. SCULLY* (1861), 9 H. L. Cas. 360; 5 L. T. 160; 7 Jur. N. S. 1169; 11 E. R. 769, H. L.

*Annotations:—Reid. Webster v. Southey* (1887), 36 Ch. D. 9; *Beighton v. Beighton* (1895), 64 L. J. Ch. 796. *Mentd. Le Clerc v. Greene* (1873), 22 W. R. 428; *Re Astley &*

**PART I. SECT. 3, SUB-SECT. 1.—K.**  
**221 i. Party claiming under tenant.]**  
 —A. having entered under B.:—*Held*:

his heirs were estopped from disputing B.'s title.—*ARMSTRONG v. ARMSTRONG* (1870), 21 C. P. 4.—*OAN.*

**221 ii. —]**—*KURN CHOWBEY v. JANKEE PERSHAD* (1866), 1 Agra, 164.—*IND.*

Tyldesley Coal & Salt Co. & Tyldesley Coal Co. (1899), 68 L. J. Q. B. 252; Dominion Coal Co. v. Maskinonge S.S. Co., [1922] 2 K. B. 132.

**231.** ———.]—Pltfs. acquired certain land for the purposes of their railway, but, not wanting it, let it from year to year to B; in consequence of their neglect to sell it, the Lands Clauses Consolidation Act, 1843 (c. 15), s. 127, became applicable; this sect. provides that on failure to sell superfluous land within a certain time such land shall vest in the owner of the adjoining land; the adjacent landowner did not interfere, & B. continued tenant till his tenancy was determined by notice to quit; before this he had let to deft., who refused to go out on the ground that pltf.'s title had ceased:—*Held*: whatever was the effect of the above sect. there was evidence of B. holding under a new tenancy from year to year, after such sect. became applicable, he therefore would have been estopped from disputing pltfs.' title, & therefore deft. was also estopped.—*LONDON & NORTH WESTERN RY. CO. v. WEST* (1867), L. R. 2 C. P. 553; 36 L. J. C. P. 245.

**232.** ——— *Executor de son tort.*]—In 1810 a lease for sixty-one & a quarter years was granted by the predecessors in title of pltfs. to one H., his exors., administrators, & assigns. In 1814 H. died intestate. His widow administered to his effects, & remained possessed of the lease till her death in 1843. After her death, G., the father of deft., who had married a daughter of H., without any administration took possession of the premises & received the rent, paying the ground rent; & he continued to do so until his death, in 1858.

After the death of G., deft. received the rent of the premises, &, after paying the ground rent, handed over the balance to his mother, conceiving her to be entitled to it. He also from time to time let the premises.

After the death of his mother deft. continued to receive the rent of the premises, paying the ground rent, & dividing the balance between his two sisters & himself, no further administration having been taken out. He continued to do this down to the expiration of the lease, when he delivered up the premises to pltfs. out of repair:—*Held*: he had estopped himself from denying that he was assignee.—*WILLIAMS v. HEALES* (1874), L. R. 9 C. P. 177; 43 L. J. C. P. 80; 30 L. T. 20; 22 W. R. 317.

*Annotations*:—*Expld.* Stratford-upon-Avon Corp'n. v. Parker, [1914] 2 K. B. 562. *Refd.* Justice v. James (1898), 14 T. L. R. 385.

**233.** ———.]—*STRATFORD-UPON-AVON CORPN. v. PARKER*, No. 204, *ante*.

**234. Party not claiming under tenant.]**—Though a tenant who has been let into possession of land by a lessor is estopped from disputing his lessor's title, third persons not claiming possession of the land under the tenant are not so estopped.—*TADMAN v. HENMAN*, [1893] 2 Q. B. 168; 57 J. P. 664; 9 T. L. R. 509; 5 R. 479.

**235. Licensee.]**—*DOE d. JOHNSON v. BAYTUP*, No. 156, *ante*.

**236. Landlord defending ejectment.]**—An agent to receive rents & let has authority to determine a tenancy. In ejectment a person defending

as landlord is bound by the same estoppel as the tenant in possession.—*DOE d. MANVERS (EARL) v. MIZEM* (1837), 2 Mood. & R. 56, N. F.

**237.** ———.]—In ejectment for rooms, it appeared that H. & the lessor of pltf. were placed in a house by the proprietor, whose servants they had been, & occupied it in distinct portions, H. having the rooms in question to himself. L. came to reside with & attend upon H., who died some time after having devised his interest in the rooms to the lessor of pltf. The original proprietor had died before H., L. continued to occupy the rooms, but was forcibly removed from one by the lessor of pltf., & the ejectment brought for recovery of the others. The declaration being served upon L., defts., who professed to have a claim under the original proprietor, entered into the consent rule to defend as landlords, but, at the trial, gave no evidence of title in themselves:—*Held*: (1) L. having come in under H., no title in him could be set up against the lessor of pltf.; (2) the lessor of pltf. showed a sufficient title, none being proved by defts., & they could not allege against him that he did not prove twenty years' adverse possession in himself & H.—*DOE d. WILLIS v. BIRCHMORE* (1830), 6 Ad. & El. 662; 1 Per. & Dav. 448; 8 L. J. Q. B. 108; 112 E. R. 1363.

## SUB-SECT. 2.—ESTOPPEL OF LANDLORD.

### A. In General.

**238. Rent paid to third party on direction of landlord.]**—*DOWNES v. COOPER*, No. 148, *ante*.

### B. Repudiation of Lease.

#### (a) In General.

**Estoppel generally.]**—See ESTOPPEL, Vol. XXI., pp. 136 *et seq.*

**239. Whether lessor estopped.]**—In ejectment the lessor of pltf. shall not be permitted to defeat a solemn deed under his own hand, covenanting that deft. shall enjoy the premises, & also, for further assurance.—*GOODTITLE d. EDWARDS v. BAILEY* (1777), 2 Cowp. 597; 98 E. R. 1260. *Annotations*:—*Refd.* Halford v. Dillon (1820), 2 Brod. & Bing. 12. *Mentd.* Corp v. Corp (1793), 1 Phillim. 11, n.; Roe d. Berkeley v. York (Archbp.) (1805), 8 East, 86; Right d. Jefferys v. Bucknell (1831), 2 B. & Ad. 278.

**240.** ———.]—*GOLEBORN v. ALCOCK*, No. 77, *ante*.

**241.** ———.]—In trespass for breaking & entering pltf.'s close, defts. justified as servants & by command of B., the assignee of the lessee; pltf. replied, that one of defts. having lawful authority from B., demised & let the close to him for a certain term, that he, pltf. accepted the demise & entered & became possessed of the close, & that, during the continuance of that demise, defts. of their own wrong, & in violation of the agreement, committed the trespasses complained of; defts. rejoined that B. did not demise to pltf. *modo et formâ*:—*Held*: this traverse was not too large, & it was not competent to pltf. to object, on general demurrer, that the rejoinder traversed what was

**234 i. Party not claiming under tenant.]**—A stranger, whose goods have been seized on the premises of a tenant, cannot, any more than the tenant himself, question the landlord's right to demise.—*SMITH v. AUBREY* (1849), 7 U. C. R. 90.—*CAN.*

remaining in possession after the expiration of his term, & paying two months' rent, cannot, in the middle of the third month, be treated by his landlord as an over-holding tenant.—*ADAMS v. BAINS* (1847), 4 U. C. R. 157.—*CAN.*

**e. Demand for rent—After expiry of lease.]**—The mere demand of rent by the successor of a lessor, after the expiration of the term, is not such an affirmation of the covenants in the lease as will estop him from disputing them.—*KIRKPATRICK v. LYSTON* (1867), 13 Gr. 323; 16 Gr. 17.—*CAN.*

**PART I. SECT. 3. SUB-SECT. 2.—A.**  
**a. Acceptance of rent.]**—A tenant

6 N. B. R. (1 All.) 339.—*CAN.*

**Sect. 3.—Estoppel as between landlord and tenant:**  
**Sub-sect. 2, B. (a) & (b) i. & ii.]**

not alleged by the replication, viz. that B. demised, that it traversed, not the facts alleged, but an inference & conclusion of law resulting from such facts, & that it involved a denial of the authority to demise, which defts. were estopped from making.—*WILKINS v. BOUTCHER* (1842), 3 Man. & G. 807; 4 Scott, N. R. 425; 11 L. J. C. P. 104; 6 Jur. 284; 133 E. R. 1364.

**242. —**—*Held*: whether W. had or had not power to grant a lease for eighty years, yet, as he was a party to a conveyance of Sept. 1875, to pltf., both he & pltf. who claimed through him, were estopped from disputing, during W.'s lifetime, the grant of land & roadway contained in the said lease; & although pltf. even if without notice, could not claim title to the lands except subject to any charge or burden created by W. yet, having had notice sufficient to put him upon inquiry, he could not be deemed a purchaser for value without notice.—*SUMNER v. SCHOFIELD* (1880), 43 L. T. 763.

**243. —**—*In* 1881, before the coming into operation of Conveyancing & Law of Property Act, 1881 (c. 41), leasehold premises were mortgaged by way of subdemise to N. for the residue of a newly created term of sixty years, less the last three days thereof. In 1892 the mtgor. purported to underlet the premises to G. & co. for twenty-one years at a rent of £140, & the deed contained a covenant not to sublet without the consent of the landlord. In 1895 N. foreclosed the mtgor., but did not get in the last three days of the term, & thenceforward G. & co. paid the rent to N. until his death in 1899. Subsequently G. & co. sublet the premises under a licence given by N.'s exors., who therein described themselves as being the reversioners on the underlease of 1892. Pltf., who claimed through N.'s exors., brought an action against G. & co., & their sublessee to recover possession of the premises upon the footing that the underlease was not binding on him:—*Held*: he was estopped as against both defts. from denying that he was the reversioner on the underlease, & the action failed.—*KEITH v. GANCIA (R.) & Co., LTD.*, [1904] 1 Ch. 774; 73 L. J. Ch. 411; 90 L. T. 395; 52 W. R. 530; 20 T. L. R. 330; 48 Sol. Jo. 329, C. A.

*Annotation*:—*Mentd.* Anderson v. Equitable Life Assco. Soc. of United States (1925), 42 T. L. R. 123.

**244. — Lease by infant—No confirmation of tenancy on attaining age.**—Where an ejectment has been brought on the demise of an infant, which has been compromised, & the tenant in possession has attorned to the infant; though the lessor of pltf., on his coming of age does not accept the rent or do any act to confirm the tenancy, yet as the former ejectment was brought at his suit & for his benefit, he shall not be allowed to consider the tenant as a trespasser, & bring a new ejectment without giving notice to quit.—*DOE d. MILLER v. NODEN* (1797), 2 Esp. 528, N. P.

**245. — Defective title apparent on lease.**—*PARGETER v. HARRIS*, No. 124, *ante*.

**246. — Void lease.**—*In* an action to recover possession of premises, deft. contended that the lease of 1892 was invalid, that the old lease had been surrendered in 1892, that Stat. Limitations began to run in 1892, & that, therefore, she

was entitled to the freehold:—*Held*: as the lease granted in 1892 was invalid there was no surrender of the old lease, & pltf. were not estopped from setting up the invalidity of the lease of 1892 or from denying that the old lease had been surrendered.—*CANTERBURY CORPN. v. COOPER* (1909), 100 L. T. 597; 73 J. P. 225; 53 Sol. Jo. 301; 7 L. G. R. 908, C. A.

**(b) Landlord Having no Interest at Time of Demise.**

**i. In General.**

**247. Whether landlord estopped.**—*In* ejectment by a lessee against a lessor, if the jury find specially that the lessor has no interest in the land demised, yet pltf. shall have judgment; for a jury may find an estoppel on the general issue.—*SUTTON v. DICON* (1589), Sav. 98; 123 E. R. 1034; *sub nom.* *SUTTON'S CASE*, Cro. Eliz. 140. *Annotation*:—*Refd.* Palmer v. Ekyms (1728), 1 Barn. K. B. 103.

**248. —**—*CUTHBERTSON v. IRVING*, No. 264, *post*.

**249. — Only on lease by indenture—Lease by parol or deed poll.**—*ANON.* (1546), Bro. N. C. 78; 73 E. R. 881.

**250. — Pre-existing lease.**—A condition to be performed on the part of a lessor, is not broken by his making another lease to a stranger before performance.

The estoppel is only between the lessor & the second lessee, so as the lessor is at large against the first lessee to enter upon his conditions notwithstanding the second lease (*per* CUR.).—*FERRERS v. BOROUGH* (1599), Cro. Eliz. 665; Owen, 116; 78 E. R. 903.

**251. —**—*Lease* for years may operate as to part by estoppel, & as to the residue by passing an interest.—*GILMAN v. HOARE* (1692), 1 Salk. 275; 91 E. R. 241; *sub nom.* *HOLMAN v. HORE*, 3 Salk. 152.

*Annotation*:—*Consd.* Langford v. Selmes (1857), 3 K. & J. 220.

**ii. Subsequent Accrual of Interest.**

**252. Whether accrued interest feeds the estoppel.**—*EDWARDS v. OMELHALLUM* (1639), March, 64; 82 E. R. 413; *sub nom.* *OMELAUGHLAND v. HOOD*, 1 Roll. Abr. 874, pl. 10. *Annotation*:—*Consd.* Webb v. Austin (1844), 7 Man. & G. 701.

**253. —**—*PAULIN v. HARDY* (1682), Skin. 2; 90 E. R. 2.

**254. —**—*If* a man demises by indenture lands in which he has no interest, & afterwards buys them, he will be estopped from saying he had no interest in them when he bought them.—*HERMITAGE v. TOMKINS* (1699), 1 Ld. Raym. 729; 91 E. R. 1387.

*Annotation*:—*Mentd.* Gibson & Johnson v. Minet & Fector (1791), 1 Hy. Bl. 569.

**255. —**—*If* a man makes a lease by indenture of D. in which he hath nothing, & after purchases D. in fee, & after bargains & sells it to A. & his heirs; A. shall be bound by this estoppel; & where an estoppel works on the interest of the lands, it runs with the land (*per* CUR.).—*TREVIVAN v. LAWRENCE* (1704), 1 Salk. 276; Holt, K. B. 282; 2 Ld. Raym. 1048; 6 Mod. Rep. 256; 91 E. R. 241.

*Annotations*:—*Refd.* Palmer v. Ekins (1728), 2 Ld. Raym. 1550; Goodtitle v. Morse (1789), 3 Term Rep. 365; Right d. Jefferys v. Bucknell (1831), 2 B. & Ad. 278;

**PART I. SECT. 3, SUB-SECT. 2.—**  
**B. (b) ii.**

**252 i. Whether accrued interest feeds the estoppel.**—Certain lands which

pltf. claimed belonged to him, & for which he subsequently obtained a Crown grant, were included in the agreement for a lease:—*Held*: he was estopped from saying that these

lands were not intended to be in the agreement, as he had represented they were his & deft. had acted thereon.—*WOODWORTH v. LANTZ* (1910), 8 E. L. R. 60.—*CAN.*

*Doe d. Downe v. Thompson, Downe v. Thompson* (1847), 9 Q. B. 1037; *Rowbotham v. Wilson* (1860), 8 H. L. Cas. 348. **Mentd.** *Wright v. Kitchingham* (1719), 1 Stra. 197; *Doe d. Lushington v. Landaff* (Lord Bp.) (1807), 2 Bos. & P. N. R. 491; *Taylor v. Needham* (1810), 2 Taunt. 278; *Voght v. Winch* (1819), 2 B. & Ald. 662; *Stafford v. Clark* (1824), 9 Moore, C. P. 724; *Doe d. Christmas v. Oliver* (1829), 10 B. & C. 181; *Magrath v. Hardy* (1838), 4 Bing. N. C. 782; *Sievers v. Boswell* (1841), 3 Man. & G. 524; *Doe v. Wellman* (1848), 2 Exch. 368; *Freeman v. Cooke* (1848), 2 Exch. 654; *Litchfield v. Ready* (1850), 5 Exch. 939; *R. v. Blakemore* (1852), 2 Den. 410; *Feverham v. Emerson* (1855), 11 Exch. 385.

**256.** —]—Particulars of sale described the property as "a shop & a dwelling-house, with rooms & offices over, for many years occupied by a tenant under a twenty-one years' lease, nine of which will be unexpired at Lady Day, 1843, at a rent of £48, & held by lease for a term of sixty-four years, at a ground rent of £6 8s." By the abstract delivered, it appeared that A., by indenture of Sept. 30, 1817, demised the premises to B. for eighty-nine years less twenty-one days from Michaelmas 1817, with various covenants to be performed by B., his heirs etc.; that B., on Mar. 25, 1820, mortgaged the premises for the residue of the term, to secure £487 & interest to C.; & that, by indenture of Apr. 2, 1831, B. demised the premises to D. for twenty-one years less eight days, at the rent of £48, with covenants on the part of D., similar to those of B. in the indenture of Sept. 1817. The mtgees. were willing to execute any conveyance that might be requisite for the purpose of making a good title to the purchaser:—**Held:** B. was in a situation to make a good title to the premises sold; the lease to D., though originally a lease by estoppel, being convertible into a lease in interest, by the concurrence of the mtgees.—**WEBB v. AUSTIN** (1844), 7 Man. & G. 701; 8 Scott, N. R. 419; 13 L. J. C. P. 203; 3 L. T. O. S. 282; 135 E. R. 282.

**Annotations:**—**Refd.** *Weld v. Baxter* (1856), 11 Exch. 816; *Cuthbertson v. Irving* (1859), 4 H. & N. 742. **Mentd.** *Hickman v. Machin* (1859), 28 L. J. Ex. 310.

**257.** —]—In 1742 a farm was demised by the Broderers' co. to F. for one hundred years, with a covenant for perpetual renewal. In 1827, the residue of this term had become vested in B., who in that year assigned it by way of mtge., with a proviso for redemption. On May 22, 1828, H. demised the same farm for twenty-one years to pltf. On Jan. 12, 1836, the mtgees. & H. surrendered the premises to the Broderers' co. On Jan. 13, 1836, the co. demised them to H. for one hundred years; & shortly afterwards the unexpired residue of that term, & all the estate & interest of H. in the premises, were assigned to deft. In an action by pltf. against deft., on a covenant in the lease from H. to pltf., to keep down the rabbits on the farm, deft. pleaded, that H. did not demise to pltf.; & that the reversion on that lease did not vest in deft.:—**Held:** both these issues ought to be entered for pltf.; for the lease, being by deed, was a good demise by way of estoppel, & a reversion in H. by estoppel was thereby created, which *prima facie* was a reversion in fee, & therefore was not surrendered to the Broderers' co., but passed from H. to deft.

This estoppel was fed by the demise for one hundred years from the Broderers' co. to H., the lessor, & thereby the lease from him to pltf. became good in point of interest (**PARKE, B.**).—**STURGEON v. WINGFIELD** (1846), 15 M. & W. 224; 15 L. J. Ex. 212; 153 E. R. 831.

**Annotations:**—**Consd.** *Cuthbertson v. Irving* (1859), 4 H. & N. 742. **Refd.** *Rowbotham v. Wilson* (1860), 27 L. J. Q. B. 61; *Dollen v. Batt* (1858), 4 Jur. N. S. 835; *Heath v. Crealock* (1874), 10 Ch. App. 22. **Mentd.** *Hickman v. Machin* (1859), 28 L. J. Ex. 310.

**258.** — **Persons claiming under landlord also bound.**—**ANON.** (undated), cited Jenk. 255; 145 E. R. 181.

**259.** — —]—**ANON.** (1560), Moore, K. B. 20; Dal. 26; 72 E. R. 412.

**260.** — —]—If a man makes a lease for life, & the lessee for life makes a lease for years, & afterwards purchases the reversion, & dies within the term, yet the lease for years is determined; & the heir in reversion may oust him, & avoid. But if one will makes a lease for years where he had nothing, & afterwards purchases the land; & the lessor dies; if that be by deed indented; the heir shall be estopped to avoid it.—**ROTHWELLS CASE** (1628), Het. 91; 124 E. R. 307.

**261.** — —]—A void lease is good by estoppel, if the lessor purchase the inheritance; but the jury may find the fact.—**ISEHAM v. MORRICE** (1628), Cro. Car. 109; 79 E. R. 690.

**Annotations:**—**Consd.** *Webb v. Austin* (1844), 7 Man. & G. 701. **Refd.** *Foot v. Berklay* (1670), 2 Keb. 651. **Mentd.** *Freeman v. Barnes* (1870), 1 Sid. 458; *Perry v. Bowes* (1882), 1 Vent. 360; *Dighton v. Greenhill* (circa 1690), 2 Vent. 321; *Wallwyn v. Landaff* (Bp.) (1764), 2 Wils. 233; *Copeland v. Stephens* (1818), 1 B. & Ald. 593; *Edge v. Stratford* (1831), 1 Tyr. 296.

**262.** — —]—If one make a lease of land in which he hath nothing & afterwards purchase the land, this is good against him & all who claim under him.—**BALLERD v. SITWELL** (1630), Clay. 32.

**263.** — —]—If a man by indenture leases land in which he has nothing & afterwards purchases his land the lease by estoppel will be good against him . . . & those estoppels will bind not only the party to the estoppel but also all privies that claim under him (*per CUR.*).—**EDWARDS v. ROGERS** (1640), W. Jo. 456; 82 E. R. 239.

**Annotations:**—**Refd.** *Goodtitle v. Morse* (1789), 3 Term Rep. 365. **Mentd.** *Round v. Kello* (1690), Freeman, K. B. 498; *Doe d. Marchant v. Errington* (1839), 6 Bing. N. C. 79.

**264.** — —]—The assignee of a lessor in a lease by deed, who has no estate in the land, has a reversion by estoppel as against the lessee, & may sue him on the covenants accordingly; & this applies to the case where a mtgor. makes a lease by deed, & assigns his equity of redemption with words that would pass a legal reversion in fee.

There are some points in the law relating to estoppels which seem clear, (a) when a lessor, without any legal estate or title, demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words, a tenant cannot deny his landlord's title, nor can the lessor dispute the validity of the lease; (b) where a lessor by deed grants a lease without title, & subsequently acquires one, the estoppel is said to be fed, & the lease & reversion then take effect in interest, & not by estoppel, & an action will lie by the assignee of the reversion against the tenant on the covenants in the lease, & by the tenant against the assignee of the reversion (**MARTIN, B.**).—**CUTHBERTSON v. IRVING** (1859), 4 H. & N. 742; 28 L. J. Ex. 306; 33 L. T. O. S. 328; 5 Jur. N. S. 740; *affd.* (1860), 6 H. & N. 135, Ex. Ch.

**Annotations:**—**Refd.** *Morton v. Woods* (1869), 38 L. J. Q. B. 81; *Hartcup v. Bell* (1883), Cab. & El. 19; *David v. Sabin* (1893), 62 L. J. Ch. 347; *Onward Bldg. Soc. v. Smithson*, [1893] 1 Ch. 1; *Keith v. Gancia* (1904), 73 L. J. Ch. 411. **Mentd.** *Underhay v. Read* (1887), 58 L. T. 457; *Brigg v. Thornton*, [1904] 1 Ch. 386.

**265.** — **By descent—Lessor an infant.**—L. devised some land & houses built thereon to his six children; the mother as guardian to the



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children, who were all infants, demised the premises on a building lease for forty-one years. The eldest son joined in making the lease, & covenanted that the rest of the children when of age should confirm it. They all attained twenty-one, & accepted the rent for above ten years, after the youngest came of age, & then brought their ejectment against the lessee, who by his bill prays to have his lease established. Under the circumstances of this case, & particularly the acceptance of the rent for so long a continuance, the ct. decreed the lease to be established during the residue of the term. Where a person is of age when he makes a lease, & has nothing in the premises, but they after descend to him, the lease shall enure by way of estoppel, otherwise if he had been an infant.—*SMITH v. Low* (1739), 1 Atk. 489; *West temp. Hard.* 669; 26 E. R. 310, L. C.

**(c) Admission of Lessee's Title—What amounts to.**

**266. Tenant permitted to build—By reversioner.]**—If reversioner permits lessees of tenant for life to build, etc., their term shall be supported in equity.—*ANON.* (1719), *Bunb.* 53; 145 E. R. 593.

**267. — By owner.]—LALA BENI RAM v. KUNDAN LAL** (1899), 15 T. L. R. 258, P. C.

**268. Service of notice to quit.]—**A notice by the owner of premises, requiring a party in possession to leave the premises he then rented of the owner, at Lady Day next is not conclusive evidence of a demise.—*DOE d. WILCOCKSON v. LYNCH* (1771), 2 Chit. 683.

**269. —]**—A notice desiring deft. to "quit the premises which you hold under me, your term therein having long since expired," does not recognise a subsisting tenancy from year to year subsequent to the term, but is a mere demand of possession.—*DOE d. GONSELL v. INGLIS* (1810), 3 Taunt. 54; 128 E. R. 22.

**270. —]**—Trustees for sale of certain premises, gave notice, dated May 18, 1824, to A., the rightful occupier of a cottage thereon, not to trespass on any part thereof, & afterwards brought an action against him for trespassing on an orchard. The same parties gave another notice to A. on Mar. 18, 1825, & before the trial, to quit possession of all the ground which he had rented, or held under them:—*Held*: the second notice acknowledged A. as a tenant, & operated as a waiver of the first, which had treated him as a trespasser, & consequently, the action did not lie.—*BARTON v. CORDY* (1825), 1 C. & P. 664; *M'Cle. & Yo.* 278.

—*See, generally, Part XX., post.*

**271. Permission of acts of ownership by tenant.]—**When the landlord suffers his tenant to exercise acts of ownership, & makes no objection to it, it is evidence to be left to the jury, whether he did not mean to be bound by those acts of his tenant.—*DOE d. WINCKLEY v. PYE* (1795), 1 Esp. 363, N. P.

*Annotation:—Mentd.* *Carr v. Nicoll* (1835), 1 Scott, 466.

**272. Obtaining possession of lease.]—**Where, in ejectment, the attorney for the lessor of pltf. obtained from one of defts., the tenant in possession a lease of the premises granted to him for a term not then expired, in order to prevent defts. from setting it up to defeat the action:—*Held*: he thereby recognised it as a valid instrument, &

when produced in pursuance of notice from defts., it might be read in evidence without calling the subscribing witness to prove the execution by the grantor of the lease.—*DOE d. TYNDALE v. HEMING* (1826), 6 B. & C. 28; 9 Dow. & Ry. K. B. 15; 108 E. R. 363.

*Annotation:—Mentd.* *Bell v. Chaytor* (1843), 1 Car. & Kir. 162.

**273. Demand for rent—Fraudulent misrepresentation by tenant—Knowledge of landlord.]—**In ejectment it appeared that deft. had been let into possession of a house upon a demise thereof to him; but soon after the commencement of the tenancy, the landlord discovered that the representation which had been made to him of deft.'s character was false, & that the house had been converted by him into a brothel. He at first demanded possession of the house, but afterwards allowed the tenant to remain until one quarter's rent became due; he then demanded the rent, which was not paid:—*Held*: after demanding the rent, he could not treat the contract as avoided by deft.'s fraud.—*DOE d. WIGAN v. POULTON* (1850), 14 L. T. O. S. 347.

**274. Acceptance of rent—Void or voidable lease.]—**A dean & chapter were empowered by a local Act to grant building leases of certain lands for ninety-nine years, provided that in every such lease there was a covenant by the lessee to build. They granted a lease for ninety-nine years, omitting the covenant. During the supposed term, after the death of the dean under whom the lease had been granted, the lessee remained in possession, & continued to pay the reserved rent to the succeeding deans & chapter, who distributed it among themselves:—*Held*: if the lease was voidable only, it was made good, as against each successive dean & chapter, for their own times respectively, by such their receipt & distribution of the rent, & if the lease was absolutely void, such receipt & distribution were evidence from which, without proof of any instrument under seal, a demise from year to year might be presumed against them; the presumption in such a case being the same against a corp. aggregate as against an ordinary person.—*DOE d. PENNINGTON v. TANIÈRE* (1848), 12 Q. B. 998; 18 L. J. Q. B. 49; 13 L. T. O. S. 204; 13 Jur. 119; 116 E. R. 1144.

*Annotations:—Consd.* *Lawford v. Billerica* R. C., [1903] 1 K. B. 772; *Bourne & Hollingsworth v. Marylebone B. C.* (1908), 72 J. P. 129. *Refd.* *Pennington v. Cardale* (1858), 3 H. & N. 656; *Kidderminster Corp. v. Hardwick* (1873), L. R. 9 Exch. 13.

**275. Former legal proceedings—Judgment against landlord—Former ejectment.]—***DOE d. STRODE v. SEATON*, No. 142, *ante*.

**276. — — —.]—**To trespass for mesne profits defts. pleaded title to the lands in themselves during the time for which mesne profits were claimed. Pltf. replied, by way of estoppel, as to so much of the mesne profits as had accrued since a certain day named, that he sued out a writ of ejectment, for the purpose of recovering possession of the lands, wherein he claimed to be entitled from such day, & that thereupon such proceedings were had that he recovered the lands & possession of them. On demurrer:—*Held*: the judgment in ejectment did not operate as an estoppel with respect to the duration of pltf.'s title, & the replication was therefore bad.—*HARRIS v. MULKERN* (1875), 1 Ex. D. 31; 45 L. J. Q. B. 244; 34 L. T. 99; 40 J. P. 24; 24 W. R. 208.

**277. — Consent order.]—**Where in an action for mesne profits it appeared that deft. had been

**PART I. SECT. 3, SUB-SECT. 2.—B. (c).**

**274 L. Acceptance of rent—Void or voidable lease.]—***SLATOR v. TRIMBLE* (1861), 14 I. C. L. R. 342.—*IR.*

made deft. in the former action of ejectment under Distress for Rent Act, 1737 (c. 19), s. 13, upon entering into the consent rule as mtgee. & landlord:—*Held*: he was estopped from denying that he was landlord of the premises.—*DOE v. CHALLIS* (1851), 17 Q. B. 166; 20 L. J. Q. B. 478; 17 L. T. O. S. 142; 15 Jur. 900; 117 E. R. 1244.

(d) *What Persons bound by Estoppel.*

**278. Parties claiming through lessor.**—*SUMNER v. SCHOFIELD*, No. 242, *ante*.

—**Landlord without title at time of demise—Subsequent acquisition of title.**—*See* Nos. 258–264, *ante*.

**279. Remainderman—Expiration of tenancy in tail.**—Tenant in tail, the remainder over leases for years, rendering rent, & dies without issue, he in the remainder accepts the rent: this shall not bind him; because that when the tail is determined, all that is comprised within it is determined, & so the lease void, & he in the remainder claims not by the lessor.—*ANON.* (1547), Bro. N. C. 2; 73 E. R. 847.

**280. Heir of lessor—Lessor originally lessee for life—Purchase of reversion.**—*ANON.* (1560), Moore, K. B. 20; Dal. 26; 72 E. R. 412.

**281.** ————] — *ROTHWELLS CASE*, No. 260, *ante*.

**282. — Infants—Estate managed by executors—Receipt of rent by executors.**—H. being seised in fee of certain premises, devised the same to his son W. for life, with remainder to the issue of W. as tenants in common in fee. In Apr. 1845, W. died, having by will appointed exors., who managed the estate for the infant children of W., & in the years 1845 & 1846, received rent from deft., who had been in possession prior to the death of W.—*Held*: the acts of the exors. did not bind the infant children, & the latter might maintain ejectment against deft. without any previous notice to quit or demand of possession.—*DOE d. THOMAS v. ROBERTS* (1847), 16 M. & W. 778; 153 E. R. 1404.

**283. Assignee—Not deriving title from persons privy to or estopped by lease—Notwithstanding receipt of rent from tenant.**—In 1819 Burton mortgaged to Bromat for £1,000; & in 1827 demised the premises to deft. for 31 years, who entered under the demise. In the same year £900 of the mtge. money was paid, part of the premises being sold. In 1828 Burton became bkpt. In 1834 Messrs. S. paid off the remaining £100; & Bromat, on Feb. 22 in that year conveyed the mtgd. premises to them in fee. On May 22, 1834, the assignees of Burton sold the premises to Lord D. for £245, of which Messrs. S. received £100, & then conveyed in fee to Lord D. The assignees joined in that conveyance. Lord D. received rent from deft. for two years; & then gave a regular notice to quit:—*Held*: he was not estopped by the lease to deft., but was entitled to recover in ejectment; & consequently, not in an action of debt for use & occupation.

Doubtless, if Lord D. had taken the legal estate from Burton he would have been estopped; but as he took nothing in the land from either Burton or his assignees, no estoppel could affect him through them; & as those from whom he did take the land were not estopped, neither is he (*LORD DENMAN, C.J.*).—*DOE d. DOWNE (LORD) v. THOMPSON, DOWNE (LORD) v. THOMPSON* (1847),

Q. B. 1037; 8 L. T. O. S. 408; 11 Jur. 1007; 115 E. R. 1572.

**284.** ————]—W. became the tenant of M. on an agreement for three years, with option of renewal at the expiration, of a workshop, etc. M. held the premises as lesser of the Crown on a lease expiring Oct. 10, 1870. On the expiration of W.'s term under the agreement he did not exercise his option of renewal, but continued M.'s tenant from year to year, the tenancy commencing on June 24 in each year. In Sept. 1869, M. parted with his interest in the premises to C., & gave W. notice to pay his rent to C. from that time. C. had previously obtained from the Crown an engagement to grant a new lease of the property held by M. to him C., on the expiration of the former lease. C. communicated to W. the fact that the remainder of the term of M.'s lease under which he, C., held, would expire on Oct. 10, 1870. W. continued to pay his rent to C. The Crown granted a new lease to C. from Oct. 10, 1870, in fulfilment of the engagement to that effect, & under this new lease C. sublet the property to S., who, at the end of the year 1870, entered & evicted W. The ordinary yearly tenancy of W. would have expired on June 24, 1871, & except the above intimation from C. that his interest under M.'s lease was about to expire, he, W., had received no other notice that C. intended to determine the same. On an action for damages for wrongful eviction by W. brought against S.:—*Held*: W.'s tenancy expired with M.'s lease on Oct. 10, 1870, inasmuch as C. only holding through M. had no power, in adopting W. as his tenant, to give the latter a greater interest than he, C., possessed himself, & the fact of C. immediately after the expiration of M.'s term acquiring an interest in the premises in his own right, made no difference inasmuch as the creation of a new independent estate in C. did not operate to create a new or to continue the former tenancy of W. to C. which was absolutely & in fact, determined by the determination of C.'s interest under M.'s lease, & S. was not estopped by the mere fact of deriving his claim to evict through C. from setting up as an answer to the action the fact that the relation of landlord & tenant did not exist between C. & W. at the time of the eviction of Oct. 10, 1870, inasmuch as no conduct or representation on the part of or by C., had operated to the prejudice of W. or had caused W. so to act as to work prejudice or injury to himself.—*WELLER v. SPIERS* (1872), 26 L. T. 806; 20 W. R. 772.

SUB-SECT. 3.—DURATION OF ESTOPPEL.

**285. General rule—Until expiration of term.**—If a man leases his own land by deed indented, the indenture is no estoppel, but during the lease; & not after (*per CUR.*).—*ANON.* (circa 1550), Bro. N. C. 78; 73 E. R. 881.

**286.** ————]—If a man accepts a lease for years by deed indented of his own land, the estoppel ends with the lease, & then both parts of the indenture belong to the lessor.—*RAWLYNS' CASE* (1587), 4 Co. Rep. 52 a; Jenk. 254; 76 E. R. 1007.

*Annotations*:—*Held*. Lampet's Case (1612), 10 Co. Rep. 46 b; Lyn v. Wyn (1665), O. Bridg. 122; Foot v. Berkley (1670), 2 Keb. 654; Hodgkins v. Thornbury (1675), Freem. K. B. 417; Symonds v. Cudmore (1691), 12 Mod. Rep. 32; Palmer v. Ekins (1728), 2 Ld. Raym. 1550; Doe d. Christina v. Oliver (1829), 10 B. & C. 181; Sturgeon v. Wingfield (1846), 15 M. & W. 224; Edwards v. Wickwar

possession.—*SCARBOROUGH SECURITIES v. LOCKE* (1912), 23 O. W. R. 239; 4 O. W. N. 228; 6 D. L. R. 897.—*CAN.*

**286 II.** ————]—*Doe d. DEVERE v. BROWN* (1857), 3 All. 438.—*CAN.*

PART I. SECT. 3, SUB-SECT. 3.

**285 I. General rule—Until expiration of term.**—Where a tenant holds premises under a verbal lease at £200 per annum until the premises should

be sold, & the purchaser of the same accepts a quarter's rent from the tenant, he is estopped from denying the tenancy but the estoppel only extends to the end of the quarter, & therefore, he may demand immediate



**Sect. 3.—Estoppel as between landlord and tenant:**  
*Sub-sect. 3. Part II. Sects. 1 & 2;*  
*sects. 1, 2 & 3, A.]*

(1866), L. R. 1 Eq. 403. *Mentd.* Blackmore's Case (1610), 8 Co. Rep. 166 a; *Simpson v. Jackson* (1822), Palm. 296; *R. v. Hornby* (1894), 5 Mod. Rep. 29; *Magrath v. Hardy* (1838), 6 Scott, 627; *Rowbotham v. Wilson* (1851), 27 L. J. Q. B. 61.

**287. ———.]**—During the life of the tenant for life, the lessor, & the continuance of the lease, deft. would have been estopped to say he had not the reversion in him; but he being dead, & the lease thereby at an end, the lessee is, as it were, unmuzzled & is not estopped to plead the truth (*per* CUR.).—*BRUDNELL v. ROBERTS* (1762), 2 Wils. 143; 95 E. R. 732.

*Annotations:—Reid.* Pluck v. Digges (1831), 5 BH. N. S. 31; *Weid v. Baxter* (1856), 1 H. & N. 568.

**288. ———.]**—*DOE d. HUMPHRIES v. HAWKES*, No. 152, *ante*.

**289. ———.]**—*Semble*: the estoppel ceases upon the expiration of the lease.—*BAYLEY v. BRADLEY* (1848), 5 C. B. 396; 16 L. J. C. P. 206; 136 E. R. 932.

*Annotation:—Reid.* Leigh v. Dickeson (1884), 15 Q. B. D. 60.

**290. ———.]**—*WATSON v. LANE*, No. 87, *ante*.

**291. ———.]**—*CLARK v. ADIE* (No. 2), No. 90, *ante*.

**292. Until eviction by title paramount.]**—*DELANEY v. FOX*, No. 104, *ante*.

*See, also, ESTOPPEL*, Vol. XXI., p. 281, Nos 969-973.

## Part II.—Agreements for Lease.

### SECT. 1.—CAPACITY TO MAKE.

*See* Part III., Sect. 1, *post*.

### SECT. 2.—DISTINCTION BETWEEN LEASE AND AGREEMENT FOR LEASE.

#### SUB-SECT. 1.—IN GENERAL.

**293. Effect of Judicature Acts—Distinction no longer valid.]**—Since the Judicature Acts, there is now no distinction, that I can see, between a lease & an agreement for a lease, because equity looks upon that as done which ought to be done (*FIELD, J.*).—*Re MAUGHAN, Ex p. MONKHOUSE* (1885), as reported in 14 Q. B. D. 956; 33 W. R. 308.

*Annotations:—Consd.* Gray v. Spyer, [1922] 2 Ch. 22. *Reid.* Furness v. Bond (1888), 4 T. L. R. 457; *Foster v. Reeves* (1892), 61 L. J. Q. B. 763.

*See, also, Part II., Sect. 5, sub-sect. 2.*

**294. Dependent on intention of parties.]**—*DOE d. JACKSON v. ASHBURNER*, No. 1040, *post*.

**295. ———.]**—*GOODTITLE d. ESTWICK v. WAY*, No. 303, *post*.

**296. ———.]**—It is familiar law that whether an agreement operates as a demise or as an agreement only depends on the intention of the parties (*LINDLEY, L.J.*).—*SIDEBOTHAM v. HOLLAND*, [1895] 1 Q. B. 378; 64 L. J. Q. B. 200; 72 L. T. 62; 43 W. R. 228; 11 T. L. R. 154; 39 Sol. Jo. 165; 14 R. 135, C. A.

*Annotations:—Mentd.* Dixon v. Bradford & District Railway Servants' Coal Supply Soc., [1904] 1 K. B. 444; *Re Lancashire & Yorkshire Bank's Lease*, *Davis v. Lancashire & Yorkshire Bank*, [1914] 1 Ch. 522; *Meggison v. Groves*, [1917] 1 Ch. 158; *Croft v. Blay*, [1919] 2 Ch. 343; *Raikes v. Ogle*, [1921] 1 K. B. 576; *Savory v. Bayley* (1922), 38 T. L. R. 619; *Shimmons v. Crossley*, [1922] 2 K. B. 95; *Brakspear v. Barton*, [1924] 2 K. B. 88.

**297. ———.]** **To be collected from circumstances.]**—*BAXTER d. ABRAHAM v. BROWNE*, No. 1042, *post*.

**298. ———.]** **To be collected from instrument.]**—Whether an instrument shall be a lease, or only an agreement for a lease, depends on the intention of the parties, as it is to be collected from the instrument. Strong circumstances of incon-

venience apparent on the instrument, if it should be construed as a lease, indicate the intention of the parties that it should be an agreement only. Such as a stipulation that out of the rent mentioned, a proportionate abatement should be made in respect of certain excepted premises; for until that was apportioned, the lessor could not distrain. A stipulation that the tenant should hold at & under all usual covenants as between landlord & tenant where the premises are situate; for it may be disputable what are usual covenants.

Where there is an instrument by which it appears that one party is to give possession & the other to take it, that is a lease, unless it can be collected from the instrument itself that it is an agreement only for a lease to be afterwards made (*LAURENCE, J.*).—*MORGAN d. DOWDING v. BISSELL* (1810), 3 Taunt. 65; 128 E. R. 27.

*Annotations:—Consd.* Dunk v. Hunter (1822), 5 B. & Ald. 322; *Curling v. Mills* (1843), 6 Man. & G. 173; *Stratton v. Pettit* (1855), 16 C. B. 420. *Reid.* Christie v. Lewis (1821), 2 Brod. & Bing. 410; *Chapman v. Bluck* (1838), 4 Bing. N. C. 187; *Doe d. Phillip v. Benjamin* (1839), 9 Ad. & El. 644; *Jones v. Reynolds* (1841), 1 Q. B. 506; *Doe d. Morgan v. Powell* (1844), 7 Man. & G. 980. *Mentd.* Alderman v. Neate (1839), 4 M. & W. 704.

**299. ———.]**—*PERRING v. BROOK*, No. 316, *post*.

**300. ———.]**—A., by deed, "in consideration of the rents, covenants, & agreements herein-after reserved & contained," on the part of B., covenants to grant to B., at his request, a lease of a house; *habendum* for twenty-one years from a day past, "but determinable as hereinafter mentioned." B. covenants to lay out a certain sum on the premises. & it is agreed that the lease shall contain a covenant for the payment of rent & other usual covenants; " & also a covenant, as it is also hereby agreed, on the part of A. for the quiet enjoyment, etc.; & it is also agreed that it shall be lawful for, & in the event of a lease being executed, there shall be contained in the lease a proviso empowering B. to determine the tenancy or the lease," etc. :—*Held*: a present demise.

It is often very difficult to say whether a par-

### PART II. SECT. 2, SUB-SECT. 1.

**297 i. Dependent on intention of parties—To be collected from circumstances.]**

—The question whether an agreement to lease operates as an immediate demise should be determined on the facts of each case.—*SWAMINATHA MUDALIAR v. RAMASWAMI MUDALIAR*

(1920), 1 L. R. 44 Mad. 399.—*IND.*

**297 ii. ———.]**—*JONES v. DUGAN* (1841), 4 I. L. R. 86; *Jebb & B. 3.—IR.*

**297 iii. ———.]**—Where an agreement for lease is in the form in which a lease is by law required to be, & the

intention of the parties is to create a tenancy under it, without the execution of any further instrument, it operates as a lease.—*PUBLIC TRUSTEE v. PATTERSON* (1893), 12 N. Z. L. R. 281.—*N.Z.*

**297 iv. ———.]**—*MILLER v. JENNER*, [1921] N. Z. L. R. 841.—*N.Z.*

ticular instrument amounts to an agreement for a lease, or an actual demise. The question depends on the intention of the parties, as it is to be collected from the instrument. Looking at the instrument in all its parts, I think effect will be given to the intention of the parties, by construing it as an actual demise rather than by treating it as a mere agreement for a lease (TINDAL, C.J.).—*CURLING v. MILLS* (1843), 6 Man. & G. 173; 7 Scott, N. R. 709; 12 L. J. O. P. 316; 1 L. T. O. S. 257; 7 J. P. 384; 134 E. R. 853.

**301.** ———.]—Whether an instrument is to operate as a lease or an agreement, depends upon the intention, to be collected from the instrument, & from the nature & condition of the subject-matter without reference to extrinsic circumstances or subsequent acts. By a memorandum made on Feb. 2, A. agreed to let & grant a lease to B. of "the coal, iron-mine, stone, & fire-clay," under certain lands, at certain specified royalties, for the term of seventy-years; & it was provided that so much royalties as would amount to £50 a year should be worked or paid for during the term; the rent to commence in a year from the time a pit was sunk; with power to work the minerals & to deposit rubbish, & make a wharf, as usually granted in leases of a similar nature, & as granted by C.; & to abandon & quit the same if at any time during the term B. should think fit, on giving six months' notice; to commence sinking a pit before June 24; & A. engaged that he had not incumbered such estate; to contain the usual covenants, & as entered into by C. & A. engaged to sign a lease upon the said terms as soon as it could be prepared.—*Held*: this was not a lease but an agreement for a demise in future.

If there had been any proviso for immediate possession, I should have thought it would have gone far to determine the case (COLTMAN, J.).

If I could see an intention to give possession immediately, I should say that this circumstance added to the other matters, would induce me to hold the instrument to be a lease (COLTMAN, J.).—*DOE d. MORGAN v. POWELL* (1844), 7 Man. & G. 980; 8 Scott, N. R. 687; 4 L. T. O. S. 134 a; 8 Jur. 1123; 135 E. R. 397; *sub nom.* *DOE d. MORGAN v. MORGAN & POWELL*, 14 L. J. C. P. 5.

**302.** ———.]—*GORE v. LLOYD*, No. 327, *post*.

#### SUB-SECT. 2.—WHAT AGREEMENTS AMOUNT TO LEASE.

See Part III., *post*.

#### SUB-SECT. 3.—WHAT AMOUNTS TO AGREEMENT FOR LEASE.

##### A. In General.

#### 303. Future lease definitely contemplated.]—

(1) A paper containing words of present contract, with an agreement that the lessee should take possession immediately, & that a lease should be executed *in futuro*, operates only as an agreement for a lease, & not as a lease itself; & therefore it need not be stamped, if executed before 23 Geo. 3, c. 58.

It plainly was not the intention of the parties

that such agreement should operate as a lease (ASHHURST, J.).

(2) The trustee of a term to satisfy creditors, not having notice of an agreement for a lease before the grant of the term, may maintain an ejectment against the tenant in possession under the agreement. (3) A lease in writing, though not under seal, cannot be given in evidence, unless it be stamped.—*GOODTITLE d. ESTWICK v. WAY* (1787), 1 Term Rep. 735; 90 E. R. 1349.

*Annotations*.—As to (1) *Conad. Poole v. Bentley* (1810), 12 East, 168; *Pinero v. Judson* (1829), 3 Moo. & P. 497. *Reid. Doe d. Green & Colcombe v. Fidler* (1795), *Peake, Add. Cas.* 33; *Doe d. Bromfield v. Smith* (1805), 6 East, 530; *Colley v. Stroeton* (1823), 3 Dow. & Ry. K. B. 522; *Doe d. Pearson v. Ries* (1832), 3 Bing. 178; *Warman v. Faithful* (1834), 3 Nev. & M. K. B. 137; *Chapman v. Bluck* (1838), 1 Arn. 27.

**304.** ———.]—*DOE d. JACKSON v. ASHBURNER*, No. 1040, *post*.

**305.** ———.]—A. agreed to let her house to B. "during her life, supposing it to be occupied by B. or a tenant agreeable to A.," & "a clause was to be added in the lease" to give A.'s son an option to possess the house when of age.—*Held*: this was only an agreement for a lease, & not a perfect lease, the latter clause showing it to be executory; & a lease granted in pursuance of such agreement would only enure for the joint lives of A. & B.; & therefore B. having continued in possession of the premises under the agreement to the time of his death, his interest then determined, & A. might maintain ejectment against B.'s extrix, who had possessed herself of the premises.—*DOE d. BROMFIELD v. SMITH* (1805), 6 East, 530; 2 Smith, K. B. 570; 102 E. R. 1390.

*Annotations*.—*Reid. Doe d. Oldershaw v. Branch* (1807), 6 Esp. 106; *Poole v. Bentley* (1810), 12 East, 168; *Doe d. Davenish v. Moffatt* (1850), 15 Q. B. 257. *Mentd.* *Doe d. Tilt v. Stratton* (1828), 4 Bing. 446.

**306.** ———.]—A document by which A. agrees to grant, & B. to take, a lease of certain premises for a certain term, at a certain yearly rent, is to be considered merely as an agreement, not requiring a lease stamp, although no lease be prepared, & B. occupies during the whole of the term under such document.

It is only an agreement for a lease, no present interest passes. I think the lessor might have turned deft. out next day (BEST, C.J.).—*P'HELLIPS v. HARTLEY* (1827), 3 C. & P. 121, N. P.

**307.** ———.]—A. agrees to execute to B. a lease of all that messuage, etc., *habendum* to B., his exors., etc., for seven years, from June 24 next, at the yearly rent of £105 payable half yearly; the lease to contain covenants to pay rent & to repair, with proviso for re-entry on non-performance of covenants: B. agrees to accept such lease & execute a counterpart, & B. further agrees, when the dwelling-houses on each side of the messuage hereby agreed to be demised shall be tenanted, to pay an additional yearly rent of £15 during the residue of the seven years; A. agrees, on or before June 24, to erect eight panels, etc., several works to be done by A. were then specified, as to paper certains rooms, flx a rango & stoves, hang bells, lay on water, etc.: & it is agreed that, by the lease hereby agreed to be granted, the rent reserved shall be £120, & that, by a separate deed, to bear date the day after such lease, A. shall release to B. the annual sum of £15 out of such rent of £120; B. to prepare the lease at his own cost, to be approved of by A.'s solr. A. to have the option of making the lease fourteen years. B. entered

#### PART II. SECT. 2, SUB-SECT. 3.—A.

203 i. *Future lease definitely contemplated.*—*POWER v. GRIFFIN* (1887), 20 N. S. R. (8 R. & G.) 52.—CAN.  
303 ii. ———.]—*WYSE v. BERESFORD* (1850), 3 Ir. Jur. 226.—IR.

**Sect. 2.—Distinction between lease and agreement for lease: Sub-sect. 3, A., B. & C.]**

& paid rent to A., as first mentioned. No lease was executed:—*Held*: the contract was not a lease, but an agreement merely.—*RAWSON v. EICKE* (1837), 7 Ad. & El. 451; 2 Nev. & P. K. B. 423, Will. Woll. & Dav. 675; 7 L. J. Q. B. 17; 112 E. R. 539.

308. —. —.]—*BICKNELL v. HOOD*, No. 1030, *post*.

309. —. —.]—Where an agreement was entered into between two parties by which the one agreed to let on lease, & the other to take, certain premises at a fixed rent, to commence from Michaelmas, then next ensuing, the lease to contain specified covenants, etc.:—*Held*: the above agreement did not amount to an actual demise.—*BURNELL v. CURTIS* (1840), 4 Jur. 490.

310. —. —.]—By arts. of agreement, dated May 2, 1838, deft. agreed with plff. that he would grant him a lease of a messuage, etc., for twenty-one years, from Midsummer Day then next, at a rent of £45, payable quarterly on the usual days of payment in every year during the term, the first payment to commence on Sept. 29 then next; to be entered upon immediately by plff., he having on the day of the date paid £25 to deft., & in the lease were to be contained covenants to pay the rent, to repair, etc., & all other usual & reasonable covenants, with a power to either party to determine the lease at the end of seven or fourteen years:—*Held*: this instrument amounted to an agreement for a lease only, & not to an actual demise; & plff. was not entitled to recover as for the breach of an implied promise for quiet enjoyment.—*BRASHIER v. JACKSON* (1840), 6 M. & W. 549; 8 Dowl. 784; 9 L. J. Ex. 313; 151 E. R. 530.

*Annotation*:—*Mentd.* Tennyson v. O'Brien (1855), 5 E. & B. 497.

311. —. —.]—*CHAPMAN v. TOWNER*, No. 544, *post*.

312. —. —.]—*DOE d. MORGAN v. POWELL*, No. 301, *ante*.

313. —. —.]—*DOE d. BAILEY v. FOSTER*, No. 331, *post*.

314. —. —.]—Although words of present demise used.]—Paper, entitled memorandum of an agreement, between A. & B. & signed by them; expressing, that in consideration of £40 A. "doth agree to let," & B. "doth agree to take a messuage," etc., at £40 *per annum* rent; " & it is further agreed " that A. "shall not raise the rent nor turn out" B. so long as the rent is duly paid quarterly, & he does not sell any article injurious to A. in his business. Though the terms do not exclude the construction of actual demise, yet, the import of the whole looking to some future instrument, & a more permanent interest than from year to year, a demurrer to a bill for specific performance against A., who had succeeded in an ejectment, was overruled.—*BROWNE v. WARNER* (1807), 14 Ves. 156; 33 E. R. 480, L. C.; *subsequent proceedings* (1808), 14 Ves. 409, L. C.

*Annotations*:—*Consd.* *Re King's Leasehold Estates, Ex p.* East of London Ry. (1873), L. R. 16 Eq. 52.—*Kusel v. Watson* (1879), 11 Ch. D. 129. *Consd.* *Cheshire Lines Committee v. Lewis* (1880), 50 L. J. Q. B. 121; *Zimmer v. Abraham*, [1903] 1 K. B. 577. *Reid*, *Wood v. Beard* (1870), 2 Ex. D. 30.

**PART II. SECT. 2, SUB-SECT. 3.—B.**

321 i. *Rent*.]—*HEMPLE v. ROBINSON*, [1924] S. A. S. R. 288.—*AUS*.

321 ii. —.]—Memoranda or heads of agreement, ascertaining no certain amount of rent, being preparatory to a letting, & under which no rent had been paid before the distress:—*Held*: not to constitute a present demise.—

*CHENEY & BRECK v. TAYLOR* (1844), 1 U. C. R. 166.—*CAN*.

321 iii. —.]—B. rented orally from plff. for a year, & it was intended to have a written lease. It was not shown that either the rent or the terms of the tenancy had been agreed upon:—*Held*: not a lease, but an agreement only.—*KYLE v. STOCKS* (1871), 31 U. C. R. 47.—*CAN*.

315. —. —.]—Time given for preparation thereof —Before commencement of term.]—*TEMPEST v. RAWLING*, No. 324, *post*.

316. Express proviso that agreement not to operate as lease.]—Whether an agreement for a lease shall enure as a present demise, is a question of intention to be collected from the instrument; therefore, where an agreement for a lease contained a stipulation as to the terms upon which the tenant should hold till a lease was granted, but also contained a proviso that it should not be construed or taken to operate as a lease or actual demise:—*Held*: it did not require a lease stamp.—*PERRING v. BROOK* (1835), 7 C. & P. 360; 1 Mood. & R. 510, N. P.

*Annotation*:—*Reid*, *Curling v. Mills* (1843), 6 Man. & G. 173.

317. —. —.]—*ANDERSON v. MIDLAND RY. CO.*, No. 537, *post*.

318. Agreement for tenancy for three years.]—An agreement for a tenancy for three years is the same thing in effect as an agreement for a lease.—*Re BARKER* (1863), 7 L. T. 724.

319. Instrument not described as lease — No words of present demise.]—*CLAYTON v. BURTON-SHAW*, No. 326, *post*.

**B. Uncertainty as to Rent and Occupation.**

320. Rent — Agreement to abate.]—*MORGAN d. DOWDING v. BISSELL*, No. 298, *ante*.

321. —. —.]—Landlord & tenant between whom there was a subsisting tenancy, agreed in writing for a letting of the farm upon different terms, the amount of the rent to be settled by valuation, & the tenant to find sureties for his paying the rent. The amount was not settled, & the sureties were not given:—*Held*: the instrument, although it contained words of present demise, did not operate as a lease, or alter the terms of the existing tenancy.—*JOHN v. JENKINS* (1832), 1 Cr. & M. 227; 3 Tyr. 170; 2 L. J. Ex. 83; 149 E. R. 384.

*Annotations*:—*Distd.* *Chapman v. Bluck* (1838), 1 Arn. 27. *Appld.* *Jones v. Reynolds* (1841), 1 Q. B. 506. *Mentd.* *Harris v. Thirkell* (1852), 20 L. T. O. S. 98.

322. —. —.]—*CHAPMAN v. TOWNER*, No. 544, *post*.

323. —. —.]—*GORE v. LLOYD*, No. 327, *post*.

324. Occupation — Commencement uncertain.]—An instrument, executed on Nov. 24, 1807, upon an agreement stamp setting forth the conditions of letting a farm & the regulations to be observed by the tenant; that the term was to be from year to year, the lands to be entered upon on Feb. 3, 1808, & the housing on May 12; & that a lease was to be made upon these conditions, with all usual covenants; at the foot of which deft. wrote "I agree to take lot 1, the premises in question at the rent, etc. subject to the covenants"; is an agreement for a lease, & not a present demise; there being not only a stipulation for a future lease, but time given to prepare it before the commencement of the term, & no present occupation as tenant contracted for. But after deft. had been let into possession under such agreement, & had paid rent under it:—*Held*: that was sufficient to satisfy count against him as tenant upon a demise, for of such agreement; & such count stating that whereas

321 iv. —. —.]—*M'CREECH v. M'GEOGH* (1873), 1 R. 7 C. L. 236.—*IR*.

321 v. —. —.]—*KERSLER v. KROGMANN*, [1908] T. S. 290.—*S. AF*.

321 vi. —. —.]—*TOTOYI v. NCUEKA* (1909), E. D. C. 113.—*S. AF*.

324 i. Occupation — Commencement uncertain.]—*Re ALEXANDER, Ex p.*

the plaintiff had demised, etc., & it was not necessary to state the whole of the agreement, if the part omitted did not qualify that which was stated.—*TEMPEST v. RAWLING* (1810), 13 East, 18; 104 E. R. 272.

*Annotations*.—*Distd.* Doe d. Pearson v. Ries (1832), 8 Bing. 178. *Mentd.* Handford v. Palmer (1820), 2 Brod. & Bing. 359.

**325.** ———.] — A landlord has no right to distrain, unless there be an actual demise to the tenant at a fixed rent; & therefore, where a tenant was in possession, under a memorandum of agreement to let on lease, with a purchasing clause, for twenty-one years, at the net clear rent of £63, the tenant to enter any time on or before a particular day:—*Held*: this only amounted to an agreement for a future lease, & no lease having been executed, & no rent subsequently paid, the landlord was not entitled to distrain.—*DUNK v. HUNTER* (1822), 5 B. & Ald. 322; 106 E. R. 1209.

*Annotations*.—*Consd.* Hamerton v. Stoad (1824), 5 Dow. & Ry. K. B. 206. *Distd.* Mann v. Lovejoy (1826), Ry. & M. 355; Stanforth v. Fox (1831), 7 Bing. 590; Warman v. Faithfull (1834), 5 B. & Ad. 1042. *Consd.* Vincent v. Godson (1853), 1 Sm. & G. 384. *Distd.* Anderson v. Mid. Ry. (1861), 3 E. & E. 614.

**326.** ——— & determination.] — By an instrument under seal, A. agreed to take hire of B. certain premises at a certain yearly rent, but no time was fixed for the commencement or determination of the interest. It was also agreed that A. should take at a valuation to be made on a future day, the fixtures, furniture, & stock in trade on the premises. The instrument had a stamp of £1 10s. impressed upon it:—*Held*: it was only an agreement for a lease, & the stamp was not sufficient. *Semble*: it should have been a stamp of £1 15s., the instrument being "a deed not otherwise charged" in the sched. to Stamp Act, 1815 (c. 184).

In judging whether this be a lease or not, let us first look at the declaration. Pltf. does not describe it as a lease, there are no words of demise, & the language as there set out is that of debts. alone. Looking at the instrument itself, I am satisfied that great injustice might be done by holding it to be a lease. Was it the intention of the parties that it should operate as a present demise? I cannot persuade myself that debts. ever consented so to consider it. *Non constat* when the interest was to commence, nor how long it was to continue (BAYLEY, J.).—(LAYTON v. BURTENSHAW (1826), 5 B. & C. 41; 7 Dow. & Ry. K. B. 800; 108 E. R. 16.

*Annotation*.—*Distd.* Wilson v. Smith (1841), 12 M. & W. 401.

**327.** ———.] — The following document: "Memorandum of an agreement entered into this Jan. 31, 1840, between B., of the one part, & J., of the other part. The said J. hereby agrees to become the tenant of G. farm, at the customary time of entry, under the following conditions: viz., that the sum of £260 annual rent shall be paid at the usual time for the house, premises, & lands, as agreed upon; & the said B. agrees to lay out in the improvement & alterations of the farm-house & new sheds a sum not exceeding £200, with the understanding that spars for rafters shall be found from the estate; cartage of all materials, except stones for walls, to be done or found by J. (Signed) B., J." :—*Held*: (1) a mere agreement for a future tenancy, not an actual demise, & therefore properly stamped with a £1 stamp; (2) this agreement did not necessarily import, in point of law,

that the year's rent was to be payable at the end of the year from the time of entry; but it might be shown from the contemporaneous or subsequent dealings of the parties, that their understanding was that the rent should become payable at an earlier period.

(3) The rule which is laid down in all the cases is, that you must look at the whole of the instrument, to judge of the intention of the parties as declared by the words of it, for the purpose of seeing whether it is an agreement or a lease (ALDERSON, B.).—*GORE v. LLOYD* (1844), 12 M. & W. 463; 13 L. J. Ex. 366; 152 E. R. 1279; *sub nom.* *GORE v. LLOYD, EVANS v. LLOYD*, 2 L. T. O. S. 329.

*Annotation*.—*As to* (1) *Folld.* Doe d. Wood v. Clarke (1845), 7 Q. B. 211.

**328.** ———.] —*DOE d. WOOD v. CLARKE*, No. 339, *post*.

#### C. Landlord Not in Position to Demise.

**329. Expectation of power to demise.**—An instrument on an agreement stamp, reciting that A., in case he should be entitled to certain premises on the death of B., would immediately demise the same to C., declaring that he did thereby agree to demise & let the same, with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, & not as an absolute demise.—*DOE d. COORE v. CLARE* (1788), 2 Term Rep. 739; 100 E. R. 398.

*Annotations*.—*Distd.* Doe d. Green & Colcombe v. Fidler (1795), Peake, Add. Cas. 33; Doe d. Pearson v. Ries (1832), 8 Bing. 178. *Refd.* Doe d. Jackson v. Ashburner (1793), 5 Term Rep. 163; Doe d. Bromfield v. Smith (1805), 6 East, 530; Pistor v. Cater (1842), 9 M. & W. 315; Doe d. Bailey v. Foster (1846), 15 L. J. C. P. 263.

**330.** ———.] — By agreement between P. & H., P. agreed to grant to H. a lease of land & the buildings then standing thereon, & others to be erected thereon under the agreement, with the appurtenances, as they then were & had been in the possession of H., for a term of years to commence at a day then past, at a specified rent, payable on days then to come; & P. agreed in four months to erect certain buildings on the land; & H. agreed to take the lease & execute a counterpart, & in the four months, to erect certain other buildings on the land; & it was agreed that the lease should be granted immediately after P. should obtain his lease of the premises from M., under a then subsisting agreement between P. & M.; & that the lease from P. to H. should contain like covenants, etc., to those in the lease from M. to P., & such other covenants as were usual in such leases: & H. agreed to pay the rent, as if the lease from P. were already executed. If H. failed to pay such rent, or perform the agreement, the agreement was to be void so far as regarded the engagements of P.; & P. might retain, or re-enter upon, & dispose of, the premises. If P. failed to perform, etc., he was to pay £500 to H., as liquidated damages:—*Held*: the instrument did not amount to a present demise, inasmuch as P. appeared by the agreement to have no present power to grant a lease; & H. having entered & made default in payment of rent, P. could not distrain.—*HAYWARD v. HASWELL* (1837), 6 Ad. & El. 265; 1 Nev. & P. K. B. 411; Will. Woll. & Dav. 158; 6 L. J. K. B. 116; 1 Jur. 54; 112 E. R. 101.

**331. Licence necessary — From lord of manor.**—By a memorandum of agreement, dated June 23, 1842, made between A., as agent for & on behalf

GRAINGER (1893), 11 N. Z. L. R. 682.—*N. Z.*

f. — Duration uncertain.]—*MORI-*  
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SON v. EDMISTON, [1907] V. L. R. 191.  
—*AUS.*

g. ———.] — *PENTLAND v.*

STOKES (1812), 2 Ball & B. 68.—*IR.*  
h. ———.] — *DALTON v. BARRY*

(1860), 12 Ir. Jur. 271.—*IR.*

**Sect. 2.—Distinction between lease and agreement for lease: Sub-sect. 3, C. & D. Sect. 3: Sub-sect. 1.]**

of the churchwardens of the parish of M., not naming them, of the one part, & B. of the other part, it was agreed, provided a licence could be obtained from the lord of the manor, & upon B. putting the premises into repair, that the churchwardens should grant a lease to B. for twenty-one years from Midsummer then next, under the clear yearly rent of £30; such lease to contain covenants for payment of rent & taxes, & to repair, insure, not to commit waste, etc., & all other usual & proper covenants, etc.; & B. agreed to accept such lease, & execute a counterpart, etc., & that, until such lease & counterpart should be granted, the said yearly rent should be payable & recoverable by distress or otherwise, in like manner as if such lease & counterpart had been executed:—*Held*: this instrument was properly stamped as an agreement.

The parties had some difficulty about a future lease, & in the meantime agree to take the best terms they can get. They therefore consent to a tenancy so long as they can agree. Whatever title A. had at the time he has now, because there has been no legal transfer of his legal estate. His title by estoppel is as good as ever (COLTMAN, J.).—*DOE d. BAILEY v. FOSTER* (1846), 3 C. B. 215; 15 L. J. C. P. 263; 7 L. T. O. S. 208; 136 E. R. 86. *Annotation*:—*Mentd.* Ford v. Ager (1863), 8 L. T. 546.

**332. — From superior landlord.] — ROL- LASON v. LEON, No. 978, post.**

**D. Fulfilment of Conditions in futuro.**

**333. By lessee — Observance of "usual covenants."]**—*MORGAN d. DOWDING v. BISSELL*, No. 298, ante.

**334. — Sureties to be found by lessee.] — JOHN v. JENKINS, No. 321, ante.**

**335. By landlord — Acquisition of additional land.]**—*DOE d. JACKSON v. ASHBURNER* (1793), 5 Term Rep. 163; 101 E. R. 93.

*Annotations*:—*Distd.* Doe d. Walker v. Groves (1812), 15 East, 244. *Consd.* Pithers v. Judson (1829), 8 Bing. 206. *Refd.* Doe d. Bromfield v. Smith (1805), 6 East, 530; Doe d. Pearson v. Rice (1832), 8 Bing. 178; Warman v. Faithful (1834), 3 Nev. & M. K. B. 137; Doe d. Rogers v. Pullen (1836), 2 Bing. N. C. 749; Chapman v. Bluck (1838) 5 Scott, 516; Doe d. Morgan v. Powell (1844), 7 Man. & G. 980. *Mentd.* Newberry v. Colvin (1830), 1 Tyr. 55.

**336. — Completion of premises.] —** A tenant entered under an agreement, containing stipulations for a lease at £25 a year, & an engagement by the landlord to complete certain erections. The erections were never completed, & the tenant never paid any rent; but being called on after some years' occupation, said he was ready to pay what was due, provided the erections were completed, & an allowance made him for the expense of some repairs:—*Held*: a demise at a rent certain could not be implied so as to entitle the landlord to distrain.—*REGNART v. PORTER* (1831), 7 Bing. 451; 5 Moo. & P. 370; 9 L. J. O. S. C. P. 168; 131 E. R. 174.

*Annotations*:—*Expld.* Marshall v. Schofield (1832), 52 L. J. Q. B. 58. *Refd.* Watson v. Waud (1853), 8 Exch. 335.

**337. — Repairs.] — RAWSON v. EICKE, No. 307, ante.**

**338. — —.] — GORE v. LLOYD, No. 327, ante.**

**339. — —.] — Agreement in substance as follows**: "Proposals for letting the M. & G. Farms in H. Quantity, 130 acres. Term twelve years, determinable," etc. "Rent \$621. To farm the arable land upon the four-course system," etc. "All other covenants, except as above altered, contained in a draft lease, dated Dec. 1, 1824, granted by P. to J." "June 3, 1835. Agreed to the above rent, provided the house & buildings are put into tenantable repair on a plan to be mutually determined upon & finally settled within one month from the above date." Signed by the landlord & the party intending to take:—*Held*: not a present demise, because the terms were to take effect only upon the performance of a condition, & it was not ascertained when the tenancy was to commence.

As we do not know from this instrument when the holding was to commence, we cannot construe it as a present demise (PATTESON, J.).—*DOE d. WOOD v. CLARKE* (1845), 7 Q. B. 211; 14 L. J. Q. B. 233; 5 L. T. O. S. 91; 9 Jur. 426; 115 E. R. 408.

**340. — —.] — TIDEY v. MOLLETT, No. 1308, post.**

**341. — Improvements.] — GORE v. LLOYD, No. 327, ante.**

**342. Present terms uncertain & insufficient.] —** Deft. wrote to pltf.; "I shall be happy to take a lease of your iron ore at N., at a royalty of 1s. a ton, & I will engage to work the ironstone, limestone, ore & manganese, in such relative proportions that the average produce of iron shall not exceed the usual average of the common ores of South Wales, which I believe to be about 40 per cent.; the term to be forty years from June 24 next, & the sleeping rent £150 per annum;" the lease to be voidable on the lessee's part, he giving six months' notice & paying a fine, the amount of which, in different cases, was then stipulated; "the relative proportion of the iron ores in weight to be worked together to be ascertained by a competent person." Pltf. wrote in answer: "I agree to the terms contained in your letter," etc., " & shall be ready to grant a lease conformable thereto from myself & all other proper parties, whenever you require me." Deft. afterwards wrote to pltf. proposing to take a lease of other lands of pltf. on the terms above mentioned. Pltf. wrote in answer: "I agree to let R.," deft., "a lease of my joint property," the last mentioned lands, "on the same terms I have granted him a lease of my independent property," the first mentioned lands, "commencing at the same time & paying the same sleeping rent & the same royalty per ton":—*Held*: in an action by pltf. on the contract as to the joint property, that the agreement, to be collected from the several documents, was not a present demise.

I do not pretend to reconcile all the cases. . . . In all those where it has been held that a present demise took place there was either an actual present demise, immediate possession given, or something to show that possession, & the relation of landlord & tenant, were to commence before a lease was executed (PATTESON, J.).—*JONES v. REYNOLDS* (1841), 1 Q. B. 506; 1 Gal. & Dav. 62; 10 L. J. Q. B. 193; 113 E. R. 1226.

**PART II. SECT. 2, SUB-SECT. 3.—D.**

**k. By lessee—Payment of deposit.]**—An agreement in writing between A. & B. that, on paying £20, B. was to get possession of a farm of land, &

also a lease for twenty-one years, at the yearly rental of £16 a year; & that B., on giving up possession at the end of twenty-one years, having done no injury, was to get his money returned:—*Held*: to constitute a

valid agreement for an executory demise for twenty-one years from the date of the payment of £20.—*ERSKINE v. ARMSTRONG* (1887), 20 L. R. Ir. 296.—*IR.*



## SECT. 3.—NECESSITY FOR CONCLUDED CONTRACT.

## SUB-SECT. 1.—OFFER AND ACCEPTANCE.

Offer & acceptance generally, *see* CONTRACT, Vol. XII., pp. 53-90.

## 343. Necessity for clear offer &amp; acceptance.]—

A agrees by letter & verbally to take land on a building lease, & a rough draft is prepared, & fair copy & plan made, after which a new clause is inserted at A.'s request, & agreed to by deft.'s [the landowner's] solr., all along acting for him; after which A., having called for completion of the agreement, the solr. declines to complete. On bill filed for specific performance, & demurrer for want of equity:—*Held*: as no copy of the agreement was signed, & as it clearly appeared that the plans had still to be settled, & therefore the premises were not defined, the demurrer must be allowed.—*ADAMS v. WHEATLEY* (1854), 3 W. R. 96.

344. —.]—WOOD v. SCARTH, No. 775, *post*.345. —.]—FORSTER v. ROWLAND, No. 416, *post*.

346. —.]—B. was tenant for fourteen years of two farms, the lease having been granted in 1839 by deft.'s brother, who was entitled to three-fourths of the freehold, & deft., who was entitled to the remainder. During the term B. died, & pltf. became entitled to the lease. Deft.'s brother died, & his widow, who was entitled to the three-fourths for her life, on the expiration of the term in 1853, agreed with pltf. that he should continue to hold on as tenant from year to year at the same rent. Deft. demanded an increased rent for his fourth, which pltf. agreed to give, & deft. thereupon agreed, in writing of Mar. 17, 1856, to grant a lease of such fourth for fourteen years from Michaelmas, 1853 at the increased rent. On the death of the widow, in 1861, deft. became entitled to the entirety, & in Mar. 1862 he wrote to pltf. to say he clearly had a right to hold the farms for the time specified, but he must of course pay the same rent for the other three quarters. On Mar. 25, 1862, pltf. wrote to deft. saying he quite agreed to pay the same rent for each quarter for the further three-quarters of the two farms from Michaelmas next, agreeably to the memorandum:—*Held*: pltf. was entitled to specific performance of an agreement for a lease for fourteen years from Michaelmas 1853, with covenants similar to those contained in the original lease.—*BRADEL v. PITT* (1863), 9 L. T. 318; 9 Jur. N. S. 1194; *subsequent proceedings* (1864), 11 L. T. 592.

347. —.]—CAYLEY v. WALPOLE, No. 377, *post*.

348. —.]—The agents of A., who had a lease of premises, No. 22, Belgrave Road, to dispose of wrote to B. as follows: "We have been requested by D. to find her a lodging-house in this neighbourhood; & we forward for your approval particulars of two which we think most likely to suit." Inclosed were particulars of two houses, one of which was No. 22, Belgrave Road, the terms for which were stated to be: Premium, 250 guineas; rent, £80; & certain fixtures & planned furniture to be taken at a valuation. B. replied as follows: "I have decided on taking No. 22, Belgrave Road, & have spoken to my agent, C., of etc., who will arrange matters with you if you will put yourselves

in communication with him. I leave town this afternoon; so, if you have occasion to write to me, please address to Cirencester":—*Held*: these two letters did not constitute a complete agreement binding on B.—*STANLEY v. DOWDESWELL* (1874), L. R. 10 C. P. 102; 39 J. P. 393; 23 W. R. 389.

349. —.]—CARTWRIGHT v. MILLER, No. 429, *post*.

## 350. —.]—BUCHANAN v. HAMILTON (DUKE), [1878] W. N. 61, H. L.

*Annotation*:—*Mentd.* Inglis v. Buttery (1878), 3 App. Cas. 553.

## 351. —.]—MORITZ v. KNOWLES (1899), 43 Sol. Jo. 529, C. A.

352. —.]—Acceptance to be unqualified—Suggested new or different terms.]—In order to constitute an agreement by letters, the answer to the written proposal must be a simple acceptance of the terms proposed, without the introduction of any new or different term.—*HOLLAND v. EYRE* (1825), 2 Sim. & St. 194; 57 E. R. 319.

*Annotations*:—*Apld.* Lucas v. James (1819), 7 Hare, 410. *Consd.* Goodwin v. Fielding (1853), 1 W. R. 255.

353. —.]—A. proposed to B. to give him a certain sum for a thirty-one year's lease of a house, with possession on July 25, & a definitive answer was to be given within six weeks. B. about three weeks after the proposal wrote that he accepted it, & would give possession on Aug. 1. A. in a few days wrote, withdrawing his proposal. Some time after this, & just before the end of the six weeks, B. wrote that it was by mistake he had offered possession on Aug. 1 & stating that he was ready to give it according to the proposal:—*Held*: the letter of B. offering possession in Aug. was not an acceptance of A.'s proposal.—*ROUTLEDGE v. GRANT* (1828), 3 C. & P. 267, N. P.; *subsequent proceedings*, 4 Bing. 653.

354. —.]—On a treaty for an underlease, a memorandum of the terms of the intended agreement was prepared, stipulating that the lease should contain all usual covenants, & also the covenants in the leases of the ground landlord, & the proposed lessee signed the memorandum, accompanying his signature by the qualification that he agreed thereto, subject to there being nothing unusual in the leases of the ground landlord. A draft of the proposed lease was afterwards submitted by the lessor's solrs. to the proposed lessee, who made some alterations & returned the draft with a request that the lessor would at once grant the lease as altered, or refuse it. The lessor's solrs. sent the draft back the same day, assenting to all the alterations except one, whereby the proposed lessee had expunged a clause in the draft restraining any assignment or demise by him without the consent of the lessor:—*Held*: upon the return of the draft lease not acceding to all the alterations, & in the absence of any proof that the lessor was previously bound by the terms as to unusual covenants introduced by the proposed lessee on his signing the memorandum, the contract was incomplete, & the proposed lessee was at liberty to determine the treaty.—*LUCAS v. JAMES* (1849), 7 Hare, 410; 18 L. J. Ch. 329; 14 L. T. O. S. 308; 13 Jur. 912; 68 E. R. 170.

*Annotations*:—*Mentd.* Andrew v. Aitken (1882), 22 Ch. D. 218; Hope v. Walter, [1900] 1 Ch. 257.

## PART II. SECT. 3. SUB-SECT. 1.

343 i. Necessity for clear offer & acceptance.]—*WRIGHT v. ST. GEORGE* (1861), 12 L. Ch. R. 226.—*IR*.

348 ii. —.]—*SOMERVILLE v. RICE* (1912), 31 N. Z. L. R. 370.—*N.Z.*

343 iii. —.]—Resp. wrote to appct. that he was prepared to lease to appct. an hotel upon certain specified conditions, & that, if those conditions were accepted, then the further general clauses could be discussed:—*Held*: the appct.'s acceptance of these

specified conditions did not conclude a contract of lease, as there was no "firm offer".—*FINESTONE v. HAMBURG* (1907), T. S. 629.—*S. AF.*

i. —.]—Acceptance to be unqualified.]—*WHITE v. M'MAHON* (1886), 18 L. R. Ir. 460.—*IR*.



**Sect. 3.—Necessity for concluded contract: Sub-sects. 1 & 2.]**

**355.** ———. ———.]—*NESHAM v. SELBY*, No. 428. *post*.

**356.** ———. ———.]—*Pltf., a spinster*, having signed an agreement for the lease of a house to her by *deft.*, *deft.* subsequently signed it, & handed it to his *solr.* with instructions not to part with it except on condition that *pltf.* obtained some responsible person to join in the lease, a condition which *pltf.* declined to fulfil:—*Held*: evidence was admissible to show that no agreement was come to between the parties, & the true effect of the transaction was that *deft.* declined to enter into an agreement on the terms of the written document, but at the same time made a counter offer which was rejected, & there was no agreement.—*PATTLE v. HORNIBROOK*, [1897] 1 Ch. 25; 66 L. J. Ch. 144; 75 L. T. 475; 45 W. R. 123; 41 Sol. Jo. 81.

**357.** ———. ———. **Afterwards withdrawn.]**—A person, who was in treaty for taking the lease of a house, stated, in a letter to the owner, that he had authorised his *solrs.* to settle the terms of his agreement. They subsequently sent the owner a draft agreement, signed by them, stating that its provisions were approved by their client, who afterwards refused to sign or acknowledge it:—*Held*: (1) in a suit for specific performance, the *solrs.* were agents in what they did, & that a defence under Stat. Frauds failed; (2) an alteration made by the owner in the terms of the agreement, but not insisted on by him, did not vitiate the contract.—*JOLLIFFE v. BLUMBERG* (1870), 18 W. R. 784.

**358.** ———. ———. **After contract completed.]**—*CAYLEY v. WALPOLE*, No. 377. *post*.

**359.** ———. ———. **Offer—Without acceptance.]**—Where, upon the letting of premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over & assented to by him, & it was then agreed that he should, on a future day, bring a surety & sign the agreement, neither of which he ever did:—*Held*: the memorandum was not an agreement, but a mere unaccepted proposal, & the terms of the letting, therefore, might be proved by parol evidence.—*DOE d. BINGHAM v. CARTWRIGHT* (1820), 3 B. & Ald. 326; 106 E. R. 683.

*Annotations*:—*Apld.* *Hawkins v. Warre* (1825), 3 B. & C. 690. *Mentd.* *Whitford v. Tutin* (1834), 4 Moo. & S. 166.

**360.** ———. ———.]—*WARNER v. WILKINGTON*, No. 413. *post*.

**361.** ———. ———. **Offer withdrawn.]**—*Deft.* made *pltf.* an offer, to remain open for seven days, of the lease of *deft.*'s premises. *Deft.* the next day agreed to let the premises to R. *Pltf.* purported to exercise the option within the seven days, & claimed specific performance of the alleged contract as from the date of *deft.*'s offer:—*Held*: there being sufficient evidence of notice received by *pltf.* of acts inconsistent with the granting of the lease by *deft.* to *pltf.*, the offer of *deft.* had been withdrawn & was not a continuing offer to the date of acceptance by *deft.*, but if it had been, R. having no notice before he entered into the agreement to take the lease of *pltf.*'s rights, R.

would have a prior equity, & *pltf.* would not have been entitled to specific performance.—*CARTWRIGHT v. HOOGSTOEL* (1911), 105 L. T. 628.

**SUB-SECT. 2.—STIPULATION FOR FORMAL DOCUMENT.**

*See, generally*, CONTRACT, Vol. XII., pp. 83–89.

Agreements for sale of land, *see* SALE OF LAND.

**362. Whether contract concluded—Intention of parties.]**—(1) If there is a signed paper, signed by an agent duly authorised thereto, which paper though agreeing to do something, leaves the subject matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together [by parol evidence], so as to constitute a contract valid under Stat. Frauds.

(2) The contract so constituted by the act of A.'s duly authorised agent will be binding on A. though the second paper may have been sent by the agent to A.'s *solr.*, to put it into form, provided that the agent & the person with whom he was dealing, agreed that it should be sent for that purpose; but not otherwise. The act of sending such a paper to a *solr.* to have the matter reduced into form, affords generally cogent evidence that the parties do not intend to bind themselves till it is reduced into form.—*RIDGWAY v. WHARTON* (1857), 6 H. L. Cas. 238; 27 L. J. Ch. 46; 29 L. T. O. S. 390; 4 Jur. N. S. 173; 5 W. R. 804; 10 E. R. 1287, H. L.

*Annotations*:—As to (1) *Consd.* *Baumann v. James* (1868), 3 Ch. App. 508. *Apld.* *Long v. Millar* (1879), 4 C. P. D. 450; *Cave v. Hastings* (1881), 7 Q. B. D. 125. *Refd.* *Lee v. Griffin* (1861), 30 L. J. Q. B. 252; *Heys v. Astley* (1863), 4 De G. J. & Sm. 34; *Jones v. Victoria Graving Docks Co.* (1877), 2 Q. B. D. 314; *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Oliver v. Hunting* (1890), 44 Ch. D. 205; *Wado v. L. & N. W. Ry.* (1920), 90 L. J. K. B. 593. As to (2) *Consd.* *Barker v. Allan* (1859), 5 H. & N. 61. *Refd.* *Bigg v. Strong* (1857), 3 Sm. & G. 592. *Generally, Mentd.* *James v. Rice* (1854), 5 De G. M. & G. 461; *Chinnock v. Ely* (1864), 13 W. R. 176; *Homfray v. Fothergill* (1866), L. R. 1 Eq. 567; *Brook v. Hook* (1871), L. R. 6 Exch. 89; *Vale of Neath Colliery Co. v. Furness* (1876), 45 L. J. Ch. 276; *Shardlow v. Cotterell* (1881), 20 Ch. D. 90; *Durant v. Roberts & Keighley, Maxsted*, [1900] 1 Q. B. 629; *Thirkell v. Cambi*, [1919] 2 K. B. 590.

**363. — Essential terms included.]**—In a suit for specific performance of an agreement, vague in its language, a ct. of Equity, having regard to the terms of such agreement, will consider the surrounding circumstances, & conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement & the commencement of the suit for its enforcement.

P. & co. entered into an agreement in writing with O. & co. for the transfer to them of the unexpired term of a lease held by P. & co. of land & houses at Shanghai, & to build or finish certain houses thereon; to proceed with the building at once; to consult O. & co.'s wishes in building the houses then in progress, & in building other houses not then commenced. O. & co. on their part, agreed to take the term so to be transferred, & to pay a certain rent divided into three portions, the liability for each portion to begin from the time

**PART II. SECT. 3, SUB-SECT. 2.**

**3621. Whether contract concluded—Intention of parties.]**—*LEE v. PURDY* (1845), 2 U. C. R. 193.—*CAN.*

**3631. — Essential terms included.]**—*STEINHOFF v. BURTON* (1866), 17 C. P. 160.—*CAN.*

**36311. — — —.]**—*FAIRBAIRN v.*

*HILLIARD* (1867), 27 U. C. R. 111.—*CAN.*

**363111. — — —.]**—The mere fact that the parties to an agreement have stipulated that a formal document shall be executed does not by itself show that an enforceable agreement has not been come to. If once a definite offer has been made & accepted without qualification, & the letters of offer & accept-

ance contain all the terms agreed upon between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiations.—*DALLAS v. TELFORD* (1905), 25 N. Z. L. R. 673.—*N.Z.*

*m. Particular stipulations—Terms to be settled on the agreement.]*—*RAMJOO MAHOMED v. HARIDAS MULLICK* (1925), 1 L. R. 53 Cal. 695.—*IND.*

when the house to which that portion related was finished by P. & co., & possession delivered over by them to O. & co. Both parties further agreed that a proper contract should be drawn for their mutual execution by a solr. named by them. No such contract, however, was executed. Possession was given, & the buildings altered by P. & co. at O. & co.'s instance:—*Held*: (1) the terms of the agreement expressed with sufficient clearness the intentions of the parties to bind them, from the time it was made, to do the several acts stipulated for each to perform; (2) the stipulation that a proper contract should be made by a legal adviser was so isolated from the other stipulations in point of sequence that it might be performed either directly after the signing of the memorandum of agreement or when possession was given of the first house specified, or at any subsequent time, either before or after the completion of all or any of the houses to be erected; (3) that part of the agreement which provided that the wishes of O. & co. should be consulted in erecting the buildings was not so vague or indefinite as to render the contract impossible to be enforced, having regard to the surrounding circumstances, & to the fact of a part performance by O. & co., in respect of the buildings & alterations of the houses.—*OXFORD v. PROVAND* (1868), L. R. 2 P. C. 135; 5 Moo. P. C. C. N. S. 150; 16 E. R. 472, P. C.

*Annotations*:—*Generally*, *Mentd.* Coatsworth v. Johnson (1885), Cab. & El. 542; Hembrow v. Talbot (1892), 36 Sol. Jo. 712; Parkin v. South Hetton Coal Co. (1907), 97 L. T. 98; Waring & Gillow v. Thompson (1912), 29 T. L. R. 154.

**364.** ———.] — *CAYLEY v. WALPOLE*, No. 377, post.

**365.** ———.] — By a letter which contained all essential terms of a contract, deft. offered to take a lease of a number of houses from pltf., but there was this provision at the end: "Such lease to be approved in the customary way by my solr." The offer contained in this letter was accepted by pltf. Deft.'s solr. subsequently refused to approve the lease, or to complete:—*Held*: there was a binding, & not a conditional, contract, which must be specifically enforced. The meaning of the provision was, that deft.'s solr. was to see that nothing irregular or unusual was inserted in the formal lease which was to carry out the agreement.—*CHIPPERFIELD v. CARTER* (1895), 72 L. T. 487.

**366. Particular stipulations—Articles to be drawn by counsel.**—*STURGEON v. PAINTER* (1608), Noy, 128; 74 E. R. 1092.

*Annotation*:—*Apld.* Goodtitle v. Way (1787), 1 Term Rep. 735.

**367. — Terms of draft to be reasonable.**—A. by a letter agreed to take a lease from B. of certain property, "provided the terms of the draft lease are reasonable in our estimation." B., in reply to this letter, wrote "As to the terms of the lease, they will be of the usual character." A. took no notice of this in his answer. A draft lease was sent to A. containing unreasonable covenant & he declined to take the lease. B. brought an action for specific performance, & in his reply stated that he was willing to waive the unreasonable covenants:—*Held*: (1) A., under the agreement made by him, was entitled to see the draft lease before being bound, & the terms of the lease being unreasonable, was at liberty to decline to take it; (2) the agreement was not, as altered by B., that the lease should be in the usual terms.—*WILCOX v. REDHEAD* (1880), 49 L. J. Ch. 539; 28 W. R. 795.

**368. — Agreement subject to approval of formal contract.**—By a written agreement deft. agreed with pltf. to take a lease of a house for a

certain term at a certain rent "subject to the preparation & approval of a formal contract." No other contract was ever entered into between the parties:—*Held*: there was no final agreement of which specific performance could be enforced against deft.—*WINN v. BULL* (1877), 7 Ch. D. 29; 47 L. J. Ch. 139; 42 J. P. 230; 26 W. R. 230.

*Annotations*:—*Consd.* Page v. Norfolk (1844), 70 L. T. 781. *Distd.* Radle v. Addison (1882), 52 L. J. Ch. 80. *Apld.* Hawkesworth v. Chaffey (1886), 55 L. J. Ch. 335. *Consd.* Sewell v. Harrow & Uxbridge Ry. (1902), 19 T. L. R. 130; Watson v. McAllum (1902), 37 L. T. 547. *Foll.* Bromet v. Neville (1909), 53 Sol. Jo. 321. *Apld.* Santa Fé Land Co. v. Forestal Land, Timber, & Railways Co. (1910), 26 T. L. R. 534; Von Hatzfeldt-Wildenburg v. Alexander, [1912] 1 Ch. 284; Rossdale v. Denny, [1921] 1 Ch. 57. *Ext.* Cooke v. Iddout, [1921] 1 Ch. 201. *Consd.* Chillingworth v. Esche, [1924] 1 Ch. 97. *Refd.* Bertel v. Neveux (1878), 39 L. T. 257; Clark v. Robinson (1903), 51 W. R. 443; Love & Stewart v. Instone (1917), 33 T. L. R. 475; Allen v. Whiteman (1920), 89 L. J. Ch. 534.

**369. ———.]** — (1) It is not every excess of authority by an agent that will vitiate a contract, & where such excess is not unreasonable it will not operate to prevent specific performance of the contract.

(2) Where an agreement by letters is made "subject to" the approval of a formal contract, there is no concluded contract until such formal contract has been approved. *Secus*, where the stipulation is not conditional, but merely supplemental.—*BROMET v. NEVILLE* (1909), 53 Sol. Jo. 321.

*Annotation*:—*As to* (2) *Apld.* Rossdale v. Denny, [1921] 1 Ch. 57.

**370. — Proper lease to be approved.**—A letter containing this sentence, "a proper lease to be drawn up, with all proper clauses, & approved by me & my solr.," is, if accepted, a sufficient statement of the terms to form a binding contract.—*EADIE v. ADDISON* (1882), 52 L. J. Ch. 80; 47 L. T. 543; 31 W. R. 320.

**371. — Subject to suitable agreements being arranged between solicitors.**—Pltf. having informed deft. of his willingness to let his top flat for eight years at a yearly rent of £300 he received on Feb. 25, 1924, a telephone message from deft. that he would take the flat on the terms arranged, & on Feb. 26, 1924, a letter in which deft. said: "Confirming my conversation over the telephone this afternoon, subject to suitable agreements being arranged between your solrs. & mine, & subject to your carrying out the decorations of the top flat at your house 117 Park St. . . . I am prepared to take the flat for a period of eight years, at an inclusive rental of £300 per annum including all rates, taxes, etc. . . ." Pltf. replied that he had sent deft.'s letter on to his solr. & that application was being made to the head landlord for permission to make the alterations. A correspondence ensued between the solrs. on either side. On Mar. 17 the alterations were put in hand & by Mar. 31 a draft lease had been approved with the terms commencing from Mar. 25. Pltf.'s solrs. had made a note on the draft: "If the premises are not ready for occupation & use by Mar. 25 the landlord will hand over a letter to the effect that the rent is not to commence until the premises are ready for occupation," & at the foot of this deft.'s solr. had added: "I observe. It is of course agreed that the alterations arranged will be carried out to the tenant's reasonable satisfaction." On Apr. 4 pltf.'s solrs. intimated that they were ready to exchange lease & counterpart & that the landlord had signed a letter as proposed. On Apr. 11 deft. refused to go on with the matter. In an action by pltf. for specific performance:—*Held*: the expression "subject to suitable agreements being arranged between your solrs. & mine"

*Sect. 3.—Necessity for concluded contract: Sub-sects. 2 & 3. Sect. 4: Sub-sect. 1, A.]*

was a condition precedent to any concluded bargain & did not make the solrs. agents to conclude the bargain; & accordingly there was no absolute contract between the parties that pltf. could enforce by virtue of the letter of Feb. 26, 1924, & the antecedent telephonic conversation, or by reason of this letter & the subsequent dealings between the solrs., including the draft lease & the notes thereon.—*LOCKETT v. NORMAN-WRIGHT*, [1925] 1 Ch. 56; 94 L. J. Ch. 123; 132 L. T. 532; 69 Sol. Jo. 125.

**SUB-SECT. 3.—CONTRACT BY AGENT.**

**372. General rule.]—BROMET v. NEVILLE**, No. 369, *ante*.

**373. Authority of agent—Insufficient authority—No contract.]—A.** was tenant for life with a power to lease by deed duly executed under her hand & seal, reserving the best yearly rent. Pltf. entered into possession, & expended money in building under an agreement for a lease evidenced only by the memorandum in writing entered in the book of A.'s authorised agent, signed not by the agent himself, but by his clerk, although in evidence to have been approved by him, & according to the usual course of business. A. died; & on a bill for specific performance against the remainderman, held, first, no sufficient agreement in writing, not being signed by an agent properly authorised, & if it had, yet the memorandum not containing some of the material terms of a lease, which were left to be made out by parol evidence; secondly, not to be established as a parol agreement in part performed, both as it was not the agreement of the principal, nor of the authorised agent, & also because the remainderman had been guilty of no fraud upon which to charge him with the conveyances of the contract. Also, pltf. not entitled to compensation from A.'s representatives for money laid out by him on the faith of the alleged agreement, such compensation being in the nature of damages, & the fault lying in pltf.'s own negligence.—*BLORE v. SUTTON* (1817), 3 Mer. 237; 36 E. R. 91.

*Annotations:—*Consd. *Potter v. Peters* (1895), 64 L. J. Ch. 357. *Reid. Bird v. Boulter* (1833), 4 B. & Ad. 443. *Mentd. Trotman v. Fleisher, Fleisher v. Trotman* (1801), 3 Giff. 1; *Onions v. Cohen* (1865), 3 Hem. & M. 354; *Landed Estates Co. v. Wooding* (1869), 21 L. T. 384; *Jaques v. Millar* (1877), 6 Ch. D. 153; *Marshall v. Berridge* (1881), 19 Ch. D. 233; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255; *Re Lander & Bagley's Contract*, [1892] 3 Ch. 41; *Edwards v. Jones* (1921), 124 L. T. 740.

**374. — To let—As land agent or steward.]—***Semble:* the owner of an estate in answer to an inquiry from an intending lessee, said: "B. manages all my affairs & you are to treat with him." This does not imply that B. had authority to enter into a binding agreement.—*BIDGWAY v. WHARTON* (1854), 3 De G. M. & G. 677; 2 Eq. Rep. 839; 22 L. T. O. S. 295; 2 W. R. 137; 43 E. R. 266, L. C.; *qfd.* (1857), 6 H. L. Cas. 238, H. L.

*Annotations:—*Reid. *Thirkell v. Cambi*, [1919] 2 K. B. 590. *Mentd. James v. Rice* (1834), 5 De G. M. & G. 491; *Biggs v. Strong* (1857), 3 Sm. & G. 594; *Barker v. Allan* (1859), 5 H. & N. 61; *Lee v. Griffin* (1861), 30 L. J. Q. B. 352; *Heys v. Astley* (1863), 4 De G. J. & Sm. 34; *Chinock v. Ely* (1864), 13 W. R. 176; *Homfray v. Fothergill* (1866), L. R. 1 Eq. 567; *Baumann v. James* (1868), 3 Ch. App. 508; *Brook v. Hook* (1871), L. R. 6 Exch. 89; *Valle of Neath Colliery Co. v. Furness* (1876), 45 L. J. Ch. 276; *Jones v. Victoria Graving Docks Co.* (1877), 3 Q. B. D. 314; *Rossiter v. Miller* (1878), 3 App. Cas. 1134; *Long v. Millar* (1879), 4 C. P. D. 456; *Cave v. Hastings* (1881), 7 Q. B. D. 125; *Shardlow v. Cotterell* (1881), 10 Ch. D.

20; *Oliver v. Hunting* (1890), 44 Ch. D. 805; *Durant v. Roberts & Keighley, Maxsted*, [1899] 1 Q. B. 629; *Wade v. L. & N. W. Ry.* (1907), 90 L. J. K. B. 593.

—*See, further, AGENCY*, Vol. I., p. 326, Nos. 428–431.

—*See, further, AGENCY*, Vol. I., pp. 325, 326, Nos. 423–427.

**375. — To let tenant into possession.]—**It is doubtful whether an agent to let a house has an implied general authority to let persons into possession, but slight evidence will be sufficient to show an express authority.—*SLACK v. CREWE* (1860), 2 F. & F. 59.

**376. — Need not be in writing.]—HEARD v. PILLEY**, No. 398, *post*.

**377. — Proof of authority—Letters of principal.]—**(1) The ct. will consider that a concluded agreement has been arrived at by correspondence when once the cardinal points are definitely proposed by one party & accepted by the other, & a reference to a more formal agreement or subsidiary non-essential stipulations, will not take away from the effect of the agreement or understanding come to by the letters.

(2) Whatever may have been the intention of the solrs. in sending this more formal agreement, there is nothing in that transaction which can take away from the effect of the clear understanding to be collected from the letters. It has been said that the letters & correspondence are those of the agents of defts., & that that agent was not duly authorised; that defence is impossible considering that the last act of the agent in the matter which concludes the agreement, is to enclose in his own letter one from defts. agreeing to the proposed stipulations (*STUART, V.-C.*).—*CAYLEY v. WALPOLE* (1870), 39 L. J. Ch. 609; 22 L. T. 900; 18 W. R. 782.

**378. — Termination of authority—Death of landlord.]—**After some negotiations, a landlord, by his agent, stated, in a letter to the tenant, the terms on which he would renew his lease, but added, he would expect an answer within a month. The landlord died seven days afterwards, & on the following day the tenant & agent, both of whom were then ignorant of the death, met, & the tenant signed his acceptance of the terms:—*Held:* there was no binding contract.—*CARR v. LEVINGSTON* (1865), 35 Beav. 41; 55 E. R. 809.

**379. Duty of agent—To inquire as to eligibility of tenant.]—**Pltf. employed deft. as house agent to let a house for her on commission. In an action for introducing an insolvent tenant:—*Held:* it was properly left to the jury upon the evidence to say whether it was part of deft.'s retainer to make reasonable inquiries as to the eligibility of the tenant.—*HEYS v. TINDALL* (1861), 1 B. & S. 296; 30 L. J. Q. B. 362; 9 W. R. 664; 121 E. R. 724; *sub nom. HAYES v. TINDALL*, 2 F. & F. 445; 4 L. T. 403.

**380. Ratification of acts of agent—Bringing action on lease.]—**In case for an injury to his reversion, pltf. declared that the premises in question were in the occupation of P. as tenant to him:—*Held:* the allegation was sufficiently proved by showing that P. had been let into possession by, & paid rent to, a *cestui que trust*, to whom pltf. was trustee.—*VALLANCE v. SAVAGE* (1831), 7 Bing. 595; 5 Moo. & P. 576; 9 L. J. O. S. C. P. 181; 131 E. R. 230.

*Annotations:—*Consd. *Jolly v. Arbuthnot* (1859), 4 De G. & J. 224. *Reid. Howe v. Scarrott, Sharp v. Scarrott* (1859), 4 H. & M. 723. *Mentd. Higham v. Rabett* (1839), 7 Scott. 827.

**381. — Lessee let into possession.]—**(1) The ct. will not refuse to decree the specific performance

of an agreement on the ground that one of the contracting parties has mistaken its legal effect.

(2) The lessee having been put into possession of the farm under the agreement:—*Held*: the lessor was precluded from disputing the agent's authority.—*POWELL v. SMITH* (1872), L. R. 14 Eq. 85; 41 L. J. Ch. 734; 26 L. T. 754; 20 W. R. 602.

*Annotations*:—As to (1) *Apprvd. Wilding v. Sanderson*, [1897] 2 Ch. 534. *Reid. McKensie v. Hosketh* (1877), 38 L. T. 171. *Generally, Mentd. Easton v. Russ*, [1914] 1 Ch. 468.

**382. Personal liability of agent—Expression of intention in contract.**—Deft. by a written agreement expressed to be made by himself on behalf of B. of the one part, & pltf. of the other part, stipulated that he would execute a lease of certain premises to pltf. These premises were proved to belong to B.:—*Held*: deft. was personally liable.—*NORTON v. HERRON* (1825), 1 C. & P. 648; Ry. & M. 229, N. P.

*Annotations*:—*Folld. Tanner v. Christian* (1855), 4 E. & B. 591. *Reid. Burton v. Langham* (1848), 5 C. B. 92.

**383.** ———.]—A written agreement was expressed to be made "Between C. for & on behalf of N., of the first part, & T. of the second part." By it "C., on the part of" N., agreed to let to T. certain premises for a term of years, T. paying rent to "C. for the use of" N. No auction to be held on the premises without the "consent in writing of C. on the part of" N. T. to take a lease, & execute a counterpart thereof "when called upon to do so by C. on the part of" N. C. signed this is his own name. N. did not sign it. In an action by T. against C. for not completing the lease:—*Held*: it sufficiently appeared to be the intention of the parties that C. should himself contract; & therefore he was personally liable.—*TANNER v. CHRISTIAN* (1855), 4 E. & B. 591; 3 C. L. R. 1366; 24 L. J. Q. B. 91; 1 Jur. N. 519; 3 W. R. 204; 119 E. R. 217.

*Annotations*:—*Consd. Ogden v. Hall* (1879), 40 L. T. 751. *Reid. Maro v. Charles* (1856), 5 E. & B. 978; Paice v. Walker (1870), L. R. 5 Exch. 173; Gadd v. Houghton (1876), 33 L. T. 811; Chapman v. Smith, [1907] 2 Ch. 97; Universal Steam Navigation Co. v. McKelvie, [1923] A. C. 492. *Mentd. Lennard v. Robinson* (1855), 5 E. & B. 125.

**384.** ———.]—*JOLIFFE v. BLUMBERG*, No. 357, *ante*.

**Description of parties acting through agent—Compliance with Statute of Frauds.**—*See* Nos. 416, 419, 435, *post*.

*See, also, SALE OF LAND.*

## SECT. 4.—EVIDENCE OF CONTRACT.

### SUB-SECT. 1.—WRITTEN MEMORANDUM.

#### A. In General.

*See, now, Law of Property Act, 1925 (c. 20), ss. 40, 53–55; Stat. Frauds, ss. 1, 3, 7, 8, 9, & generally, CONTRACT, Vol. XII., pp. 118 et seq.*

**385. All material terms to be included.**—*BLORE v. SUTTON*, No. 373, *ante*.

**386.** ———.]—A tenant applied to the landlord's solrs. as to the renewal of his lease. The solrs. sent him a report by a surveyor, who recommended the granting a lease for fourteen years at a given rent if certain repairs were done by the tenant. The tenant wrote back assenting to the repairs & rent, but asking for a term of twenty-one years. No final agreement was come to, but some months

afterwards a negotiation having proceeded between the tenant & landlord without the intervention of the solrs., the landlord wrote a letter promising the tenant a lease for fourteen years "at the rent & terms agreed upon," to which the tenant wrote back an unqualified acceptance:—*Held*: parol evidence was admissible to connect the report & the tenant's previous letter with the subsequent letters; & it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy Stat. Frauds.

The report provided for the tenant doing certain specified works & "other works" upon the property, & estimated the expense at from £150 to £200. The specified works being such as must evidently cost nearly that sum:—*Held*: there was no such uncertainty as to prevent specific performance.

In all cases where there is a reasonable doubt or a reasonable ground for doubting whether the parties sought to be bound by a conducted agreement intended more than negotiation. I think the ct. should hesitate to enforce specific performance (*SELWYN, L.J.*).—*BAUMANN v. JAMES* (1868), 3 Ch. App. 508; 18 L. T. 424; 32 J. P. 643; 16 W. R. 877, C. A.

*Annotations*:—*Reid. Long v. Millar* (1879), 4 C. P. D. 450; *Cave v. Hastings* (1881), 7 Q. B. D. 125; *Thirkell v. Cambi*, [1919] 2 K. B. 590; *Stokes v. Whicher*, [1920] 1 Ch. 411.

**387.** ———.]—*MARSHALL v. BERRIDGE*, No. 430, *post*.

**388. Whether terms of collateral agreement to be included.**—Declaration stated that deft. wished pltf. to hire of her a house, & furniture for the same, at the rent of, etc.; & thereupon, in consideration that pltf. would take possession of the house partly furnished, & would, if complete furniture were sent into the house by deft. in a reasonable time, become tenant to deft. of the house, with all the furniture, at the aforesaid rent, & pay the same quarterly from a certain day, to wit, etc., deft. promised pltf. to send into the house, within a reasonable time after pltf.'s taking possession, all the furniture necessary, etc.:—*Held*: deft.'s agreement to send in furniture was an inseparable part of a contract for an interest in lands, & therefore came within Stat. Frauds, s. 4, which, in the case of such contract, requires the agreement, or a memorandum thereof, to be in writing.—*MECHELEN v. WALLACE* (1837), 7 Ad. & El. 49; 2 Nev. & P. K. B. 224; Will. Woll. & Dav. 408; 6 L. J. K. B. 217; 112 E. R. 389; *sub nom. MICHELIN v. WALLIS*, 1 Jur. 402.

*Annotations*:—*Folld. Vaughan v. Hancock* (1846), 3 C. B. 766. *Reid. Wright v. Stavert* (1860), 24 J. P. 403; *Angell v. Duke* (1875), L. R. 10 Q. B. 174.

**389.** ———.]—Pltf. agreed to let a house to deft., & to sell him certain furniture & fixtures therein, & to make certain alterations & improvements in the house; & deft. agreed to take the house, & to pay for the furniture & fixtures & alterations:—*Held*: this was an agreement relating to an interest in land, within Stat. Frauds, s. 4.—*VAUGHAN v. HANCOCK* (1846), 3 C. B. 766; 16 L. J. C. P. 1; 8 L. T. O. S. 118; 10 Jur. 926; 136 E. R. 307.

**390.** ———.]—Pltf. sued upon an agreement, before the making of which, he & deft. had been negotiating concerning his tenancy of

## PART II. SECT. 4, SUB-SECT. 1.—A.

**385 i. All material term to be included.**—Where in an agreement for a lease it is a condition precedent to the

contract of tenancy that certain alterations are to be made, these alterations become an essential part of the contract, & under Stat. Frauds, must be set out in the agreement.—*WATSON v.*

*RAYMOND* (1890), 9 N. Z. L. R. 216.—N. Z.

**385 ii.** ———.]—*KOLIA v. AMERROODEN & SONS* (1921), 42 N. L. R. 275.—S. AF.



**Sect. 4.—Evidence of contract: Sub-sect. 1, A., B., C. & D.]**

deft.'s house furnished. Pltf. had objected to become tenant on the terms proposed on the ground that the house wanted repairs & the furniture was insufficient; deft. then in order to induce, as he in fact thereby did induce, pltf. to become forthwith tenant upon the terms without requiring pltf. to do any repairs or add any furniture previously to the commencement & creation of such tenancy, verbally promised pltf. within a reasonable time after the tenancy commenced to do the repairs & add the furniture required; & thereupon afterwards, in consideration that pltf. at the request of deft. had so forthwith as aforesaid become tenant to deft., deft. promised that he would within a reasonable time do the repairs & add the furniture required. Pltf. averred the performance of all conditions precedent, & that pltf. would not at all perform his last mentioned promise:—*Held*: upon demurrer to the declaration, that the agreement sued upon was collateral to that concerning the tenancy; the consideration was good, & the agreement not being within Stat. Frauds, s. 4, need not be in writing.—*ANGELL v. DUKE* (1875), 1 L. R. 10 Q. B. 174; 44 L. J. Q. B. 78; 32 L. T. 25; 39 J. P. 247; 23 W. R. 307; *subsequent proceedings*, 32 L. T. 320.

*Annotations*:—*Consd.* *Boston v. Boston*, [1904] 1 K. B. 124. *Refd.* *Carier v. Salmon* (1880), 43 L. T. 490; *Burtsal v. Bianchi* (1891), 65 L. T. 678; *De Lassalle v. Guildford*, [1901] 2 K. B. 216; *Re Banks, Weldon v. Banks* (1912), 56 Sol. Jo. 362; *Michael v. Phillips* (1923), 130 L. T. 142.

**391. — Reference to future agreement.]**—Plea of Stat. Frauds to a bill for specific performance of an agreement to grant a lease "subject to certain agreements to be drawn up & signed immediately." Plea allowed.—*SANSOM v. PROLE* (1842), 12 L. J. Ch. 25.

**392. Entry by steward—In manorial contract book.]**—The bare entry of a steward in his lord's contract book with his tenants, is not an evidence itself, that there is an agreement for a lease between the lord & a tenant.—*CHARLEWOOD v. BEDFORD (DUKE)* (1738), 1 Atk. 497; 26 E. R. 314.

*Annotations*:—*Apld.* *Willis v. Stradling* (1797), 3 Ves. 378. *Mentd.* *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 154.

**393. Endorsement on draft agreement.]**—If a party has entered into a parol agreement for a lease, & a draft of it is prepared, though the agreement is void under Stat. Frauds, yet by an indorsement referring to the lease, on the draft by the party, admits the agreement, it being in writing is sufficient within the Statute.—*SHIPPEY v. DERRISON* (1805), 5 Esp. 190.

**394. Pencil memorandum in note book.]**—W. lets premises to V. upon a contract written in pencil by V., & signed by him in a note book belonging to W.; both act under the contract, but V. ultimately alleges non-performance by W. of certain things not contained in it, & W. makes like charges. On a claim for specific performance, decree for specific performance made without costs.—*WALLER v. VIGURS* (1853), 2 W. R. 51.

**395. Parol agreement to take other premises in lieu of agreed premises—Effect of.]**—A. held under B. under a written agreement of lease, & afterwards verbally agreed to take other premises in lieu of the first on the same terms:—*Held*:

this was a new contract by parol on the terms of the first contract, & not an alteration of the terms of that contract.—*GILES v. SPENCER* (1857), 3 C. B. N. S. 244; 26 L. J. C. P. 237; 21 J. P. 727; 5 W. R. 883; 140 E. R. 734.

*Annotation*:—*Mentd.* *Re River Swale Brick & Tile Works* (1883), 52 L. J. Ch. 638.

**396. Written admission of agreement—Letters.]**—O. agreed by parol to grant a building lease to J., & a draft lease containing the terms was approved & engrossed. O. was then induced to alter his mind, & his agents wrote to J. as follows: "In consequence of the deputation from the town council, O. will not trouble himself to increase the rental of Moorlands, & he has gone away without executing the lease, & as he will not return for a month the matter must stand over until his return, when he will go to the castle & judge for himself as to the effect of a house in the scenery." In a subsequent letter O.'s agents wrote: "I am instructed to inform you that after the pressure which has been put upon O. he will not carry out the agreement to grant a lease which your client alleges he has entered into, unless compelled to do so by the Ct. of Ch."—*Held*: (1) in a suit for specific performance, these expressions constituted no memorandum of the contract in writing within Stat. Frauds; (2) the answer in the suit, which admitted the parol contract & the engrossment of the lease, but insisted on the defence of the Statute, did not constitute such a memorandum.—*JACKSON v. OGLANDER* (1865), 2 Hem. & M. 465; 13 L. T. 16; 13 W. R. 936; 71 E. R. 544.

**397. — Answer in Chancery.]**—*JACKSON v. OGLANDER*, No. 396, *ante*.

**398. Pleading—Sufficiency of statement.]**—A bill for specific performance of an agreement to grant a lease, which was made by plaintiff, through an agent, did not state the letter which constituted the agreement, or that there was such a letter; but only that the agent informed pltf. that the lessors had written & sent a letter agreeing to let the premises; but, as a later paragraph of the bill alleged that the agent had entered into the said agreement as agent of pltf.:—*Held*: (1) the passages coupled together constituted a sufficient statement that there was an agreement in writing; (2) it was not necessary that the bill should state that the appointment of the agent by pltf. was by writing.—*HEARD v. PILLEY* (1869), 4 Ch. App. 548; 38 L. J. Ch. 718; 21 L. T. 68; 33 J. P. 628; 17 W. R. 750, L. J.

*Annotations*:—*As to* (1) *Consd.* *Cave v. Mackenzie* (1877), 46 L. J. Ch. 564; *James v. Smith*, [1891] 1 Ch. 384. *Generally*, *Mentd.* *Chattock v. Muller* (1878), 8 Ch. D. 177; *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196.

**399. Production of memorandum—Necessity for—In action for use & occupation—Disclosure of existence of memorandum in evidence.]**—In an action for use & occupation it is not a ground for nonsuit that pltf. does not produce a written agreement under which the premises are held if the evidence given by pltf. in support of his case does not disclose the existence of such an agreement.—*FRY v. CHAPMAN* (1836), 5 Dowl. 265.

**B. Separate Documents.**

*See* Law of Property Act, 1925 (c. 20), ss. 53–55; Stat. Frauds, ss. 1, 3, 7, 8, 9; & *generally*, CONTRACT, Vol. XII., pp. 136–142, Nos. 916–967.

**396. 1. Written admission of agreement—Letters.]**—Specific performance of an agreement for a lease decreed against the owner of the estate, though not originally binding on him, he having by a letter subsequently written, constituted it an agreement, by which, under Stat. Frauds, he was bound.—*POWELL*

*v. DILLON* (1814), 2 Ball & B. 416.—*IR.*

**396. II. —**—*PALMER v. WHITE* (1768), Wallis by Lyne 10.—*IR.*

**396. III. —**—*HARTLY & WHITE v. WILKINSON* (1794), Ridg. L. & S. 357.—*IR.*

**n. Minute of lease—Prepared by**

*solicitor.*—In a suit of specific performance of a verbal agreement to grant a lease:—*Held*: a minute of a lease for three or five years, prepared under instruction by deft.'s solr. established the main fact of the letting.—*FORAN v. STAFFORD* (1878), 6 Nfld. L. R. 151.—*NFLD.*

**400. May be read together.]—RIDGWAY v. WHARTON, No. 362, ante.**

**401. —.]—**One paper referring to another, in which the terms of an agreement are stated, will constitute a contract sufficiently executed according to the provisions of Stat. Frauds; but where the first paper was in these words, "I agree to let the premises in L., containing, three stables, etc. for the same rent & subject to the same conditions that I hold them myself":—*Held*: this paper, even though ratified by the proposed lessee, as it did not state the duration of the term, did not contain enough to constitute a memorandum of an agreement sufficient to satisfy the Statute.—*FITZMAURICE v. BAYLEY* (1860), 9 H. L. Cas. 78; 3 L. T. 69; 6 Jur. N. S. 1215; 8 W. R. 750; 11 E. R. 657, H. L.; *affg.* S. C. *sub nom.* *BAYLEY v. FITZMAURICE* (1857), 8 E. & B. 664, Ex. Ch.

*Annotations:—* *Consd. Clarke v. Fuller* (1864), 16 C. B. N. S. 21. *Reid. Dale v. Humphrey* (1858), E. B. & E. 1004; *Austin v. Newham*, [1906] 2 K. B. 167.

**402. — Letters.]—VERLANDER v. COOD, No. 437, post.**

**403. — — & memorandum.]—WARNER v. WILLINGTON, No. 413, post.**

**404. — —.]—**By Stat. Frauds the agreement as relating to an interest in land must be in writing, signed by deft., the party sued. It need not, however, be all in any one writing, & a letter signed by her referring to & ascertaining the terms of the agreement, would be sufficient.

In an action on an alleged agreement by deft., to let to pltf. a furnished house, an agreement having been drawn up by pltf., & sent to deft., who returned it unsigned, & sent a letter, in which he wrote, "I approve of the agreement, & will sign it"; but, before it was signed, refused to carry it out, on the ground that she found pltf., while assuring her that he meant to use the house only as a private residence, was actually advertising it as a boarding house:—*Held*: (1) if the letter amounted to an adoption of it as a final agreement, it would be sufficient within Stat. Frauds; (2) if deft. was deceived into adopting it, by a wilful mis-statement as to the deft.'s object, that would support the plea of fraud. Fraud lies in the wilful misrepresentation of any material matter of fact present & existing; not in a promise, the breach of which is something future. It is not enough even that there has been fraud, unless the party upon whom it was practised was deceived by it into making the contract (*CROMPTON, J.*).—*CAVALEIRO v. PUGET* (1865), 4 F. & F. 537.

**405. — — & surveyor's report.]—BAUMANN v. JAMES, No. 386, ante.**

**406. — — & telegrams.]—**Where the proposed vendor wrote: "I have let this house to you, the proposed purchaser on the following terms, etc. (stating the terms at length,)" to which he replied, "At the risk of being thought capricious & irresolute, I have to ask you if you will for a pecuniary consideration allow me to withdraw from my obligation to take your house & farm, etc.," & in the subsequent correspondence the proposed purchaser referred to his "engagement," etc.:—*Held*: the contract could be inferred from the tenor of this correspondence with certain telegrams taken together, & specific performance

decreed accordingly.—*COUFLAND v. ARROWSMITH* (1868), 18 L. T. 755.

**407. — Documents not clearly connected.]—PRICE v. GRIFFITH, No. 666, post.**

**408. Admissibility of parol evidence to connect documents.]—RIDGWAY v. WHARTON, No. 362, ante.**

**409. —.]—BAUMANN v. JAMES, No. 386, ante.**

**410. —.]—BRODIE v. ST. PAUL, No. 798, post.**

*See, also, SALE OF LAND.*

#### C. Description of Property.

*See, now, Law of Property Act, 1925 (c. 20), ss. 53-55; Stat. Frauds, ss. 1, 3, 7, 8, 9.*

**411. Necessity for.]—DOLLING v. EVANS, No. 127, post.**

**412. Description substantially definite—Subsequent settlement of detail—Boundaries.]—**(1) A., by contract in writing, agreed with B. to take a lease of "those two seams of coal known as "the two-feet coal" & the "three-feet coal" lying under lands hereafter to be defined in the Bank End estate," & B. agreed to let to A. "the before-mentioned seams of coal":—*Held*: the contract was sufficiently definite to enforce, & the true construction of it was, that the boundaries of the estate, which consisted of about twenty-seven acres, were to be thereafter defined.

(2) A draft lease was prepared by the lessor, in pursuance of a written contract, which was not objected to by the lessee, who afterwards refused to complete:—*Held*: the draft lease could not be used for the purpose of controlling or explaining the contract itself.

(3) Pltf. had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards deft. cleared the pit & examined the coal in the shaft with other persons, & subsequently contracted for a lease. The colliery turned out to be worthless:—*Held*: deft. could not resist a specific performance, on the ground of pltf. not having communicated the fact of his having worked the mine & found it unprofitable.

(4) A person contracting for the lease of a mine cannot resist its performance, on the ground of his ignorance of mining matters, & of the mine turning out worthless.—*HAYWOOD v. COPE* (1858), 25 Beav. 140; 27 L. J. Ch. 468; 31 L. T. O. S. 48; 4 Jur. N. S. 227; 6 W. R. 304; 53 E. R. 589.

*See, also, SALE OF LAND.*

#### D. Description of Parties.

*See, now, Law of Property Act, 1925 (c. 20), ss. 53-55; Stat. Frauds, ss. 1, 3, 7, 8, 9, & generally, CONTRACT, Vol. XII., pp. 143-148, Nos. 908-1014.*

**413. Lessor—Sufficiency of Identification—Memorandum & letters.]—**A memorandum of agreement for a lease for twenty-one years was signed by the intended lessee, but not by the lessor, & named referees. Lessor's agents prepared a draft lease, & wrote to the lessee, saying they hoped on a certain day to have the agreement prepared & ready for inspection; to this the lessee replied by a letter making an appointment, & hoping

#### PART II. SECT. 4, SUB-SECT. 1.—B.

**400 L. May be read together.]—CRAIG v. ELLIOTT** (1885), 15 L. R. Ir. 257.—IR.

#### PART II. SECT. 4, SUB-SECT. 1.—C.

**o. Sufficiency of.]—**An agreement for a lease & a sale of a stock-in-trade

which said that the lease was to be "of the whole premises used by the vendor in connection with the business," & which showed that premises were those on which he carried on business in a certain town:—*Held*: to give a sufficiently definite description of the premises to be leased to enable parol evidence to be given of

what they consisted, & to satisfy Stat. Frauds.—*SCOTT & SHEPPARD v. MILLER* [1921] 3 W. W. R. 163.—CAN.

#### PART II. SECT. 4, SUB-SECT. 1.—D.

**p. "We" followed by signatures.]—**Where a document uses the word "we" & signatures follow, the parties are sufficiently identified to satisfy Stat.



**Sect. 4.—Evidence of contract: Sub sect. 1, D., E. & F. (a).]**

all would be satisfactorily arranged. The lessee refused to complete:—*Held*: there was an agreement sufficiently signed by the lessor, but the agreement imported a proposal merely, & was not an unconditional agreement; & a demurrer to the lessor's bill was allowed.

If it can be ascertained who is the intended lessor from some other document which is sufficiently connected with the memorandum by clear reference, that will cure the defect of the memorandum. I think *deft.*'s letter . . . showing that *pltf.* was the intended lessor does contain a sufficient reference to the memorandum to supply the omission of the lessor's name therein (*KINDERSLEY, V.-C.*).—*WARNER v. WILLINGTON* (1856), 3 Drew. 523; 25 L. J. Ch. 602; 27 L. T. O. S. 194; 20 J. P. 774; 2 Jur. N. S. 433; 4 W. R. 531; 61 E. R. 1002.

*Annotations*:—*Apld.* *Williams v. Jordan* (1877), 6 Ch. D. 517. *Refd.* *Skelton v. Cole* (1857), 1 De G. & J. 587; *Bourdillon v. Collins* (1871), 24 L. T. 344; *Lovesy v. Palmer*, [1916] 2 Ch. 233. *Mentd.* *Bonecke v. Chadwick* (1856), 4 W. R. 687; *Smith v. Neale* (1857), 2 C. B. N. S. 67; *Liverpool Borough Bank v. Eccles* (1859), 4 H. & N. 139; *Reuss v. Pickaley* (1868), L. R. 1 Exch. 342; *Dickinson v. Dodds* (1878), 2 Ch. D. 463; *Coombs v. Wilkes*, [1891] 3 Ch. 77; *Filby v. Hounsell*, [1896] 2 Ch. 737.

**414. —**—[An offer in writing to take a lease of a theatre signed by the intending lessees & attested by the lessor's agent but not naming the lessor & only addressed to him as "Sir" followed by an acceptance in writing by the agent addressed to & received by the intending lessees, but likewise not naming the lessor, which letter was not signed by them nor referred to in any other writing:—*Held*: not to be an agreement in writing under Stat. Frauds so as to entitle the lessor to have the same specifically performed.—*WILLIAMS v. JORDAN* (1877), 6 Ch. D. 517; 40 L. J. Ch. 681; 26 W. R. 230.

*Annotations*:—*Consd.* *Lovesy v. Palmer*, [1916] 2 Ch. 233. *Refd.* *Filby v. Hounsell*, [1896] 2 Ch. 737.

**415. — Acting through agent—Agent not duly authorised.]—CLARKE v. FULLER, No. 435, post.**

**416. Tenant—Acting through agent—Authority of agent.]—***Deft.* having proposed to take a lease of certain premises for the term of seven years, a draft lease was prepared, to which *deft.* made some objections. He ultimately took it away to be settled by his solrs. *Deft.*'s solrs. returned the draft to *pltf.*'s solrs., with the following letter: "We have seen our client & have altered the draft lease in accordance with his instructions. We trust there will be no impediment to prevent an early completion, & shall be glad to receive the draft as soon as you can, that we may engross the counterpart." *Pltf.*'s solrs. replied, returning the draft & engrossment of lease & counterpart, stating that, according to the practice where there is no stipulation on the subject, the lessor's solr. invariably prepares both lease & counterpart:—*Held*: there was no evidence of any contract binding *deft.* to take the lease; & no memorandum of any contract sufficient for that purpose within Statute of Frauds, sect. 4.

There is not a particle of evidence to show that *deft.* authorised [his solrs.] to sign a contract to bind him (*MARTIN, B.*).—*FORSTER v. ROWLAND* (1861), 7 H. & N. 103; 30 L. J. Ex. 396; 7 Jur. N. S. 998; 158 E. R. 410.

**417. — Sufficiency of identification—Not named in body of memorandum.]—**By a memorandum of agreement *pltf.* agreed to let a certain brickfield for five years, "the tenant" to pay a certain rent & royalty. Only the name of *pltf.* appeared in the body of the agreement, but it was signed by *deft.* & *pltf.*:—*Held*: it could not be reasonably inferred that *deft.* signed the agreement in any other capacity than that of tenant, & therefore so far as regarded Stat. Frauds the agreement was valid.—*STOKELL v. NIVEN* (1889), 61 L. T. 18; 5 T. L. R. 481, C. A.

**418. — Receipt of money acknowledged.]—**A landlord verbally agreed to grant his tenant, the assign of an existing lease of the "Warden Arms," a further lease of twenty-four years for a fine of £50, on receipt of which sum in cash the landlord signed & handed to the tenant the following memorandum: In consideration of your having this day paid me the sum of £50. . . . I hereby agree . . . to grant you . . . a further lease of twenty-four years of . . . the "Warden Arms" . . . to run immediately after the expiration of . . . the now existing lease. . . . The name of the proposed lessee was not stated in this memorandum:—*Held*: for the purpose of Stat. Frauds, the proposed lessee was sufficiently described as the person who had paid the £50.

*Qu.*: whether the reference to a further lease would by itself have identified the proposed lessee with the existing tenant.—*CARR v. LYNCH*, [1900] 1 Ch. 613; 69 L. J. Ch. 345; 82 L. T. 381; 48 W. R. 616.

*Annotation*:—*Consd.* *Stokes v. Whicher*, [1920] 1 Ch. 411.

**419. — Acting through agent—Parol evidence to identify principal.]—**Correspondence & documents passed between H., the solr. of *pltf.*, & the solrs. of *defts.* by which the terms of a lease to be granted by *defts.* were arranged. *Pltf.* alleged that the agreement was that the lease was to be granted to a co. to be formed by *pltf.*, & that H. made the agreement on behalf of *pltf.* In the documents relied on by *pltf.* as constituting the memoranda of the alleged agreement, *pltf.* was not named or referred to as a contracting party, & the persons for whom H. purported to act were described as his "clients," in the plural:—*Held*: on the true construction of the documents & correspondence relied on, H. was not intended to be bound by the alleged contract; that being so, parol evidence could not be given that *pltf.* was the principal of H., or that *defts.* knew him to be such; & there was no memorandum in writing of the alleged agreement sufficient to satisfy Stat. Frauds, & therefore no binding agreement upon which *pltf.* could sue.—*LOVESY v. PALMER*, [1916] 2 Ch. 233; 85 L. J. Ch. 481; 114 L. T. 1033.

*Annotation*:—*Mentd.* *Keen v. Mear*, [1920] 2 Ch. 574.

*See, also, SALE OF LAND.*

**E. Signature.**

*See, now, Law of Property Act, 1925 (c. 20), ss. 53–55; Stat. Frauds, ss. 1, 3, 7, 8, 9; & generally, CONTRACT, Vol. XII., pp. 152–160, Nos. 1053–1143.*

**420. What is sufficient signature—Signature in partnership name.]—**An agreement for letting premises, under hand only, was signed "H. Curtis & Co."; & it appeared that there were two persons trading under that firm, but it was not proved, through the absence of the attesting witness, in whose handwriting it was signed:—

**Held:** upon evidence, that both persons acted in the business, there was sufficient proof of an execution by the partnership.—*EVANS v. CURTIS* (1826), 2 C. & P. 296, N. P.

**421.** — “Approved by me, A. B.”] — *PARKER v. SMITH*, No. 613, *post*.

**422. Position of signature—Immaterial—If intention to sign clear.**]—Provided the name be inserted in an instrument in such a manner as to have the effect of authenticating it, the requisition of the Act with respect to signature is complied with, & it does not matter in what part of the instrument the name is found.—*OGILVIE v. FOLJAMBE* (1817), 3 Mer. 53; 36 E. R. 21.

**Annotations.**—*Consd.* *Caton v. Caton* (1867), L. R. 2 H. L. 127. *Mentd.* *Evans v. Jackson* (1836), Donnelly, 147; *A. G. v. Dixon* (1842), 1 Y. & C. Ch. Cas. 614; *Clive v. Beaumont* (1848), 1 De G. & Sm. 397; *Cowley v. Watts* (1853), 22 L. J. Ch. 591; *Cox v. Middleton* (1854), 2 Eq. Rep. 631; *McMurray v. Spicer* (1868), L. R. 5 Eq. 527; *Naylor v. Goodall* (1877), 47 L. J. Ch. 53; *Shardlow v. Cottrell* (1881), 20 Ch. R. 90; *Ellis v. Rogers* (1885), 29 Ch. D. 661; *Plant v. Bourne*, [1897] 2 Ch. 281; *Sheers v. Thimbleby* (1897), 76 L. T. 709; *Bank of New Zealand v. Simpson*, [1900] A. C. 182; *G. W. Ry. & Mid. Ry. v. Bristol Corp.* (1918), 87 L. J. Ch. 414; *McGrory v. Alderdale Estate Co.* [1918] A. C. 503; *Auerbach v. Nelson*, [1919] 2 Ch. 383.

**423.** — **In body of agreement.**] — The mere circumstance of the name of the party being written by himself in the body of a memorandum of agreement for a lease will not constitute a signature within Stat. of Frauds.—*STOKES v. MOORE* (1786), 1 Cox, Eq. Cas. 219; 29 E. R. 1137. **Annotations.**—*Refd.* *Ogilvie v. Foljambe* (1817), 3 Mer. 53; *Caton v. Caton* (1867), L. R. 2 H. L. 127. *Mentd.* *Thornbury v. Bevil* (1842), 1 Y. & C. Ch. Cas. 554.

**424.** — **At head of document.**] — A memorandum of a contract is sufficiently signed within Stat. Frauds, s. 4, if it contains the terms of the contract & the name of the party charged, & is given by him to the other party under circumstances which show a recognition of the name as it stands for his own.

A letter containing proposed terms of a contract between B., the sender & the sendee, written out by the sender, upon paper bearing a printed heading, “Memorandum from B.”:—**Held:** a sufficient note in writing to charge B.—*TOURET v. CRIPPS* (1879), 48 L. J. Ch. 567; *sub nom.* *TORRET v. CRIPPS*, 27 W. R. 706.

**Annotations.**—*Expld.* *Hucklesby v. Hook* (1900), 82 L. T. 117. *Refd.* *Buckton v. L. & N. W. Ry.* (1916), 87 L. J. K. B. 234. *Mentd.* *Fe New Durham Salt Co., Stevenson & Quin’s Cases* (1890), 2 Meg. 360.

*See, also, SALE OF LAND.*

## F. Commencement and Duration of Term.

### (a) Necessity for Expression.

*See, now, Law of Property Act, 1925 (c. 20), ss. 53–55; Stat. Frauds, ss. 1, 3, 7, 8, 9; & generally, CONTRACT, Vol. XII., pp. 150, 151, Nos. 1034–1037.*

**425. Commencement.**] — Where an undated written contract for a lease omits to state the period of commencement, & contains nothing from which it may be inferred, a specific performance of it cannot be enforced as a written contract.—*GILBERT v. HALL* (1831), 1 L. J. Ch. 15.

**426.** —] — *CLARKE v. FULLER*, No. 435, *post*.

**427.** —] — (1) An agreement for a lease, in order to be sufficient within Stat. Frauds, must state the property, the price paid, & the interest to be parted with.

(2) Where, in an agreement for a lease, no time for commencement, & no term, were specified, a demurrer, for insufficiency of the agreement within Stat. Frauds, to a bill for specific performance, was allowed with costs.—*DOLLING v. EVANS* (1807), 36 L. J. Ch. 474; 15 L. T. 604; 31 J. P. 375; 15 W. R. 394.

**428.** —] — *Pltf.*, in a bill for specific performance of an agreement to take a lease of a house, alleged & produced evidence of a verbal agreement which was denied by *deft.* In order to take the case out of Stat. Frauds, *pltf.* relied on a letter written by *deft.*, in which *deft.* agreed to take the house for seven years on certain terms, but in which the day of the commencement of the lease was not mentioned; & on another letter from *deft.* mentioning the day of commencement, & adding terms to which *pltf.* did not agree:—**Held:** there was no memorandum of agreement sufficient to satisfy the requirements of Stat. Frauds.—*NESHAM v. SELBY* (1872), 7 Ch. App. 406; 41 L. J. Ch. 551; *sub nom.* *NELSHAM v. SELBY*, 26 L. T. 568, L. J. J.

**Annotations.**—*Consd.* *Cartwright v. Miller* (1877), 36 L. T. 398; *Jaques v. Millar* (1877), 6 Ch. D. 153. *Expld.* *White v. Hay* (1895), 72 L. T. 281.

**429.** —] — Action for specific performance of an agreement to take a lease of a house. In order to take the case out of Stat. Frauds *pltf.* relied on a letter, written by *deft.*, in which “the term” was stated “to be for twelve years,” but the day of the commencement of the term was not mentioned; & in the same letter referring to certain covenants, *deft.* “suggested that they be similar to those contained in A.’s lease:—**Held:** on demurrer, (1) there never was any concluded agreement between the parties; & (2) if there had been an agreement, there was no memorandum of the agreement, in writing, sufficient to satisfy Stat. Frauds, as the commencement of the term was not stated.—(*CARTWRIGHT v. MILLER* (1877), 36 L. T. 398.

**Annotation.**—*As to* (2) *Distd.* *Jaques v. Millar* (1877), 6 Ch. D. 153.

**430.** —] — An agreement for a lease, in order to satisfy the requirements of Stat. Frauds, must contain all the material terms of the lease to be granted; accordingly, the date from which the term is to commence must be either definitely stated in the agreement or must be clearly ascertainable by reasonable inference from the language of the agreement. The mere fact that the agreement bears a date does not, except in the case of an actual present demise, show that the date of the agreement is to be the date of the lease.—*MARSHALL v. BEHRIDGE* (1881), 19 Ch. D. 233; 51 L. J. Ch. 329; 45 L. T. 599; 46 J. P. 279; 30 W. R. 93, C. A.

**Annotations.**—*Consd.* *Furness v. Bond* (1888), 4 T. L. R. 467; *Re Lander & Bagley’s Contract*, [1892] 3 Ch. 41. *Appld.* *Humphery v. Conybeare* (1899), 80 L. T. 40; *Edwards v. Jones* (1921), 124 L. T. 740. *Refd.* *Rock Portland Cement Co. v. Wilson* (1882), 52 L. J. Ch. 211; *Wood v. Aylward* (1887), 57 L. T. 54; *Oxford Corp. v. Crow* (1893), 69 L. T. 228; *Curlew v. B. U. R. T. Co.* (1912), 28 T. L. R. 353; *Berners v. Fleming*, [1925] Ch. 264.

**431.** —] — In order to satisfy the requirements of Stat. Frauds, s. 4, the written memorandum of a contract for the grant of a lease must, either expressly or by reasonable inference, state the time at which the term is to commence.—*HUMPHERY*

## PART II. SECT. 4. SUB-SECT. 1.—F. (a).

**425 i. Commencement.**] — *LONSDALE v. WHITTAKER* (1915), 17 W. A. L. R. 111.—*AUS.*

**425 ii.** —] — An agreement is not

sufficient to satisfy Stat. Frauds, from which it does not appear with certainty when the term is to begin.—*CARROLL v. WILLIAMS* (1882), 1 O. R. 150.—*CAN.*

**425 iii.** —] — *MITCHELL v. MORT-*

*GAOE Co. OF CANADA*, [1918] 3 W. W. R. 838; 43 D. L. R. 337.—*CAN.*

**425 iv.** —] — *WHITE v. M’MAHON* (1886), 18 L. R. Ir. 460.—*IR.*

**425 v.** —] — *BANOVICH v. SMITH* (1907), 27 N. Z. L. R. 73.—*N.Z.*

*Sect. 4.—Evidence of contract: Sub-sect. 1, F. (a) & (b), & G.; sub-sect. 2, A. & B.]*

*v. CONYBEARE (1899), 80 L. T. 40; 15 T. L. R. 162, C. A.*

**432.** —.]—By an agreement dated Sept. 2, 1918, deft. agreed to grant a lease for ninety-nine years of certain property to pltf., & pltf. agreed to pay deft. the sum of £2 10s. as ground rent, & it was declared as follows: "A legal lease to be drawn out after" deft. "gets possession of the whole . . . land & premises on Sept. 29 next." Deft., at the time when the foregoing agreement with pltf. was executed, had entered into an agreement for the purchase of the whole of some land, & the premises required by pltf. formed part of that land. Deft.'s agreement provided that the purchase should be completed on Sept. 28, 1918, Sept. 29 (Michaelmas) being a Sunday:—*Held*: no concluded agreement had been arrived at between the parties because no date was defined by the agreement of Sept. 2, 1918, either expressly or by implication, from which the proposed term of the lease of ninety-nine years was to begin, the fixing of the date of the beginning of the term of a lease being essential to the validity of the lease.—*EDWARDS v. JONES (1921), 124 L. T. 740, C. A.*

**433. Duration.]**—The ct. will not decree a specific performance of an agreement for a lease to be collected from letters where there is no definite term expressed for which the lease was to be granted nor any reference *aliunde* by which it might be ascertained. But *semble*, otherwise if the letters had been more explicit, or had afforded any criterion for defining the object of the parties.—*GORDON v. TREVELYAN (1814), 1 Price, 64; 145 E. R. 1332.*

**434.** —.]—*FITZMAURICE v. BAYLEY, No. 401, ante.*

**435.** —.]—Pltf. advertised a house, to be let, referring for particulars to E., a house agent. Deft. called upon E., & proposed to take up the house from the following Michaelmas Day at a certain rent, & wrote down a specification of alterations & repairs which he would require to have done; & E., without his assent, wrote to pltf., communicating to him deft.'s proposal, with a copy of the specification of repairs, & telling him that he had already set about doing them.

In an action brought in a county ct. for a year's rent, or for the breach of the contract, the above letter was tendered in evidence on pltf.'s part, but was rejected by the judge; & pltf. was nonsuited:—*Held*: the letter was properly rejected; & assuming that it was admissible as a letter written & signed by an agent duly authorised for that purpose by deft., it was not such a memorandum of the bargain as to satisfy Stat. Frauds, s. 4, inasmuch as it was a mere proposal & did not specify the commencement or the duration of the term, so as to amount to evidence of a contract.

The statute says that the memorandum must be signed by the party to be charged or some other

person thereunto by him lawfully authorised, & I see nothing to show that E. was lawfully authorised (*WILLIAMS, J.*).—*CLARKE v. FULLER (1864), 18 C. B. N. S. 24; 3 New Rep. 513; 9 L. T. 831; 12 W. R. 671; 143 E. R. 1032.*

**436.** —.]—*DOLLING v. EVANS, No. 427, ante.*  
*Grounds for refusing specific performance.]*—*See Part II., Sect. 8, sub-sect. 1, F. (o), post.*

*Admission of extrinsic evidence—To show contract executory.]—See DEEDS, Vol. XIII., pp. 334, 335, Nos. 1456, 1465, 1466.*

#### (b) What is Sufficient Expression.

*See, now, Law of Property Act, 1925 (c. 20), ss. 53-55; Stat. Frauds, ss. 1, 3, 7, 8, 9; & generally, CONTRACT, Vol. XII., pp. 150-151, Nos. 1034-1037.*

**437. Commencement—Agreement to grant extension of lease—Expiration of old term.]**—The person entitled to the reversion in fee of a house expectant upon a term vested in a lessee who has demised the premises for a portion of his term to a sub-lessee, agrees by one letter to grant that sub-lessee an extension of lease at a certain yearly rent, & in another letter fixes the time, when the term, which he thus proposes to grant, is to expire; this is a valid agreement within Stat. Frauds & under it, the sub-lessee has a right to a lease which shall commence from the expiration of the existing term.—*VERLANDER v. CODD (1823), Turn. & R. 352; 37 E. R. 1136.*

*Innotation:—Apld. Warner v. Willington (1856), 3 Drew. 523.*

**438.** —.]—D., a lessee, wrote to his landlord's agents, asking for an extension of his term for twenty-one years from the termination of his present lease, & offering a premium. The landlord wrote to his agents declining D.'s offer, but adding, "As the lease will not run out for the next two years, I think there is plenty of time to think over the matter. However, if D. is very urgent, I will consent to grant him a lease for twenty-one years at £50 a year, & a premium of £100." The latter part of the letter was communicated to D., who accepted the offer:—*Held*: D. was entitled to a lease for twenty-one years at a rent of £50 a year, & a premium of £100, commencing from the expiration of his existing lease.—*WOOD v. AYLWARD (1887), 58 L. T. 662, 4 T. L. R. 97, C. A.*

**439.** —.] *Date when rent to commence.]*—*WESLEY v. WALKER, No. 870, post.*

**440.** —.] *Date of agreement.]*—*JAQUES v. MILLAR, No. 869, post.*

**441.** —.] *Only if clearly indicated.]*—*MARSHALL v. BERRIDGE, No. 430, ante.*

**442.** —.] *Reasonable inference from language of agreement.]*—*MARSHALL v. BERRIDGE, No. 430, ante.*

**443.** —.] *Date of possession.]*—*ROCK PORTLAND CEMENT Co., LTD. v. WILSON, No. 860, post.*

**444.** —.]—An agreement, dated Apr. 1, 1891, for a lease of a public-house, provided that

**433 i. Duration.]**—It is doubtful whether a memorandum of an agreement for a lease, not specifying the term, is sufficient to satisfy Stat. Frauds.—*McLENNAN v. MILLINGTON (1897), 5 B. C. R. 345.—CAN.*

**433 ii.** —.]—*CLINAN v. COOKE (1802), 1 Sch. & Lef. 22.—IR.*

**PART II. SECT. 4, SUB-SECT. 1.—F. (b).**

**440 i. Commencement—Date of agreement.]**—An executory agreement in writing to grant a lease for a term of

years, which does not state the date from which the term is to commence, is not sufficiently definite to satisfy Stat. Frauds, & cannot be enforced, & the mere fact of the agreement being dated does not show from what date the lease is to run.—*WYSE v. RUSSELL (1882), 11 L. R. 173.—IR.*

**442 i.** —.] *Reasonable inference from language of agreement.]*—Where an agreement in writing for a lease for a term of years did not expressly state the date at which the term was to commence, but contained a reference

to circumstances from which such date could be clearly ascertained:—*Held*: sufficient to satisfy Stat. Frauds.—*PHELAN v. TEDCASTLE (1884), 15 L. R. 169.—IR.*

**442 ii.** —.]—*BIOS v. BRENNAN (1907), 41 I. L. T. 60.—IR.*

**442 iii.** —.]—*VALENTINE v. O'DONNELL (1906), 25 N. Z. L. R. 779.—N.Z.*

*r.* —.]—*"So soon as gas laid on."—TERRY v. TINDALE (1882), 3 N. S. W. L. R. (L.) 444.—AUS.*

the lease should be for a term of three years, & that possession should be given within a month from the date, but did not expressly state when the term was to commence, nor was any reference made as to the covenants to be inserted in the lease:—*Held*: the date from which the term was to begin could be collected from the language of the agreement, & that such date was the day on which possession was given.—*Re LANDER & BAGLEY'S CONTRACT*, [1892] 3 Ch. 41; 61 L. J. Ch. 707; 87 L. T. 521.

*Annotation*:—*Reid. Re Hughes & Ashley's Contract*, [1900] 2 Ch. 595.

**445.** — *Correspondence subsequent to agreement.*—On Mar. 28, 1894, pltf. & deft. signed a memorandum of agreement, by which deft. was to take an underlease of a house on certain terms. The date from which the underlease was to commence was omitted in this agreement, but it was understood by the parties, at the time, that it was to be Apr. 7, 1894. This date was specifically agreed to in writing by subsequent letters:—*Held*: there was a contract made on Mar. 28, 1894, sufficiently evidenced in writing to satisfy Stat. Frauds.—*WHITE v. HAY* (1895), 72 L. T. 281.

*Annotation*:—*Reid. Douglas v. Derooy* (1895), 39 Sol. Jo. 484.

**446.** *Duration—Agreement for lease for lives—Lives not named.*—*KENSINGTON (LORD) v. PHILLIPS*, No. 718, *post*.

**447.** — *Option for lease for seven, fourteen or twenty-one years.*—(1) A letting in 1845 to a yearly tenant, & if he should wish a lease, that the lessor will grant the same for seven, fourteen or twenty-one years, at the same rent, is sufficiently certain to be specifically performed. It is to be construed an optional lease for twenty-one years from 1845, determinable at the end of seven or fourteen years, at the option of the tenant.

(2) Under such a contract, the landlord might call on the tenant to exercise his option, &, in default, might determine the tenancy, but this might afterwards be waived by a receipt of rent.

A tenant under an agreement, with an option of taking a lease:—*Held*: not to have waived the option by declining to take a lease when asked so to do, no step being taken to determine the tenancy.—*HERSEY v. GIBLETT* (1854), 18 Beav. 174; 23 L. J. Ch. 818; 2 W. R. 206; 52 E. R. 69.

*Annotations*:—(a) to (2) *Apld. Moss v. Barton* (1866), L. R. 1 Eq. 471. *Consd. Ruder v. Ford* (1923), 129 L. T. 347.

**448.** — *Agreement to let bars of theatre—"As long as theatre remained in hands" of lessor.*—*EDWARDES' MENU CO. v. CHUDLEIGH* (1897), 14 T. L. R. 64, C. A.

### G. Consideration.

*See, now, Law of Property Act, 1925 (c. 20), ss. 53-55; Stat. Frauds, ss. 1, 3, 7, 8, 9; & generally, CONTRACT, Vol. XII., pp. 151, 152, Nos. 1039-1052.*

**449.** *Must be stated.*—*DOLLING v. EVANS*, No. 427, *ante*.

### PART II. SECT. 4, SUB-SECT. 2.—A.

**450 i.** *Where lessor tenant for life—Not binding on remainderman.*—A remainderman is not bound by a contract for a lease with the tenant for life, unless it be binding within Stat. Frauds, & within the power of the tenant for life. He is not affected by part performance by the tenant for life.—*O'FAY v. BURKE* (1838), 8 I. Ch. R. 511.—*IR.*

### PART II. SECT. 4, SUB-SECT. 2.—B.

**453 i.** *Must be unequivocal—Such*

*as to infer some agreement.*—Part performance to take the case out of Stat. Frauds must consist of an unequivocal act referable to some agreement in relation to the land, i.e. of such a nature that if stated it would infer the existence of some agreement relating to the land.—*KAUFMAN v. MICHAEL* (1892), 18 V. L. R. 375.—*AUS.*

**453 ii.** — *—*—*THOMAS v. R.* (1904), 2 C. L. R. 127.—*AUS.*

**453 iii.** — *—*—*MEISNER v.*

### SUB-SECT. 2.—PART PERFORMANCE.

#### A. Extent of Doctrine.

*See Law of Property Act, 1925 (c. 20), s. 55 (d).*

**450.** *Where lessor tenant for life—Not binding on remainderman.*—*BLORE v. SUTTON*, No. 373, *ante*.

**451.** — *—* *If prejudicial.*—*TROTMAN v. FLESHER, FLESHER v. TROTMAN*, No. 793, *post*.

**452.** *Trustees with power to lease with consent in writing—Execution of lease with parol consent.*—A settlement contained a power for the trustee to lease at the request in writing of a married woman. She & the trustee, in pursuance of a parol agreement, executed a lease, & delivered it to their solr. to exchange for the counterpart, but before the exchange was made or the counterpart executed, she directed the solr. not to part with the deed:—*Held*: the execution of the deed was not a part performance of the parol agreement, & the deed was executed as an escrow, & the ct. would not compel the lessors to deliver it to the lessee.—*PHILLIPS v. EDWARDS* (1864), 33 Beav. 440; 3 New Rep. 658; 55 E. R. 438.

*Application to parol agreement for easement.*—*See EASEMENTS, Vol. XIX., pp. 28, 29, 30, 115, Nos. 125, 135, 139, 758.*

*See, also, SALE OF LAND.*

#### B. Acts must be referable to Agreement.

**453.** *Must be unequivocal—Such as to infer some agreement.*—Parol agreement not enforced upon the ground of part performance, when the act is equivocal, & easily admits compensation; as, by a tenant, rebuilding a party wall. So, a tenant's possession & cultivation of the land would not sustain a parol agreement to purchase. The act must be unequivocal; & such as of itself to infer some agreement; the terms of which may then be proved by parol.—*FRAME v. DAWSON* (1807), 14 Ves. 386; 33 E. R. 569.

*Annotations*:—*Consd. Parker v. Smith* (1845), 1 Coll. 608. *Expld. Williams v. Evans* (1875), L. R. 19 Eq. 547. *Consd. Maddison v. Alderson* (1883), 8 App. Cas. 467; *Hodson v. Heuland*, [1896] 2 Ch. 428. *Reid. Dickinson v. Barrow*, [1904] 2 Ch. 339.

**454.** — *—*—*MORPHETT v. JONES*, No. 477, *post*.

**455.** — *—*—If a bill is filed to enforce a parol agreement on the ground of part performance, there must be no uncertainty; the terms of the agreement must be plainly & distinctly shown, & it must also be shown that the part performance referred to them. The owner of an estate, consisting of freeholds, leaseholds for years & leaseholds for lives, agreed to demise the same in consideration of receiving a year's rent in advance. He signed notices requesting the tenants to attorn to the lessee; but he did not, in the first instance, clearly understand the boundaries, limits & rental of the several estates. The agreement was subsequently added to by a further agreement, & by verbal communications, & a sum for the year's rent was paid in advance. These arrangements still left the subject & the terms & conditions indefinite, &

*MEISNER* (1904), 37 N. S. R. 23; 38 S. C. R. 34.—*CAN.*

**453 iv.** — *—*—*BRENNAN v. BOLTON* (1842), 2 Dr. & War. 349.—*IR.*

**453 v.** — *—*—*FERN HILL RAILWAY & COAL CO., LTD. v. DUNEDIN CORPN.* (1884), 3 N. Z. L. R. 86 (S. C.).—*N.Z.*

**453 vi.** — *—*—*MALFROY v. RAYMOND* (1906), 26 N. Z. L. R. 563.—*N.Z.*

**Sect. 4.—Evidence of contract: Sub-sect. 2, B. & C.**  
 (a) i. & ii.]

difficulties arose in carrying the agreement into effect. Upon a bill by the lessee for specific performance:—*Held*: there had been no part performance which had reference to the agreement alleged; it was too vague & uncertain to be enforced; & the bill must be dismissed.—*PRICE v. SALUSBURY* (1863), 32 Beav. 446; 32 L. J. Ch. 441; 9 Jur. N. S. 838; 55 E. R. 175; *affd.* (1866), 14 L. T. 110, H. L.

**456. — Alteration of premises by intended landlord.]**—The making of alterations in premises by the intended landlord under a verbal agreement to let:—*Held*: not to be a part performance taking the case out of Stat. Frauds.—*WHITTICK v. MOZLEY* (1883), 1 Cab. & El. 86.

**457. — —.]**—Deft. entered into an oral contract with pltf. to take a lease of a flat. It was agreed that certain alterations should be made to the flat. During the progress of the alterations deft. frequently visited the flat & made suggestions for further alterations, which were carried out by pltf. at her request. She subsequently repudiated the contract. In an action for specific performance she relied on Stat. Frauds as a defence:—*Held*: the acts done by pltf. at request of deft. were acts of part performance taking the case out of Stat. Frauds & pltf. was entitled to specific performance.—*RAWLINSON v. AMES*, [1925] Ch. 96; 94 L. J. Ch. 113; 132 L. T. 370; 60 Sol. Jo. 142.

**458. — Possession antecedent to agreement.]**—*HODSON v. HEULAND*, No. 499, *post*.

**459. — —.]**—*WHITE & WONTNER v. WHITEWOOD* (1897), 13 T. L. R. 409.

**460. — —.]**—*BISS v. IYGATE*, No. 501, *post*.

—.]—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**C. What Constitutes Part Performance.**

(a) Under Original Agreement for Tenancy.

i. Entry into Possession.

**461. Whether part performance—Wrongful entry.]**—*COLE v. WHITE* (1767), cited 1 Bro. C. C. 409; 128 E. R. 1208, L. C.

*Annotation*:—*Consd.* *Whitbread v. Brockhurst* (1784), 1 Bro. C. C. 404.

**462. —.]**—A. by an agreement in writing, but not stamped, articles with B. to grant him a lease for twenty-one years. B. enters & continues in possession eighteen years. But no lease was ever tendered by A. or demanded by B. The agreement is a good defence in an ejectment brought by A.—*WEAKLY d. YEA v. BUCKNELL* (1776), 2 Cowp. 473; 98 E. R. 1193.

*Annotations*:—*Consd.* *Barry v. Nugent* (1782), 3 Doug. K. B.

**458 i. — Possession antecedent to agreement.]**—Possession taken before & irrespective of a contract is no part performance of it so as to take it out of Stat. Frauds.—*MOGG v. LORD RAGLAN & ST. ARNAUD GOLD MINING CO. (NO LIABILITY)* (1878), 4 V. L. R. (E.) 138.—*AUS.*

t. — *Surrender by third party.]*—A., being lessee to B., agreed verbally to surrender his lease, in consideration of B. granting a new lease of the lands comprised in A.'s lease to C. A. accordingly executed the surrender, & C. executed the new lease, but B., the lessor, declined to execute either instrument:—*Held*: the surrender by A. was executed on the faith of B.'s promise to grant a new lease to C., & was an act of part performance taking the case out of Stat.

Frauds.—*Re LONGFORD'S (EARL) (TRUSTEE OF COOKS) ESTATE* (1880), 5 L. R. Ir. 99.—*IR.*

**PART II. SECT. 4, SUB-SECT. 2.—**  
 G. (a) i.

**462 Whether part performance.]**—Where a person under a verbal agreement, to rent premises has entered into & taken possession of the same, but subsequently abandons such premises, taking possession is sufficient part performance to take the contract out of Stat. Frauds, & to enable the landlord to maintain an action for damages for breach of agreement.—*M'BRAIN v. BROWN* (1887), 13 V. L. R. 726.—*AUS.*

**462 ii. —.]**—*SHEPPARD v. WARNER* (1895), 21 V. L. R. 239.—*AUS.*

**462 iii. — —.]**—*PERRY v. SELWAY*

(1900), 2 W. A. L. R. 89.—*AUS.*

**462 iv. —.]**—*BROWN v. APPENHEIMER* (1903), 7 Terr. L. R. 51.—*CAN.*

**462 v. —.]**—*FABRIE v. HEWELMAUS*, [1919] 2 W. W. R. 146.—*CAN.*

**462 vi. —.]**—*PACHAL v. LUDWIG*, [1921] 3 W. W. R. 551.—*CAN.*

**462 vii. —.]**—*PAIN v. DIXON*, [1923] 3 D. L. R. 1167; 52 O. L. R. 347.—*CAN.*

**462 viii. —.]**—*PALMER v. WHITE* (1768), *Walls by Lyne* 10.—*IR.*

**462 ix. —.]**—Entering into possession under a contract for a lease is a part performance.—*MORTAL v. LYONS* (1858), 8 I. Ch. R. 112.—*IR.*

**462 x. —.]**—*BREDIN v. HUNTER* (1910), 30 N. Z. L. R. 359.—*N.Z.*

**462 xi. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xiii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xiv. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xv. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xvi. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xvii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xviii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xix. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xx. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxi. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxiii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxiv. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxv. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxvi. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxvii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxviii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxix. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxx. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxxi. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxxii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxxiii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxxiv. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxxv. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxxvi. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxxvii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxxviii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xxxix. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xl. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xli. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xlii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xliii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xliv. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xlv. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xlvi. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xlvii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xlviii. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 xlvix. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*

**462 l. —.]**—*See CONTRACT*, Vol. XII., p. 168, Nos. 1233 *et seq.*



conflict of evidence on the question whether the covenants agreed upon had not been already broken, the proper decree was to direct the lease to be dated at a time antecedent to the alleged breaches, & to require from pltf. an undertaking to admit in any action that the lease was executed on the day of its date. *Qu.*: whether possession taken previously to, but continued after, a parol agreement, may not be such a part performance as to exclude a defence founded on Stat. Frauds.—*PAIN v. COOMBS* (1857), 1 De G. & J. 34; 30 L. T. O. S. 47; 21 J. P. 677; 3 Jur. N. S. 847; 44 E. R. 634, L. C. & L. J.

*Annotations*:—As to (1) *Appl. Hodson v. Heuland*, [1896] 2 Ch. 428. As to (2) *Folld. Rankin v. Lay* (1860), 2 De G. F. & J. 65. *Reid. Parker v. Taswell* (1858), 2 De G. & J. 559.

467. —.]—A bill was filed for the specific performance of an agreement to grant a lease. There had been an unstamped agreement for a lease signed by pltf., the lessee, but which had been mislaid. The terms were subsequently embodied in a printed form, the blanks of which had been filled up in pencil by deft., the lessor, but the document was unsigned & unstamped. It was alleged that pltf. took possession with the consent of deft., under the terms of this agreement:—*Held*: there had been a sufficient part performance of the unsigned agreement to support a decree for its specific performance.—*MILLER v. FINLAY* (1861), 5 L. T. 510, L. C.

468. —.]—*REDDIN v. JARMAN*, No. 483, *post*.

469. —.]—*RICHARDS v. NORTH LONDON RY. CO.*, No. 778, *post*.

470. —.]—(1) Deft. attended fairs with a "roundabout," & arrived at a parol agreement with pltf. to hire a piece of waste ground for three Bank Holidays at a rent of £45; £15 to be paid for each Bank Holiday. He occupied & paid for the ground on the first of the three Bank Holidays only:—*Held*: in an action to recover the balance of the rent, this was one & an entire agreement for possession & use of the ground on three occasions. Stat. Frauds, s. 4, was no defence.

(2) There having been an entry for the purpose of occupation under an agreement for a single letting, although the period of the agreed letting was not continuous, at a single rent, & payment of rent on account of the entry, pltf.'s right to recover the balance after the termination of the letting period was not affected by the fact that the agreement was parol.—*SMALLWOOD v. SHEPPARDS*, [1895] 2 Q. B. 627; 64 L. J. Q. B. 727; 73 L. T. 219; 44 W. R. 44; 11 T. L. R. 586; 39 Sol. Jo. 735, D. C.

*Annotation*:—As to (1) *Appl. Ayers v. Hanson, Stanley & Prince* (1912), 56 Sol. Jo. 735.

471. —.]—A. verbally agreed with B. to grant him a lease of a certain house for two & a half years from Oct. 1, 1917, at a specified rent & that B. should have the option, to be exercised in writing, of purchasing the house at any time during the tenancy for £500. On the faith of this parol agreement B. went into possession of the house, regularly paid rent, & on Dec. 30, 1919, exercised in writing his option to purchase. A. refused to sell the house, alleging that no such agreement existed & that B. was only a yearly tenant at the specified rent; alternatively, he relied on Stat. Frauds:—*Held*: the possession

taken by B. was an act of part performance which enabled him to give evidence of all the terms of the parol agreement for tenancy, & entitled him to specific performance of that agreement including the option to purchase.—*BROUGH v. NETTLETON*, [1921] 2 Ch. 25; 90 L. J. Ch. 373; 124 L. T. 823 65 Sol. Jo. 515.

## ii. Entry into Possession and Expenditure of Money.

472. Whether part performance — Entry & expenditure with acquiescence of lessor. — Where a man on promise of a lease to be made to him lays out money on improvements he shall oblige the lessor afterwards to execute the lease because it was executed on the part of the lessee; besides that the lessor shall not take advantage of his own fraud to run away with the improvements made by another.—*SEAGOON v. MEALE & LEONARD* (1721), 2 Eq. Cas. Abr. 49; Prec. Ch. 560; 22 E. R. 43, L. C.

*Annotations*:—*Reid. Maddison v. Alderson* (1883), 8 App. Cas. 467. *Mentd. Barkworth v. Young* (1856), 4 Drew. 1.

473. —.]—*LESTER v. FOXCROFT* (1701), Colles, 108; 1 E. R. 205, H. L.; *reversing S. C. sub nom. FOXCRAFT v. LISTER*, cited in 2 Vern. p. 456.

*Annotations*:—*Consd. Maddison v. Alderson* (1883), 8 App. Cas. 467. *Reid. Guernsey v. Rodbridges* (1708), Gilb. Ch. 3; Lockey v. Lockey (1719), Prec. Ch. 518; Gunter v. Halsey (1739), Amb. 586. *Mentd. Dillwyn v. Llewelyn* (1862), 4 De G. F. & J. 517; Cornwall v. Hawkins (1872), 41 L. J. Ch. 435.

474. —.]—*FLOYD v. BUCKLAND* (1703), Freem. Ch. 268; 2 Eq. Cas. Abr. 41; 22 E. R. 1202.

*Annotation*:—*Reid. Clayton v. A. G.* (1834), 1 Coop. temp. Cott. 97.

475. —.]—This ct. will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; & the circumstance of looking on is in many cases as strong as using terms of encouragement (LORD ELDON, C.).—*DANN v. SPURRIER* (1802), 7 Ves. 231; 32 E. R. 91, L. C.; *subsequent proceedings* (1803), 3 Bos. & P. 390.

*Annotations*:—*Reid. Rochdale Canal Co. v. King* (1853), 16 Beav. 630; White v. Wakley (No. 1), (1858), 26 Beav. 17; Mold v. Wheatcroft (1859), 27 Beav. 510; Cotching v. Bassett (1862), 32 Beav. 101; Eardley v. Granville (1876), 45 L. J. Ch. 689; McManus v. Cooke (1887), 35 Ch. D. 681. *Mentd. Beaufort v. Patrick* (1853), 17 Beav. 60; Biggs v. Strong (1857), 3 Sm. & G. 592; Davies v. Marshall (1861), 4 L. T. 105; Davies v. Bear (1861), L. R. 7 Eq. 427; McAlister v. Rochester (Bp. & Eccl. Comm. for England (1879), 42 L. T. 22; Russell v. Watts (1885), 25 Ch. D. 559; London General Omnibus Co. v. Lavell (1900), 83 L. T. 453.

476. —.]—Agreement for a lease, in part performed by possession taken, though without express assent, acquiesced in, & expenditure permitted: specific performance according to pltf.'s evidence against the assertion of a right of resumption by the answer, & one witness, not proving, that it was admitted.—*GREGORY v. MIGHELL* (1811), 18 Ves. 328; 34 E. R. 341.

*Annotations*:—*Consd. Ramsden v. Dyson* (1866), L. R. 1 H. L. 129. *Reid. Mundy v. Jolliffe* (1839), 5 My. & C. 167; Meynell v. Surtees (1854), 3 Sm. & G. 101; Pain v. Coombs (1857), 3 Sm. & G. 449; Parker v. Taswell (1858), 30 L. T. O. S. 347; Tillett v. Charing Cross Bridge Co. (1859), 26 Beav. 419; Nunn v. Fabian (1865), 1 Ch. App. 35; Reddin v. Jarman (1867), 16 L. T. 449; Plimmer v. Wellington Corp'n. (1884), 9 App. Cas. 699; McManus v. Cooke (1887), 35 Ch. D. 681; Civil Service Musical Instrument Assocn. v. Whiteman (1899), 88 L. J. Ch. 484; Ahmad Yar Khan v. Secretary of State for India in Council (1901), 17 T. L. R. 500. *Mentd. G. N. Ry. v. East & West India Docks & Birmingham Junction Ry.* (1852), 7 Ry. & Can. Cas. 358; Jackson v. Jackson (1853), 22 L. J. Ch. 873; Morgan v. Milman (1853), 3 De G. M. & G. 24; Hutton v. Beeton & M'Murray, Beeton v. M'Murray

## PART II. SECT. 4, SUB-SECT. 2.— C. (a) ii.

### a. Whether part performance.]—

*TOOLE v. MEDLICOTT* (1810), 1 Ball & B. 393, 404.—*IR.*

b. —.]—R. agreed to become tenant of certain premises to one S.,

who instructed an agent, J., to prepare a lease. J. caused his clerk to make an entry in his rent-roll of "lease for two hundred years from Mar. 25, 1880;



## Sect. 4.—Evidence of contract: Sub-sect. 2, C. (a)

& Hutton (1863), 9 Jur. N. S. 1310; Darnley v. L. C. & D. Ry. (1865), 13 W. R. 824; Wycombe Ry. v. Donnington Hospital, Minister & Poor Men (1866), 14 L. T. 179; Thomson v. Anderson (1870), 39 L. J. Ch. 468; Chattock v. Muller (1878), 8 Ch. D. 177; Hart v. Hart (1881), 18 Ch. D. 670; *Re* Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co. (1888), 38 Ch. D. 156.

477. ———.]—Specific performance decreed of a parol agreement for a lease though denied by the answer on the evidence of one witness confirmed by circumstances & followed by acts of part performance such as taking possession & making improvements.

In order to amount to part performance an act must be unequivocally referable to the agreement (PLUMER, M.R.).—MORPHEIT v. JONES (1818), 1 Wils. Ch. 100; 1 Swan. 172; 37 E. R. 45.

*Annotations*.—*Distd.* Canning v. Catling (1864), 4 New Rep. 259. *Refd.* Sutherland v. Briggs (1841), 1 Hare, 26; Shephard v. Walker (1875), L. R. 20 Eq. 659; Maddison v. Alderson (1883), 8 App. Cas. 467; McManus v. Cooke (1887), 35 Ch. D. 681; Rawlinson v. Ames, [1925] Ch. 96. *Mentd.* Dale v. Hamilton (1846), 5 Hare, 369.

478. ———.]—If a regular corporate resolution has been passed for granting an interest in the corporate property, &, upon the faith of it, expenditure has been incurred, the ct. will compel the corpn. to make a legal grant in pursuance of the resolution, although it is not under the corporate seal.—MARSHALL v. QUEENBOROUGH CORPN. (1823), 1 Sim. & St. 520; 57 E. R. 206.

*Annotations*.—*Consd.* Wilmot v. Coventry Corpn. (1835), 1 Y. & C. Ex. 518. *Refd.* Drogheda Corpn. v. Holmes (1854), 5 H. L. Cas. 480; Stevens' Hospital v. Dyas (1864), 10 L. T. 882. *Mentd.* Diggle v. London & Blackwall Rly. (1850), 15 L. T. O. S. 208; Hoare v. Kingsbury U. C., [1912] 2 Ch. 452.

479. ———.]—MUNDY v. JOLLIFFE, No. 817, *post*.

480. ———.]—A. B. offered in writing to grant a lease of a coal mine upon certain terms. C. D. verbally accepted the offer. A draft lease was sent to him, & returned with the approval of C. D.'s solr. C. D. laid out money in driving shafts towards the coal mine through the adjoining property. Before any lease was executed, & something more than a month after the return of the draft lease, A. B. died:—*Held*: the parol acceptance of the written offer of the lessor, coupled with the subsequent acts in the lifetime of A. B., entitled C. D. to specific performance of the agreement from the representatives of A. B.—BENECKE v. CHADWICKE (1856), 4 W. R. 687.

481. ———.]—Deft. in Jan. 1858, verbally agreed to let to pltf. a farm for the term of fourteen years, &, on the faith of the agreement by deft. to grant a lease, pltf. took possession of, & expended a considerable sum of money in making improvements on the farm. In 1860, deft. not having in accordance with his promises had the lease prepared, disputes arose between him & pltf.; & in Aug. 1860, pltf. was served with a notice to quit in Feb. 1861. Deft. denied that he had entered into any agreement for a lease:—*Held*: there was clear proof of a parol agreement for the term & that, with possession of & expenditure of money upon the farm, bound deft. & entitled pltf. to a decree for specific performance, with costs.—FARRALL v. DAVENPORT (1861), 3 Giff. 363; 8 Jur. N. S. 862; 66 E. R. 450; *affil.*, 5 L. T. 436; 8 Jur. 1043, L. C.

482. ———.]—If a man, under a verbal agreement with a landlord for a certain interest

in land, or under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, &, upon the faith of such promise or expectation, with the knowledge of the landlord, & without objection by him, lays out money upon the land, a ct. of equity will compel the landlord to give effect to such promise or expectation (LORD KINGSDOWN).—RAMSDEN v. DYSON (1866), L. R. 1 H. L. 129; 12 Jur. N. S. 506; 14 W. R. 926, H. L.; *reversg.* S. C. *sub nom.* THORNTON v. RAMSDEN (1864), 4 Giff. 519.

*Annotations*.—*Consd.* Bankart v. Tennant (1870), L. R. 10 Eq. 141. *Apld.* Plimmer v. Wellington Corpn. (1884), 9 App. Cas. 699. *Consd.* McManus v. Cooke (1887), 35 Ch. D. 681. *Apld.* Civil Service Musical Instrument Assn. v. Whiteman (1899), 68 L. J. Ch. 484. *Consd.* Ahmad Yar Khan v. Secretary of State for India in Council (1901), 17 T. L. R. 500. *Refd.* Bastin v. Bidwell (1881), 44 L. T. 742; Weller v. Stone (1885), 54 L. J. Ch. 497; Lala Beni Ram v. Kundan Lal (1899), 15 T. L. R. 258. *Mentd.* Proctor v. Bennis (1887), 36 Ch. D. 740; *Re* Clarke, *Ex p.* Newton & Kearly (1889), 60 L. T. 335; Wimbledon & Putney Common Conservators v. Nicol (1894), 10 T. L. R. 247; *Re* Williams & Parry's Contract (1895), 72 L. T. 869; Marriott v. Reid (1900), 82 L. T. 369; Cloutie v. Storey (1910), 80 L. J. Ch. 193; Wheeler v. Stratton (1911), 105 L. T. 786; Ramsden v. I. R. Comrs., [1913] 3 K. B. 580, n.; A.-G. to Prince of Wales v. Collom, [1916] 2 K. B. 193; Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co. & Donkin (1921), 90 L. J. Ch. 420; Jones Bros. (Holloway) v. Woodhouse, [1923] 2 K. B. 117; Michaud v. Montreal City (1923), 92 L. J. P. C. 161.

483. ———.]—R. took four houses & land of J., it being agreed by J. to grant a lease for forty years at £185 a year, & R. agreeing to erect certain buildings within three years. This agreement being embodied in a short memorandum, a more extended agreement in a legal form was drawn up by J.'s solr., but neither document was ever executed. R. remained in possession for twenty-five years, & erected some of the buildings, not being able to erect the remainder owing to J. failing to give possession of the requisite land. R. having regularly paid the rent, & there being documentary evidence to show that J. considered that R. was in possession on the terms of the unsigned agreement, on a bill filed by R. for specific performance of the contract to grant the lease. Decree made without costs.

It was clearly established that if a person had a verbal contract for a term of years, for however long a period, & on the faith of that contract took possession, even although he did not expend any money on the premises, the mere fact of his taking possession on the faith of such verbal contract completely took the case out of the statute & he was just as much entitled as if there had been a contract in writing (MALINS, V.-C.).—REDDIN v. JARMAN (1867), 16 L. T. 449.

484. ———.]—CROOK v. SEAFORD CORPN., No. 932, *post*.

485. ———.]—Agreement for use of water—Not essential to lessee's works.]—Pltfs., under an agreement for a lease from deft., entered into possession of land near a canal belonging to deft., & erected thereon copperworks, for which a supply of water was essential, & they remained for many years in possession under an understanding that so long as they were good customers of the canal they might use the waste water from it for the purposes of their works, & pltfs. had constructed a culvert to bring the water, & had used it with deft.'s knowledge. On a bill to establish pltfs.' right to use the water of the canal for their works,

yearly rent £100." S. died, & the lease was never made: but R. went into possession, & expended £3,000

on the premises:—*Held*: a sufficient agreement for a lease, & specific performance decreed.—*Re* SULLIVAN'S

ESTATE (1889), 23 L. R. Ir. 255.—*IR.* o. ———.]—DRILLER v. PUBLIC TRUSTEE (1911), 31 N. Z. L. R. 337.—N.Z.

It was not shown that the water from this particular source was absolutely essential to the works, & under the circumstances of the case:—*Held*: the understanding between plffs. & the landowner did not come within the principle under which a landlord permitting his tenant to expend money on his land on the faith of his promise to give the tenant an interest therein, will be compelled to give effect to that promise.—*BANKART v. TENNANT* (1870), L. R. 10 Eq. 141; 39 L. J. Ch. 809; 23 L. T. 137; 34 J. P. 628; 18 W. R. 639.

486. ———.]—A gentleman entered into an arrangement by letter with the land agent who acted for the committee of a lunatic's estate, to take a lease of part of the estate for a term of three years. No formal agreement was entered into, nor was the sanction of the Master in Lunacy applied for, but the tenant was let into possession, & expended a considerable sum in repairs & improvements. After he had been nearly eighteen months in possession, the committee gave him six months' notice to quit, upon which he applied by petition to have the terms of his arrangement with the agent carried into effect:—*Held*: the ct. had jurisdiction to make an order giving effect to that arrangement; & order accordingly.—*Re WYNNE* (1872), 7 Ch. App. 229; 26 L. T. 406; 20 W. R. 348, L. J.J.

487. ———.]—If, after an agreement for a lease involving a stipulated outlay on the demised premises by the lessee, before the lease is granted the landlord stands by & encourages the lessee to expend additional moneys in artistically paying a passage excepted from the demise, but over which the lessee is given a right of way to the demised premises, the lessee, to the landlord's knowledge, being under the belief that the pavement will remain, the landlord cannot afterwards, as legal owner, insist on its removal or alteration. Nor can the landlord insist on the removal of an advertisement board affixed by the lessee to the outside wall of the landlord's premises under similar circumstances.—*CIVIL SERVICE MUSICAL INSTRUMENT ASSOCN., LTD. v. WHITEMAN* (1899), 68 L. J. Ch. 484; 80 L. T. 685; 63 J. P. 441; 43 Sol. Jo. 507.

488. ———.]—Entry without authority of lessor.]—After an offer had been made by pltf. to take a lease of a farm from defts., a draft was prepared by defts.' solrs., & approved of by pltf. with some alterations, & was afterwards altered by deft. himself & left by him with his solrs. for the purpose of its being ascertained whether pltf. would agree to the alterations. On their submitting it to him he agreed to the alterations, but no agreement was signed. A part of the terms was, that pltf. should execute certain repairs before the lease was granted. Pltf. was put into possession by the direction of defts.' solrs., & executed some repairs:—*Held*: although pltf. might have been let into possession without authority from deft. there was a concluded agreement for a lease on the part of deft. & a sufficient part performance to take the case out of Stat. Frauds, & a specific performance was decreed.—*SHILLIBEER v. JARVIS* (1856), 8 De G. M. & G. 79; 44 E. R. 319, L. J.J.

489. ———.]—Entry into possession—Circumstances affecting mode of living of occupier.]—Stat.

Frauds cannot be pleaded to a verbal agreement to allow the occupation of a leasehold house for life on payment merely of ground rent, rates, & taxes, if there has been a part performance by possession under the agreement & the agreement has affected the mode of living of the occupying party.—*COLES v. PILKINGTON* (1874), L. R. 19 Eq. 174; 44 L. J. Ch. 381; 31 L. T. 423; 23 W. R. 41.

Annotation:—*Reid. Alderson v. Maddison* (1880), 5 Ex. D. 293.

### iii. Payment of Rent.

490. Whether part performance—Possession retained by vendor.]—It was part of an agreement to purchase a farm that the vendor should, for twelve years from the completion, be at liberty to require, at his own expense, & the purchaser agreed to grant him a lease of the farm, at a rent to be estimated at a specified percentage on the outlay in making the purchase, "etc." The vendor, just before the completion, wrote a letter to the purchaser, agreeing to pay the percentage on the amount of the purchase-money, which had been already paid, but stating that the letter was a temporary thing until the completion of the purchase & the execution of an agreement already prepared & intended to be executed. The agreement referred to had been engrossed, & provided for the payment of a rent calculated on the aggregate amount of the purchase-money & expenses of the purchase & of repairs, but left the amount in blank. It was never signed, but the vendor remained in possession, & paid rent calculated on the aggregate amount:—*Held*: (1) there was a sufficient part performance to exclude a defence founded on Stat. Frauds to a bill for specific performance of the agreement to take a lease; & (2) the option had been exercised by the vendor to take a lease; & (3) the agreement was sufficiently definite to be specially performed.—*POWELL v. LOVEGROVE* (1856), 8 De G. M. & G. 357; 2 Jur. N. S. 791; 44 E. R. 427, L. J.J.

Annotation:—As to (3) *Reid. Parker v. Taswell* (1858), 2 De G. & J. 559.

491. ———.]—Payment on account of entry.]—*SMALLWOOD v. SHEPPARDS*, No. 470, *ante*.

492. ———.]—When unaccompanied with taking of possession.]—A contract to grant a lease of a furnished flat is a contract concerning an interest in land within Stat. Frauds, s. 4, & part payment of rent is not, unless possession is taken by the tenant, such a part performance as to take the case out of the operation of the section.—*THURSBY v. ECCLES* (1900), 70 L. J. Q. B. 91; 49 W. R. 281; 17 T. L. R. 130; 45 Sol. Jo. 120.

Annotation:—*Apprvd. Chaproniere v. Lambert*, [1917] 2 Ch. 356.

493. ———.]—Payment of rent in advance in respect of a parol agreement for a lease of premises of which the lessee has not taken possession is not such part performance as will take the case out of the operation of Stat. Frauds, s. 4.—*CHAPRONIERE v. LAMBERT*, [1917] 2 Ch. 356; 86 L. J. Ch. 726; 117 L. T. 353; 33 T. L. R. 485; 61 Sol. Jo. 592, C. A.

Annotation:—*Mentd. Re Davies, Ex p. Miles*, [1921] 3 K. B. 628.

25 N. Z. L. R. 689.—N.Z.

f. ———.]—*BREDIN v. HUNTER* (1910), 30 N. Z. L. R. 359.—N.Z.

g. ———.]—*Receipt of fines.*—*HARTLY & WHITE v. WILKINSON* (1794), Ridg. L. & S. 357.—IR.

C C

## PART II. SECT. 4, SUB-SECT. 2.—C. (a) iii.

d. Whether part performance—When accompanied with taking of possession.]—An agreement in writing for a lease, not signed by the party sought to be charged, specifically  
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executed, on the ground of part performance: viz. possession taken, & rent paid according to the terms of the agreement.—*KINE v. BALFE* (1813), 2 Ball & B. 343, 347, 348.—IR.

e. ———.]—*MACKY v. CAFE MONICO, LTD. (IN LIQUIDATION)* (1905),

**Sect. 4.—Evidence of contract: Sub-sect. 2, C. (b) i., ii. & iii.; sub-sect. 3.]**

**(b) Under Agreement for New Tenancy.  
i. Retention of Possession.**

**494. Whether part performance.]—SMITH v. TURNER (1720), 2 Eq. Cas. Abr. 49; 22 E. R. 43.**

**495. —.]—WILLS v. STRADLING, No. 511, post.**

**496. —.]—DOWELL v. DEW, No. 639, post.**

**497. — Continuation of possession taken previously to parol agreement.]—PAIN v. COOMBS, No. 466, ante.**

**498. — —.]—Where pltf. alleged a parol contract for a lease of a house of which he was in possession, but deft. denied the contract & alleged that pltf. was in possession in accordance with a written memorandum whereby pltf. agreed to take the house from deft, as a weekly tenant:—*Held*: the possession was not of such a nature as to constitute an act of part performance to take the case out of Stat. Frauds; though pltf. had been let into possession some days previously to the date of the memorandum.—*CANNING v. CATLING* (1864), 4 New Rep. 259.**

**499. — —.]—Possession taken before, but continued after, a parol contract for a lease may, if unequivocally referable to the contract, constitute part performance, taking the case out of Stat. Frauds.**

A contract for a lease of land for more than three years was, after negotiation, entered into & reduced into writing in the form of a draft lease, which, however, was not signed by the intended lessor. Shortly before the contract was made, the intended lessee was let into possession, & he subsequently continued in possession & paid rent according to the terms of the draft lease:—*Held*: although the entry into possession was antecedent to the contract, yet the subsequent continuance in possession being, under the circumstances, unequivocally referable to the contract, constituted a part performance sufficient to take the case out of Stat. Frauds.—*HODSON v. HEULAND*, [1890] 2 Ch. 428; 65 L. J. Ch. 754; 74 L. T. 811; 44 W. R. 684.

*Annotation*.—*Fold*. *Biss v. Hygate*, [1918] 2 K. B. 314.

**500. — —.]—WHITE & WONTNER v. WHITEWOOD (1897), 13 T. L. R. 409.**

**501. — —.]—Applt. on Feb. 26, 1916, agreed to let, & resp. agreed to take from applt., a nursery garden for six years from Mar. 25, 1916, at £20 a year payable quarterly, subject to the preparation of a formal lease. On the same day applt. agreed to let resp. into immediate possession, & resp. went into possession & did such acts as digging, sowing seeds, & watering plants. On Mar. 18 all the terms were agreed as embodied in a written lease, but it was not signed. After that date resp. did no acts upon the land. On Mar. 26, resp.'s wife died & he declined for that reason to go on with the matter. In an action by applt. against resp. for rent from Mar. 25, resp. pleaded Stat. Frauds, & applt. in answer set up part performance:—*Held*: although resp. had gone into possession before the terms of the lease were agreed to, nevertheless, as his possession continued until after the date fixed for the commencement of the tenancy & its continuance after that date was unequivocally referable to the**

contract, there was a sufficient part performance to take the case out of Stat. Frauds, & applt. was entitled to recover.—*Biss v. Hygate*, [1918] 2 K. B. 314; 87 L. J. K. B. 1101; 119 L. T. 284, D. C.

**502. — —.]—B. occupied part of the business offices of a co. as tenant from year to year. An agreement was entered into to grant him a lease for twenty-one years of the premises which he occupied at the same rent & under the same conditions. The agreement did not comply with Stat. Frauds:—*Held*: a continued occupation of the same premises after the date of the agreement on the same terms & conditions as before did not entitle B. to specific performance of the agreement.—*Re NATIONAL SAVINGS BANK ASSOCN., BRADY'S CASE* (1897), 15 W. R. 753.**

**ii. Expenditure of Money.**

**503. Whether amounts to part performance.]—Before the Statute written agreements could not be controlled by a parol agreement contrary to it, or altering it; but this is a new agreement, & the laying out the money is a performance on one part, & ought to be carried into execution (*per CUB.*).—*ANON.* (1717), 2 Eq. Cas. Abr. 48; 5 Vin. Abr. 522, pl. 38; 22 E. R. 41.**

**504. — Act easily compensated by money.]—*FRAME v. DAWSON*, No. 453, ante.**

**505. — Where no specific agreement.]—Lease not decreed upon expenditure in repairs & improvements under an alleged agreement, proved by one witness; the answer containing a positive denial of the agreement; which denial was also confirmed by circumstances. No relief upon general equity from expenditure under the observation of the landlord by a tenant, but not under any specific engagement or arrangement. No relief under an agreement, stated by the answer; the bill not being adapted to that agreement, but framed upon a different ground; which failed.—*PILLING v. ARMITAGE* (1805), 12 Ves. 78; 33 E. R. 31.**

*Annotations*.—*Expld.* *Ramsden v. Dyson* (1866), L. R. 1 H. L. 129; *Plimmer v. Wellington Corpn.* (1884), 9 App. Cas. 699. *Refd.* *Beaufort v. Patrick* (1853), 17 Beav. 60.

**506. — —.]—If any lessor so treats his tenant as to make him believe that he will renew his term; if on a faith so superinduced, the tenant expends his money, or in any other way becomes a loser, the lessor will be compelled to give him such renewal as his own conduct may have led the tenant to reckon upon, especially if the thing done by the tenant in any way redounds to the advantage of the lord (*LORD BROUGHAM, C.*).—*CLAYTON v. A.-G.* (1834), 1 Coop. temp. Cott. 97; 47 E. R. 766, L. C.**

*Annotation*.—*Mentd.* *Kirk v. R., A.-G. v. Kirk* (1872), L. R. 14 Eq. 558.

**507. — —.]—Pltf. was the lessee of a house & other premises for a term of thirty-one years at a rent of £60, & was under a covenant to make certain improvements on the property. He was also tenant from year to year of an adjoining meadow belonging to a different proprietor at a rent of £9. The lessor of the house became the purchaser of the meadow, & by arrangement between him & pltf. the improvements were extended, & part of the house was made to project over the field, &**

**PART II. SECT. 4, SUB-SECT. 2.—C. (b) i.**

**494 i. Whether part performance.]—A continuance in possession referable unequivocally to a contract not being**

in writing, offends against Stat. Frauds, but is met by the doctrine of part performance.—*SAINT v. ADAMS*, [1921] S. R. Q. 41.—*AUS.*

**494 ii. —.]—A tenant being permitted to continue in possession after**

the expiration of his lease, & the payment of rent by him at the agreed amount, constitutes part performance sufficient to take the case out of the Stat. Frauds.—*LANYON v. MARTIN* (1884), 15 L. R. Ir. 297.—*IR.*

part of the field was attached to the demised premises, *pltf.* paying about half of the expense of the alterations, which far exceeded the sum he had originally covenanted to lay out, & also signing a memorandum, which the lessor drew up, whereby he agreed to pay an entire rent of £80 a year for the consolidated property:—*Held*: (1) the extension of the house into the meadow by *pltf.*, with the concurrence of his landlord, was evidence of, & was sufficient consideration for, a contract to demise the meadow; (2) the act of building part of the house upon the meadow, if it was evidence of any right, was evidence of a right which affected the entire tenement, & it could not be restricted so as to affect only the part of the meadow actually built upon; (3) the extension of the house, part of the demised premises, into the meadow, & the increase & consolidation of the rents, was evidence that the meadow was to be held for the same term as the demised premises.—*SUTHERLAND v. BRIGGS* (1841), 1 *Ilare*, 26; 11 *L. J. Ch.* 36; 5 *Jur.* 1151; 66 *E. R.* 936.

*Annotation*:—As to (1) & (2) *Reid*. *Millard v. Harvey* (1864), 11 *L. T.* 360.

**508.** — *Expense incurred in expectation of lease—Not encouraged by landlord.*—*RAMSDEN v. DYSON*, No. 482, *ante*.

**509.** — *KUSEL v. WATSON*, No. 1494, *post*.

**510. Expenditure by sub-lessee—With knowledge of landlord.**—*A.*, a tenant in possession, filed a bill against *B.* for the specific performance of a parol agreement for a lease of thirty years. *A.* had contracted to sub-let, & his sub-lessee had expended money in alterations & repairs with the knowledge & approval of *B.*:—*Held*: the outlay by the sub-lessee was as much a part performance of the agreement as if made by *A.*, who was therefore entitled to specific performance.—*WILLIAMS v. EVANS* (1875), *L. R.* 19 *Eq.* 547; 44 *L. J. Ch.* 319; 32 *L. T.* 359; 23 *W. R.* 466.

### iii. *Payment of Increased Rent by Tenant in Possession.*

**511. Whether part performance.**—Bill by the tenant of a farm for a specific performance of a parol agreement for a new lease, stating improvements made at a considerable expense & continuance of possession after the expiration of the old lease & payment of an increased rent under the agreement: plea of Stat. Frauds ordered to stand for an answer with liberty to except.

The delivery of possession by a person having possession is a strong & marked circumstance; but the mere holding over by the tenant, which he will do of course if he has no notice to quit, would not of itself take the case out of the Statute (LORD LOUGHBOROUGH, C.).—*WILLS v. STRADLING* (1797), 3 *Ves.* 378; 30 *E. R.* 1063, *L. C.*

*Annotations*:—*Consd.* *McManus v. Cooke* (1827), 35 *Ch. D.* 681. *Reid*. *Maddison v. Alderson* (1833), 8 *App. Cas.* 467. *Mentd.* *Dickinson v. Barrow*, [1904] 2 *Ch.* 339.

## PART II. SECT. 4, SUB-SECT. 2.—C. (b) iii.

**511 i. Whether part performance.**—*R. v. KIFFIN THOMAS* (1904), 6 *W. A. L. R.* 91.—*AUS.*

**511 ii.** —.—*DESFART v. GODDARD* (1784), *Wallis by Lyne* 347.—*IR.*

**511 iii.** —.—*ARCHBOLD v. HOWTH* (1866), 1 *R. 1 C. L.* 698.—*IR.*

**511 iv.** —.—*HOWE v. HALL* (1870), 4 *L. R. Eq.* 242.—*IR.*

**511 v.** —.—*Where a new letting at an altered rent is made to a tenant in possession under a pre-existing tenancy, the payment by the tenant & the acceptance by the landlord of*

*the altered rent, if shown to have been paid & accepted on foot of the new tenancy, is a sufficient part performance to enable either party to sustain an action for specific performance of the contract for such new tenancy.*—*CONNER v. FITZGERALD* (1883), 11 *L. R. Ir.* 106.—*IR.*

## PART II. SECT. 4, SUB-SECT. 3.

**514 i. To prove variation of written contract.**—*LOFFE v. KEZAR* (1856), 5 *C. P.* 234.—*CAN.*

**514 ii.** —.—*In an action on an agreement under seal to accept a lease:—Held*: parol evidence was

**512.** —.—*A landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate:—Held*: this constituted a sufficient part performance of the agreement to take the case out of Stat. Frauds, & specific performance was decreed.—*NUNN v. FABIAN* (1865), 1 *Ch. App.* 35; 35 *L. J. Ch.* 140; 13 *L. T.* 343; 29 *J. P.* 758; 11 *Jur. N. S.* 868, *L. C.*

*Annotations*:—*Consd.* *Williams v. Evans* (1875), *L. R.* 19 *Eq.* 547; *Humphreys v. Green* (1882), 10 *Q. B. D.* 148. *Appld.* *Miller & Aldworth v. Sharp*, [1899] 1 *Ch.* 622. *Reid*. *Chaproniere v. Lambert*, [1917] 2 *Ch.* 356. *Reid*. *Kidderminster Corp. v. Hardwick* (1873), *L. R.* 9 *Exch.* 13; *McManus v. Cooke* (1827), 35 *Ch. D.* 681; *Dickinson v. Barrow*, [1904] 2 *Ch.* 339.

**513.** —.—*A landlord having verbally agreed with his yearly tenants to grant them a lease for twenty-one years of the messuage held by them, without the inclusion in the lease of any additional property, at an increased rent, the tenants for some time afterwards paid the increased rent:—Held*: the payment of rent was a sufficient part performance to take the case out of Stat. Frauds; & parol evidence of the agreement was therefore admissible.—*MILLER & ALDWORTH, LTD. v. SHARP*, [1899] 1 *Ch.* 622; 68 *L. J. Ch.* 322; 80 *L. T.* 77; 47 *W. R.* 268; 43 *Sol. Jo.* 245.

## SUB-SECT. 3. PAROL EVIDENCE.

*See, now, Law of Property Act, 1925 (c. 20), ss. 54, 55.*

**514. To prove variation of written contract.**—A bill brought to carry an agreement into execution for a lease of a house which was signed by *deft.* the lessor only, who by his answer insisted it ought to be insert in the agreement that the tenant should pay the rent clear of taxes, *pltf.* who wrote the agreement having omitted to make it so, & offered to read evidence to show this was a part of the agreement. The evidence ought to be admitted, for if there has been any omission, *deft.* ought to have the benefit of it by way of objection to a specific performance.—*JOYNES v. STATHAM* (1746), 3 *Atk.* 388; 26 *E. R.* 1023, *L. C.*

*Annotations*:—*Consd.* *Rich v. Jackson* (1794), 4 *Bro. C. C.* 514. *Expld.* *Townshend v. Stangroom* (1801), 6 *Ves.* 328. *Consd.* *Woollam v. Hearn* (1802), 7 *Ves.* 211. *Reid*. *Rogers v. Earl* (1757), 1 *Dick.* 294; *Ramsbottom v. Gordon* (1812), 1 *Ves. & B.* 165. *Mentd.* *Mason v. Armitage* (1806), 13 *Ves.* 25; *London & Birmingham Ry. v. Winter* (1840), *Cr. & Ph.* 57; *Smith v. Wheatcroft* (1878), 9 *Ch. D.* 223.

**515.** —.—*Plea of Stat. Frauds a good defence to parol variation of agreement for a lease: not, if it only amounts to waiver of part, or to a declaration of trust.*—*JORDAN v. SAWKINS* (1791), 1 *Ves.* 402; 3 *Bro. C. C.* 388; 30 *E. R.* 407, *L. C.*; *subsequent proceedings* (1793), 4 *Bro. C. C.* 477, *L. C.*

*Annotation*:—*Expld.* *Robson v. Collins* (1802), 7 *Ves.* 130.

not admissible to show that *pltf.* was bound to complete certain repairs before calling on *deft.* to accept.—*O'NEIL v. LINGHAM* (1859), 9 *C. P.* 14.—*CAN.*

**514 iii.** —.—*WILLIAMS v. JENKINS* (1871), 18 *Gr.* 536.—*CAN.*

**514 iv.** —.—*MEISNER v. MEISNER* (1904), 37 *N. S. R.* 23.—*CAN.*

**514 v.** —.—*Memorandum signed by tenant only.*—*Parol evidence admitted to prove a demise although a memorandum had been drawn up as to the terms of the lease, but signed only by the tenant.*—*VALENTINE v. SMITH* (1851), 9 *C. P.* 59.—*CAN.*



**Sect. 4.—Evidence of contract: Sub-sect. 3. Sect. 5: Sub-sect. 1, A.]**

**516. —**—[Parol evidence not admissible in support of a bill for specific performance to prove from conversations before & at the time of signing an agreement for a lease, that the intent of the parties was apparent from the memorandum, though the same was written by the lessee, & the words "clear of all taxes," which was the purport of the conversation, were omitted in the memorandum.—*RICH v. JACKSON* (1794), 4 Bro. C. C. 514; 6 Ves. 334, n.; 29 E. R. 1017, L. C.

*Annotations:—**Consd.* *Ogilvie v. Foljambe* (1817), 3 Mer. 53. *Refd.* *Townshend v. Stangroom* (1801), 6 Ves. 378; *Clarke v. Grant* (1807), 14 Ves. 519.

**517. — Made at same time.]**—Specific performance of an agreement in writing for a lease for sixty years refused upon parol evidence of an alteration, stipulated for at the same time; & upon the faith of which the party executed. Distinction between the case of a deft. refusing, & a pltf. seeking, the execution of an agreement under such circumstances.—*CLARKE v. GRANT* (1807), 14 Ves. 519; 33 E. R. 620.

*Annotations:—**Consd.* *Croome v. Lediard* (1834), 2 My. & K. 251; *Dear v. Verity* (1869), 38 L. J. Ch. 297; *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266. *Refd.* *Gordon v. Hertford* (1817), 2 Madd. 106. *Mentd.* *A. G. v. Jackson* (1846), 5 Hare, 355.

**518. —**—[Though a parol waiver of a written contract, amounting to a complete abandonment, & clearly proved, would bar a specific performance, or even parol variations, so acted upon, that the original agreement could no longer be enforced without injury to one party; variations, verbally agreed upon, are not sufficient to prevent the execution of a written agreement: the situation of the parties in all other respects remaining the same. In this case the variations were all for the advantage of deft. by gratuitous covenants of pltf.—*PRICE v. DYER* (1810), 17 Ves. 356; 34 E. R. 137.

*Annotations:—**Refd.* *Vezev v. Rashleigh*, [1904] 1 Ch. 634; *Morris v. Baron*, [1918] A. C. 1. *Mentd.* *Robinson v. Page* (1826), 3 Russ. 114; *Stowell v. Robinson* (1837), 3 Bing. N. C. 928.

**519. —**—[An agreement to grant a lease had been executed by the lessor & lessee, in which it was stipulated that the lease should be granted "so far as the lessor can grant the same." The allegations in the bill filed by the lessee were to the effect that the agreement was that the lessor should grant a lease in more ample terms than those which by the written agreement he had engaged to do:—*Held*: (1) the lessee could not set up the parol agreement against the written one. (2) if the lessee had required production of the lessor's title, he would have seen what the powers of the lessee as to granting leases were.—*LONDONDERRY (MARCHIONESS) v. BAKER* (1860), 3 L. T. 546.

**520. —**—[Pltfs. entered into an agreement in writing with deft. to let him a public-house as tenant from year to year, with the option on his part to call on them to grant him a lease of the house for twenty-eight years, upon the terms, amongst others, that if he sold such lease for more than £1,200 he should give pltfs. half the difference. Pltfs. having granted him a lease of the house, which he sold for £2,500, brought an action against him upon the agreement to recover one-half of £1,300. Deft. contended that the lease to him was granted under a substituted agreement, which was not in writing so as to satisfy Stat. Frauds. The lease granted differed from that specified in the written agreement in the following particulars: the term was for thirty-two

years, instead of twenty-eight. The rent was £105 instead of £100. The premium was £800 instead of £1,200. There was also no covenant against assignment without the lessor's consent, nor one binding the lessee to take his beer from pltfs., as in the original agreement. These differences were the result of objections by deft. yielded to by pltfs. who on their part required the additional rent. The jury found, however, that the stipulation as to dividing the profit remained in force or was renewed:—*Held*: deft. was entitled to judgment, as there was a new agreement, which ought to have been in writing to satisfy Stat. Frauds. *Semble*: if there had been anything in writing to show that the lease granted was accepted in substitution for that originally stipulated for, the action might have been maintained.—*SANDERSON v. GRAVES* (1875), L. R. 10 Exch. 234; 44 L. J. Ex. 210; 33 L. T. 269; 23 W. R. 797.

*Annotation:—**Refd.* *Morris v. Baron*, [1918] A. C. 1.

**521. —**—[By the terms of a written agreement J. agreed to lease to W. "a shop & premises . . . which are to be built at a cost not to exceed £400 . . . at the annual rental of £75 . . ." J. expended £750 in building the premises, & refused to grant a lease to W. at the annual rent of £75. In an action by W. against J. for specific performance of the written agreement, deft. set up as a defence a contemporaneous parol proviso to the agreement, to the effect that, if the outlay exceeded £40, the rent was to be raised in proportion:—*Held*: as such parol proviso did not contradict but merely explained, the terms of the written instrument, evidence of it was admissible; & as the evidence proved that pltf. had agreed to such parol proviso, the action must be dismissed.—*WILLIAMS v. JONES* (1888), 36 W. R. 573.

**522. —**—[Although parol evidence is admissible to prove rescission of a written agreement concerning land, such evidence cannot be given to prove a subsequent agreement to vary the terms of the written agreement.

Where, therefore, in an action for a declaration that a lease was valid & had not been forfeited, an order had been made by consent that deft. should grant pltf. a new lease upon the terms set out in the order, & at a subsequent interview between the parties suggested alterations on the lease were embodied in a memorandum signed by them, the ct., holding that the memorandum was not intended to operate as an agreement, refused to allow pltf. to give parol evidence of a fresh agreement alleged by him to have been made at the interview for the variation of the terms of the order, & directed the order to be carried out.—*VEZEV v. RASHLEIGH*, [1904] 1 Ch. 634; 73 L. J. Ch. 422; 90 L. T. 663; 52 W. R. 442; 48 Sol. Jo. 312.

*Annotations:—**Consd.* *Williams v. Moss' Empires*, [1915] 3 K. B. 242. *Refd.* *Morris v. Baron*, [1918] A. C. 1.

—[See, also, *CONTRACT*, Vol. XII., pp. 354–358, Nos. 2947–2976.

**523. To prove rescission of written contract.]**—*PRICE v. DYER*, No. 518, *ante*.

**524. —**—[Two parties entered into a written agreement, by which one was to take a farm of the other, & to take the straw, chaff, etc. at a valuation to be made by such competent persons as the two other parties should respectively appoint. Such agreement entire; the two parts cannot be separated from each other; & if one person only is, by parol agreement, afterwards appointed to make the valuation, the landlord cannot maintain an action upon the parol agreement thus substituted, even though the straw &

chaff, etc., have been taken & used by the tenant.—**HARVEY v. GRABHAM** (1836), 5 Ad. & El. 61; 2 Har. & W. 146; 6 Nev. & M. K. B. 754; 5 L. J. K. B. 235; 111 E. R. 1089.

*Annotations*.—**Consd.** Sanderson v. Graves (1875), L. R. 10 Exch. 234. **Refd.** Thames Haven Dock & Ry. Co. v. Brymer (1850), 5 Exch. 696. **Mentd.** Mechelen v. Wallace (1837), 7 Ad. & El. 49.

525. —.]—**VEZEY v. RASHLEIGH**, No. 522, *ante*.

—.]—*See, also*, **CONTRACT**, Vol. XII., pp. 353, 354, Nos. 2938–2946.

526. To prove terms of letting.]—**DOE d. BINGHAM v. CARTWRIGHT**, No. 359, *ante*.

527. To prove meaning of particular terms.]—Pltf. by her bill alleged that an agreement to take a house had been entered into by deft., & charged that though no formal note thereof was ever made, yet that the same was proved & made out of the letters of deft. & his agent, & that such letters were a sufficient note thereof. A letter of deft.'s was proved, containing an agreement to take the house, & "give £50 more of premium," "provided I get the profit rent of the present tenant." Upon evidence, *aliunde*, showing what, in fact, these words meant, specific performance was decreed.—**SKINNER v. M'DONALD** (1848), 2 De G. & Sm. 265; 17 L. J. Ch. 347; 11 L. T. O. S. 411; 12 Jur. 741; 64 E. R. 120.

528. To prove defence of mistake.]—Parol evidence admissible in opposition to a specific performance of a written agreement upon the heads of mistake or surprise as well as of fraud; & upon such evidence the bill was dismissed. Another bill for a specific performance of the agreement, corrected according to the same evidence, contradicted by the answer, was also dismissed.—**TOWNSHEND (MARQUIS) v. STANGROOM**, **STANGROOM v. TOWNSHEND (MARQUIS)** (1801), 6 Ves. 328; 31 E. R. 1076, L. C.

*Annotations*.—**Expld.** Clowes v. Higginson (1813), 1 Ves. & B. 521. **Consd.** Beaumont v. Bramley (1822), Turn. & E. 41; Smithson v. Powell, Powell v. Smithson (1852), 20 L. T. O. S. 105. **Refd.** Squire v. Campbell (1836), 1 My. & Cr. 457; London & Birmingham Ry. v. Winter (1840), Cr. & Ph. 57; Wood v. Searth (1855), 2 K. & J. 33; Vouillon v. States (1856), 25 L. J. Ch. 875; Carroll v. Keays (1873), 22 W. R. 243; Fowler v. Sugden (1916), 115 L. T. 51. **Mentd.** Mortlock v. Buller (1804), 10 Ves. 292; Manser v. Back (1848), 6 Hare, 443; Fowler v. Fowler (1859), 4 De G. & J. 250; Wharram v. Wharram (1864), 4 New Rep. 117; Richardson v. Smith (1870), 39 L. J. Ch. 877; *Re* Marlborough, Davis v. Whitehead, [1894] 2 Ch. 133; Craddock v. Hunt, [1923] 2 Ch. 136.

529. To prove defence of fraud.]—A. filed a claim for specific performance of a contract by B., C. & D., stating in his claim that defts. had by an agreement in writing contracted to demise a house to A. for a certain term, at a stated rent, & that pltf., A., had agreed by parol, at the same time, to pay to defts. a premium of £200. The claim prayed that defts. might grant a lease, pltf. offering to pay the premium according to the parol agreement.—**Held**: Stat. Frauds did not present an obstacle to specific performance if there were no fraud.

Defts., at the hearing, alleging that the agreement was obtained by pltf. from one by fraud & from another by fraudulent misrepresentation, the cause was ordered to stand over that an oral examination of witnesses might take place under 15 & 16 Vict. c. 86, & such examination having taken place, upon which the allegations of fraud & fraudulent misrepresentation failed, the ct. decreed specific performance. Where persons sign a written agreement, & there has been no

circumvention, or fraud, or mistake, the written agreement binds at law & in equity according to its terms, although verbally a provision be agreed to, which has not been inserted in the document, if the party who should perform the omitted term consents to the performance of it.—**MARTIN v. PYCROFT** (1852), 2 De G. M. & G. 785; 22 L. J. Ch. 94; 20 L. T. O. S. 135; 16 Jur. 1125; 1 W. R. 58; 42 E. R. 1079, L. J.

*Annotations*.—**Expld.** Price v. Ley (1863), 4 Giff. 235. **Refd.** Jervis v. Borridge (1873), 8 Ch. App. 351; Jacobs v. Batavia & General Plantations Trust (1924), 93 L. J. Ch. 520. **Mentd.** North v. Loomes, [1919] 1 Ch. 378; Berners v. Fleming, [1925] Ch. 264.

Admissibility to connect separate documents.]—*See* Nos. 362, 386, *ante*, No. 798, *post*.

Admission of extrinsic evidence to show intention of parties.]—*See* **DEEDS**, Vol. XVII., p. 302, Nos. 1144 *et seq.*

## SECT. 5.—NATURE OF TENANCY CREATED.

### SUB-SECT. 1.—BEFORE JUDICATURE ACTS.

#### A. Tenancy at Will.

*See* Law of Property Act, 1925 (c. 20), s. 55 (c).

530. On entry by tenant—General rule.]—

When a person is so foolish as to enter upon premises under an agreement for a lease, without a stipulation that in case no lease is executed he shall hold for one year certain, if he does not execute, the landlord may turn him out without notice (*per cur.*).—**HEGAN v. JOHNSON** (1809), 2 Taunt. 148; 127 E. R. 1033.

*Annotations*.—**Distd.** Anderson v. Mid. Ry. (1861), 3 E. & E. 614. **Refd.** Knight v. Benett (1826), 3 Bing. 361; Mann v. Lovejoy (1826), Ry. & M. 355; Riseley v. Ryle (1843), 11 M. & W. 16.

531. —.]—Where parties enter under a mere agreement for a future lease they are tenants at will; & if rent is paid under the agreement they become tenants from year to year (**LITTLEDALE, J.**).—**HAMERTON v. STEAD** (1824), 3 B. & C. 478; 5 Dow. & Ry. K. B. 206; 107 E. R. 811; *sub nom.* **HAMERTON v. STEAD**, 3 L. J. O. S. K. B. 33.

*Annotations*.—**Consd.** Anderson v. Mid. Ry. (1861), 3 E. & E. 614. **Refd.** Knight v. Benett (1826), 3 Bing. 361. **Mentd.** Doe d. Biddulph v. Poole (1848), 17 L. J. Q. B. 143.

532. —.]—**BRAYTHWAYTE v. HITCHCOCK**, No. 547, *post*.

533. — Parol agreement to lease.]—A parol agreement to lease lands for four years only creates a tenancy at will; & if that tenancy be not determined before the day of the demise laid in the declaration, pltf. cannot recover.—(**GOODTITLE d. GALLAWAY v. HERBERT** (1792), 4 Term Rep. 680; 100 E. R. 1211.

534. —.]—**Deft.**, *bona fide* believing he had authority, verbally agreed, on behalf of the owners, to let pltf. a house for seven years; & pltf. was let into possession by deft., & began repairing the premises. The owners had not given deft. authority, & they informed pltf. of this, & brought ejectment against him; pltf. consulted deft., who persisted that he had authority, & advised pltf. to defend the action; & a verdict passed against him. Pltf. having brought an action against deft. for his breach of warranty of authority.—**Held**: pltf. could not recover the costs of defending the ejectment, as they were not the consequence of deft.'s breach of warranty inasmuch as, if deft. had had authority, pltf.

## PART II. SECT. 5, SUB-SECT. 1.—A.

533 i. On entry by tenant—Parol agreement to lease.]—**BROUGHAM v. BALFOUR** (1853), 3 C. P. 72.—**CAN. K.** — Lease without date for termination.]—**WILMOT v. LARABEE** (1858), 7 C. P. 407.—**CAN.**



**Sect. 5.—Nature of tenancy created: Sub-sect. 1, A. & B. (a) & (b).]**

could not have succeeded in the ejectment, by reason of the agreement being verbal only, & consequently creating no more than a tenancy at will.

The law is that, in order to make an agreement for a seven years' lease operative, there must be a deed under seal, which was totally wanting in this case, & therefore, if *pltf.* had been let into possession under such circumstances he would have been no more than a tenant at will, liable, like every such tenant, to have the will determined & ejectment brought against him (*Cockburn, C.J.*).—*Pow v. Davis* (1861), 1 B. & S. 220; 30 L. J. Q. B. 257; 4 L. T. 399; 25 J. P. 662; 7 Jur. N. S. 1010; 9 W. R. 611; 121 E. R. 697.

*Annotation:—Mentd. Hughes v. Graeme* (1864), 33 L. J. Q. B. 335.

**535. — Agreement by infant.] — CLAYTON v. ASHDOWN** (1714), 2 Eq. Cas. Abr. 516; 22 E. R. 435, L. C.

**536. — Terms endorsed on draft lease—Security for rent given to landlord—Acceptance of rent by landlord.]—**After a tenant at will entered into possession there was an agreement for a lease of the premises, but no lease was ever prepared; on the back of the draft there was an indorsement made & signed between the parties; rent had been paid & a receipt given for a quarter's rent, & a distress also had been put in by the landlord upon the tenant:—*Held*: not sufficient to alter the original tenancy at will into a tenancy from year to year.—*DOE d. BENSON v. FROST* (1851), 17 L. T. O. S. 145; 15 J. P. Jo. 378.

*Annotation:—Refd. Doe d. Davies v. Thomas* (1851), 6 Exch. 854.

**537. — Under clause in agreement—Till lease executed.]—**A. held premises under an agreement for a lease, whereby the lessor agreed to grant the same to him for three years, at the yearly rent of £84, payable quarterly, the lease to contain certain covenants on A.'s part; he further agreed to accept such lease on the terms aforesaid, etc.; & the lessor agreed that in such lease should be contained a covenant for quiet enjoyment, & it was mutually agreed that the instrument should act as an agreement only, & that until a lease should be executed, the rent, covenants & agreement agreed to be therein contained & reserved should be paid & observed, & the several rights

remedies should be enforced in the same manner if the same had been actually executed. No rent had been paid:—*Held*: there was a tenancy at will, created with a fixed & ascertained rent, & the landlord had a good right to distrain.—*ANDERSON v. MIDLAND RY. CO.* (1861), 3 E. & E. 614; 30 L. J. Q. B. 94; 3 L. T. 809; 25 J. P. 405; 7 Jur. N. S. 411; 121 E. R. 573.

*Annotation:—Apld. Kearsley v. Phillips* (1883), 11 Q. B. D. 621.

**Creation of tenancy from year to year.] — See Sub-sect. 1, B. (a), *post*.**

**B. Tenancy from Year to Year.**

**(a) In General.**

**538. On entry by tenant.] —**By agreement between F., the receiver appointed in Chancery

for lands & buildings thereon, & J., it was recited that J. had expended money in improving the premises on the understanding that a lease thereof should be granted to him on the terms after mentioned, pursuant to a previous agreement with parties at that time interested, in consideration whereof F. had consented to enter into this agreement. It was witnessed that F., in consideration of the premises, & according to his power, agreed with J. to let to him, & J. agreed to take, the land, with the buildings thereon lately converted at J.'s expense into a mill, & other buildings, to hold for twenty-one years at rent payable quarterly; & it was agreed that, when that agreement should have been approved of by the Ct. of Ch., or the master, or if it should be ascertained that such sanction was not necessary, a lease should be executed by F. to J., & a counterpart by J., under the terms in the agreement stipulated, which should contain covenants on the part of J. "to pay the said rent in manner before mentioned, damage by fire excepted," & to keep the premises in repair, & to deliver up possession of the premises, " & all the present additions," "but not including any buildings not shown" on a plan indorsed, in good repair, "damage by fire excepted." & that, until the lease should be granted, F. might distrain "for all or any part of the rent hereby agreed to be paid." Provided that the agreement should be in all respects subject to the approbation of the Ct. of Ch. or the master, F. undertaking to endeavour to obtain such approbation: but, if the approbation were refused, the agreement to be void. J. entered into possession, & erected new buildings:—*Held*: (1) J. was tenant from year to year on such terms as would be inserted in a lease pursuing the agreement, so far as they were applicable to a tenancy from year to year. (2) If any part of the premises originally demised were destroyed by fire, the result would be, not to destroy or suspend the whole rent, but to entitle J. to a deduction from the rent according to the proportion which the annual value of the destroyed part bore to the annual value of the whole: taking the whole to be the premises as originally demised, not as improved by subsequent additions made by J.—*BENNETT v. IRELAND* (1858), E. B. & E. 326; 28 L. J. Q. B. 48; 4 Jur. N. S. 1104; 120 E. R. 530.

*Annotation:—Refd. Swain v. Ayres* (1888), 21 Q. B. D. 289.

**539. —.] —**(1) An agreement that an outgoing tenant shall be paid for tillages on the expiration of his tenancy is not inconsistent with the terms of a tenancy from year to year.

(2) Where a tenant entered on possession of premises in pursuance of an unsigned agreement for a lease, he became a yearly tenant upon such of the terms in the unsigned agreement as were not inconsistent with such a tenancy (*per CUR.*).—*BROCKINGTON v. SAUNDERS* (1864), 13 W. R. 46.

**540. — & payment of rent.] — HARRISON v. STREAD**, No. 531, *ante*.

**541. —.] —**Where the occupier under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, on the terms of the agreement, & the landlord

**PART II. SECT. 5, SUB-SECT. 1.—B. (a).**

**538 i. On entry by tenant.] —**Where a tenant enters under an agreement void for uncertainty as to duration of tenancy there is a tenancy from year to year by implication of law.—*MORISON v. EDMISTON*, [1907] V. L. R.

**191.—AUS.**

**538 ii. —.] —KENNAN v. MURPHY** (1880), 8 L. R. Ir. 285.—IR.

**540 i. — & payment of rent.] — MARSHALL v. COUPON FURNITURE CO., LTD.**, [1916] St. R. Qd. 120.—AUS.

**i. — & improvements made.] —**

Where A. went into possession of premises as tenant to B., & had occupied for several years, without any terms of holding being agreed upon, & never paid any rent, but built a barn & made other improvements on the premises, & on being applied to for payment of rent after B.'s death,

may distrain.—*MANN v. LOVEJOY* (1826), Ry. M. 355, N. P.

*Annotations*:—*Apld.* *Doe d. Thomson v. Amey* (1840), 1 Ad. & El. 475. *Refd.* *Doe d. Tilt v. Stratton* (1828), Moo. & P. 183.

542. ———.]—Pltf. took possession of premises under an agreement for a lease to be granted to him for a term of ten years, at a yearly rent, payable half-yearly. No lease was executed, nor was the quantum of rent to be paid ascertained; but pltf. occupied under the agreement for three years, paying rent for two:—*Held*: this created a tenancy from year to year, & entitled the landlord to distrain for the arrears due, at the rate previously paid.—*KNIGHT v. BENETT* (1826), 3 Bing. 361; 11 Moore, C. P. 222; 4 L. J. O. S. C. P. 94; 130 E. R. 552.

*Annotations*:—*Apld.* *Cox v. Bent* (1828), 5 Bing. 185. *Refd.* *Watson v. Wand* (1853), 8 Exch. 335.

543. ———.]—Pltf., who had entered premises under an agreement for a lease, admitted a charge of half a year's rent in an account between him & his landlord:—*Held*: this constituted him a tenant from year to year, & liable to distress.—*COX v. BENT* (1828), 5 Bing. 185; 2 Moo. & P. 281; 7 L. J. O. S. C. P. 68; 130 E. R. 1031.

*Annotations*:—*Refd.* *Regnart v. Porter* (1831), 7 Bing. 451. *Braythwaite v. Hitchcock* (1842), 10 M. & W. 494; *Watson v. Wand* (1853), 8 Exch. 335; *Vincent v. Godson* (1854), 4 De G. M. & G. 548.

544. ———.]—By a memorandum of agreement, pltf. agreed to let to deft., & deft. agreed to take a house, etc., from June 24 then next ensuing, for the term of twenty-one years determinable at seven & fourteen years; that the lease to be granted by pltf. was to contain a covenant on her part for deft. to purchase the fee simple for £600 at any time within the first seven years of the term to be granted, & a covenant on the part of deft. for payment of the rent of £35, payable quarterly, clear of all deductions for taxes whatsoever; & that the insurance on the sum of £500 was to be paid by pltf., & to be repaid by deft. as an increased rent; to lay out within twelve months the sum of £100 on the said premises; to keep the premises in substantial repair, & all other usual covenants as in leases of houses in B.; & that deft. should execute a counterpart of lease when tendered to him by the solr. of pltf., & that the expense of the lease & counterpart was to be borne & paid by deft.:—*Held*: this was an agreement for a lease, & not an actual demise, & deft., having entered & paid rent under the agreement, became tenant from year to year, which tenancy could only be determined by a regular notice to quit, or a surrender in writing.

Here there are no words of demise . . . nothing is said as to rent . . . the instrument shows on the face of it that it was not intended to operate as a present demise but as an agreement for a future lease (PARKE, B.).—*CHAPMAN v. TOWNER* (1840), 6 M. & W. 100; 9 L. J. Ex. 54; 151 E. R. 338.

*Annotation*:—*Distd.* *Curling v. Mills* (1843), 7 Scott, N. R. 709.

545. ———.]—*DOE d. THOMSON v. AMEY*, No. 551, *post*.

546. ———.]—A., in July, 1823, proposes by letter to take a house of B., for five & a half years, at £86 *per annum*. A. enters into possession at Michaelmas 1823, & a draft lease is prepared, but not executed. In Sept. 1826, negotiations are entered into for enlarging the premises

& increasing the rent, & A. proposes, in consideration of additions & repairs by B., to take the house for seven, fourteen or twenty-one years, at the expiration of his present term. No instrument in the nature of a lease is ever executed, but a sum of money is expended by B. on the premises, in Sept. 1827, & at Michaelmas 1828 a rent of £87 is paid by A., & from that period the rent of £84 *per annum* is paid at Michaelmas, till the year 1835. On Mar. 18 in that year, A. gives B. notice of his intention to quit at the Michaelmas following:—*Held*: this was a good notice.

*Semble*: B.'s tenancy under his original proposal was from year to year, determinable at Michaelmas in any year, with notice, or at Lady Day 1829 without notice.—*BERREY v. LINDLEY* (1841), 3 Man. & G. 499; 4 Scott, N. R. 61; 11 L. J. C. P. 27; 5 Jur. 1081; 133 E. R. 1240.

*Annotations*:—*Consd.* *Kelly v. Patterson* (1874), L. R. 9 C. P. 681; *Croft v. Blay*, [1919] 3 Ch. 343. *Refd.* *Doe d. Clarke v. Smarridge* (1845), 14 L. J. Q. B. 327; *Doe d. Buddle v. Lines* (1848), 12 Jur. 80; *Trees v. Savage* (1851), 4 E. & B. 36.

547. ———.]—In debt for rent, stating a demise of a messuage, etc., by pltf. to H., for one year, & so on from year to year if they should respectively please, at the yearly rent of £140, payable quarterly, & an assignment by H. to deft., pltf. proved an agreement, signed by himself only, for a lease of the premises by him to H. for seven years, at £140 a year, that no lease had been actually executed, but that H. had entered into possession shortly after the date of the agreement, & had paid two quarters' rent, at the rate of £140 a year:—*Held*: this was sufficient evidence of a tenancy from year to year, as stated in the declaration, & in which H. had an assignable interest.

Although the law is clearly settled, that where there has been an agreement for a lease, & an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held that if he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding (PARKE, B.).—*BRAYTHWAITE v. HITCHCOCK* (1842), 10 M. & W. 494; 152 E. R. 565; *sub nom.* *BRAITHWAITE v. HITCHCOCK*, 12 J. Ex. 38; 6 Jur. 976.

*Annotations*:—*Apld.* *Coatsworth v. Johnson* (1886), 54 L. T. 520. *Mentd.* *Stowe v. Querner* (1870), L. R. 6 Exch. 155.

**Terms applicable to tenancy.**—*See* Sub-sect. 1, B. (b), *post*.

**Creation of tenancy at will.**—*See* Sub-sect. 1, A., *ante*.

#### (b) Terms Applicable to Tenancy.

548. **Terms to be included in lease.**—If a tenant holds under an agreement for a lease, which specifies the covenants to be inserted in the lease, with a right of entry, for a breach of them, an ejectment may be sustained on any breach, though no lease has ever been executed.—*DOE d. OLDERSHAW v. BREACH* (1807), 6 Esp. 06, N. P.

*Annotation*:—*Mentd.* *Doe d. Tilt v. Stratton* (1828), 4 Bing. 446.

549. ———.]—*MANN v. LOVEJOY*, No. 541, *ante*.

550. ———.]—Where a party occupies under an agreement for a lease during the whole of the term for which the lease was to be granted; a notice

stated that his improvements were worth more than the rent:—*Held*: it enured as a tenancy from year to year.—*DOE d. MACQUEEN v. HUNTER* (1842), 1 Kerr, 518.—*QAN*.

**m. Tenant retaining possession.**—Where a tenancy from year to year exists, & during its continuance the parties agree for a lease for a certain term, with a power to the tenant to

purchase, which is never executed, the tenant stands in his original situation after the agreement fails.—*DOE d. CROOKSHANK v. CROOKSHANK* (1841), 2 Ont. Dig. 3841.—*QAN*.

*Sect. 5.—Nature of tenancy created: Sub-sect. 1, B.  
(b); sub-sect. 2.]*

to quit is not necessary at the end of such term, as the agreement is evidence of the expiration of the tenancy as well as of the other terms of the holding.—*DOE d. TILT v. STRATTON* (1827), 3 C. & P. 164, N. P.; *subsequent proceedings* (1828), 4 Bing. 446.

551. —.] — Where a party is let into possession, & pays rent, under an agreement for a future lease for years, which is to contain a covenant against taking successive crops of corn, & a condition of re-entry for breach of covenants:—*Held*: he thereby becomes a yearly tenant, subject to the above terms & condition.

Whether the obligation to repair can be enforced under such circumstances, at least as to substantial repairs, may perhaps be questionable (*LORD DENMAN, C.J.*).—*DOE d. THOMSON v. AMFY* (1840), 12 Ad. & El. 476; 4 Per. & Dav. 177; 113 E. R. 892.

*Annotation*:—*Reid. Thomas v. Parker* (1857), 1 H. & N. 669.

552. —.] — By an indenture between pltf. & deft., it was covenanted that deft. should obtain a license from the lord of the manor, & should grant a lease to pltf., & that such lease should contain a covenant that deft. would, during the term, repair the premises demised, & that till such licence was obtained & such lease granted, pltf. should hold the premises as tenant from year to year, subject to the terms & conditions therein-before specified. In an action of covenant upon the indenture, pltf., in his declaration, set out the covenant that deft. should obtain the licence & grant the lease, & the proposed covenant to repair, & then alleged that the parties further covenanted that till the licence should be obtained & the lease granted, pltf. should be considered as tenant from year to year, etc., & that whilst pltf. should be possessed of the premises as tenant from year to year under the provisions of the indenture, deft. should repair the premises:—*Held*: no variance.—*PRICE v. BIRCH* (1842), 4 Man. & G. 1; 1 Dowl. N. S. 720; 11 L. J. C. P. 193; 134 E. R. 1.

553. — So far as applicable.] — Declaration stated that, by contract between pltfs. & deft., deft. agreed to procure, as soon as possible & within four months from the making of the contract, sufficient land for a communication between a certain railway & certain gas works, & stowing a certain quantity of coals, " & to grant a lease of the same land to pltfs. for a term of five years from the date of the contract," determinable at the end of three years " of the term " by notice from pltfs., which notice never was given; that pltfs. should pay to deft. for the land half-yearly an annual rent equivalent to 4 per cent. on the money paid by deft. for the purchase, the first payment to be made six months after possession of the land should be given to pltfs., from which time only the rent was to run: & that, " upon the termination of the term of five years, by effluxion of time or by notice," deft. should pay to pltfs. all the moneys expended by them for laying down sidings for the communication, & building sheds & erections on the land for the purposes mentioned in the contract, less 5 per cent. for deterioration. Allegation: that, in part performance of the contract, deft. procured the land & put pltfs. into possession; & that pltfs. occupied & used the land from that time " until the termination of the term of five years as hereinafter mentioned;" & during the term they so occupied, etc., did, pursuant to the contract, expend money for laying

down sidings, etc.; " that the term of five years has expired & terminated, to wit by effluxion of time;" that all things necessary had happened to entitle pltfs. to receive from deft., & render deft. liable to pay, the money expended, less etc.: but deft. had not paid. Plea: " That no lease of the land was ever granted to pltfs. by deft., pursuant to the agreement; nor did the term of five years in the agreement mentioned & contemplated ever come into, or have, any existence. On demurrer:—*Held*: a bad plea, for the granting of the lease by deft. was not a condition precedent to his liability to pay the money; & the meaning of the word " term " was not, in the agreement, restricted to a term created by lease, but included a period of five years during which pltfs. should occupy, after being put into possession under the contract.

The question is how many of the stipulations which were to have been introduced into the lease remain in force. . . . The question always is whether a stipulation is materially connected with the lease which has not been granted (*ERLE, J.*).—*BOWES v. CROLL* (1856), 6 E. & B. 255; 27 L. T. O. S. 77; 4 W. R. 484; 119 E. R. 859.

*Annotations*:—*Apld. Martin v. Smith* (1874), L. R. 9 Exch. 50. *Mentd. Christie v. Borely* (1860), 7 C. B. N. S. 561.

554. — Proviso for two years' occupation after notice to quit.] — An agreement for a lease of a farm contained a stipulation that the tenancy should continue until after two years' notice to quit had been given. The tenant occupied the farm, paid rent for some years, but no lease was executed:—*Held*: it could not be implied that the stipulation as to the two years' notice to quit was one of the terms under which the tenant held.—*TOOKER v. SMITH* (1857), 1 H. & N. 732; 156 E. R. 1396.

555. — —.] — *BENNETT v. IRELAND*, No. 538, *ante*.

556. — —.] — *COATSWORTH v. JOHNSON*, No. 583, *post*.

557. — Re-entry clause.] — *DOE d. OLDERSHAW v. BREACH*, No. 548, *ante*.

558. — —.] — *HAYNE v. CUMMINGS*, No. 1307, *post*.

559. — Expiration of tenancy — Yearly tenancy continuing for whole period of agreed lease.] — *DOE d. TILT v. STRATTON*, No. 550, *ante*.

560. — Covenant to repair.] — Declaration stated, that in consideration that deft. had become tenant to pltfs. of premises, upon the terms that he should, during his said tenancy, keep the premises in tenantable repair, deft. agreed to keep the same in tenantable repair during the said tenancy. It was proved that he took the premises, by written agreement, for three years & a quarter, & engaged to keep them in good repair during the time they should be in his occupation; but the agreement was neither stamped as a lease, nor signed by both parties:—*Held*: deft. was bound by the covenant to repair, though the agreement was void, as to the duration of the term, by Stat. Frauds: & the count was applicable.

In point of law he [def't.] was tenant at will for the first year subject to the terms of the agreement on his own part; & afterwards tenant from year to year subject still to that agreement which bound him to keep the premises in good repair (*PARKER, J.*).—*RICHARDSON v. GIFFORD* (1834), 1 Ad. & El. 52; 3 Nev. & M. K. B. 325; 3 L. J. K. B. 122; 110 E. R. 1127.

*Annotations*:—*Reid. Doe d. Marlow v. Wiggins* (1843), 4 Q. B. 367; *Arden v. Sullivan* (1850), 14 Q. B. 832.

**561.** — — —.] — By agreement dated Oct. 20, 1824, reciting a former agreement in 1819, for the grant of a lease of copyhold premises to B. for twenty-one years, from Mar. 25, 1820, & that B. had requested, & pltf. had agreed, that deft. should be accepted as tenant, & a lease should be granted to him instead of to B., on the same terms: & that pltf. was desirous to let the premises to deft. so soon as a good licence for that purpose should be granted to him by the lord of the manor, but not before: pltf., in consideration of the covenants & agreements thereafter contained on the part of deft., covenanted that he would, so soon as a good licence for that purpose should have been procured by him from the lord, at deft.'s expense, lease the premises to deft. for all the residue then unexpired of the term of twenty-one years from Mar. 25, 1820, etc.: & deft. thereby covenanted, from thenceforth yearly during the remainder to come of the term, to pay pltf. the rent, & also that he would from time to time during the term to be granted as aforesaid, keep the premises in repair, etc. The agreement contained also a covenant by pltf. for quiet enjoyment during the remainder of the term, on payment of the rent & performance of the covenants. Deft. entered upon the premises, & occupied them until the expiration of twenty-one years from Mar. 25, 1820:—*Held*: he was liable on the covenant for repair, although no lease had ever been made to him pursuant to the agreement, nor any licence obtained from the lord for that purpose.—*PISTOR v. CATER* (1842), 9 M. & W. 315; 12 L. J. Ex. 129; 152 E. R. 131.

*Annotation*:—*Reid*. *Martin v. Smith* (1874), 30 L. T. 268.

**562.** — — —.]—*PRICE v. BIRCH*, No. 552, *ante*.

**563.** — — —.]—An agreement of demise for three years, executed in Mar. 1845, in writing but not by deed, was prevented from operating as a lease by stat. 7 & 8 Vict. c. 76, & was not re-established as a lease by Real Property Act, 1845 (c. 100), which repealed the former Act, but took effect only as from Oct. 1845. A tenant entered into possession of a house under such agreement, made with A. & B., paid them rent, & so became tenant from year to year to them, on such terms of the agreement as were not inconsistent with a yearly tenancy. Afterwards A. assigned all his interest in the premises to B. The tenant continued in occupation, & paid rent to B. singly:—*Held*: under these circumstances, it was to be presumed, in the absence of proof to the contrary, that the tenant had, in consideration of B. permitting him to continue, agreed to hold of B. on the terms on which he had held of A. & B., & an action lay at the suit of B. singly against the tenant for not putting the premises in repair & keeping them repaired, there being a stipulation to that effect in the agreement with A. & B., & that being a term not inconsistent with a yearly holding.—*ARDEN v. SULLIVAN* (1850), 14 Q. B. 832; 19 L. J. Q. B. 268; 15 L. T. O. S. 45; 14 Jur. 712; 117 E. R. 320.

*Annotation*:—*Apld.* *Wyatt v. Cole* (1877), 36 L. T. 613.

**564.** — — —.]—*BOWES v. CROLL*, No. 553, *ante*.

**565.** — — —.]—*BENNETT v. IRELAND*, No. 538, *ante*.

**566.** — — —.]—*HAYNE v. CUMMINGS*, No. 1307, *post*.

**567.** — — —.]—*Covenant against taking successive crops of corn.*—*DOE d. THOMSON v. AMEY*, No. 551, *ante*.

# SUB-SECT. 2.—SINCE JUDICATURE ACTS.

*See, now*, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49); Law of Property Act, 1925 (c. 20), ss. 54, 55.

**568. Terms of lease agreed upon—Where tenant has entered—and paid rent.**—Deft. on May 29, 1879, agreed to grant & pltf. to accept a lease of a mill for seven years at the rent of 30s. a year for each loom run, pltf. not to run less than five hundred & forty looms. The lease to contain such stipulations as were inserted in a certain lease of May 1, which was a lease at a fixed rent made payable in advance, & contained a stipulation that there should at all times be payable in advance on demand one whole year's rent in addition to the proportion, if any, of the yearly rent due & unpaid for the period previous to such demand. Pltf. was let into possession & paid rent quarterly, not in advance, down to Jan. 1, 1882, inclusive, having run in 1881 five hundred & sixty looms. In Mar. 1882, deft. demanded payment of £1,005 14s. (£840 as one whole year's rent for five hundred & sixty looms at 30s., & £165 14s. as the proportionate part of the rent from Jan. 1 last), & put in a distress. Pltf. thereupon commenced his action for damages for illegal distress, for an injunction, & for specific performance, & moved for an injunction:—*Held*: (1) since the Jud. Acts the rule no longer holds that a person occupying under an executory agreement for a lease is only made tenant from year to year at law by the payment of rent, but that he is to be treated in every ct. as holding on the terms of the agreement.

(2) There is an agreement for a lease under which possession has been given... He holds under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specified performance (*JESSEL, M.R.*).—*WALSH v. LONSDALE* (1882), 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109, C. A.

*Annotations*:—*As to* (1) *Distd.* *Murgatroyd v. Silkstone & Dodsworth Coal & Iron Co., &c. p. Charlesworth* (1895), 65 L. J. Ch. 111. *Reid.* *Beighton v. Beighton* (1895), 64 L. J. Ch. 796; *Friary Holroyd & Healey's Breweries v. Singleton*, [1899] 1 Ch. 86; *Lewis v. Baker*, [1905] 1 Ch. 46; *White v. Grand Hotel Eastbourne* (1912), 106 L. T. 785; *Pole-Carow v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97. *As to* (2) *Apld.* *Allhusen v. Brooking* (1884), 26 Ch. D. 559. *Consd.* *Coatsworth v. Johnson* (1885), Cab. & El. 542; *Re Northumberland Avenue Hotel Co., Sully's Case* (1885), 54 L. T. 76. *Expld.* *Swain v. Ayres* (1888), 21 Q. B. D. 289. *Apld.* *Lowther v. Heaver* (1889), 41 Ch. D. 248. *Consd.* *Strong v. Stringer* (1889), 61 L. T. 470. *Apld.* *Foster v. Reeves*, [1892] 2 Q. B. 255. *Follid.* *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608. *Consd.* *Gilbey v. Cossey* (1912), 106 L. T. 607. *Apld.* *I. R. Comrs. v. Derby*, [1914] 3 K. B. 1186. *Consd.* *Purchase v. Lichfield Brewery Co.*, [1915] 1 K. B. 184; *Gray v. Spyer*, [1922] 2 Ch. 22. *Follid.* *Carrington Manufacturing Co. v. Saldin* (1925), 133 L. T. 432. *Reid.* *Furness v. Bond* (1888), 4 T. L. R. 457; *Slough Picture Hall Co. v. Wade, Wilson v. Neville*, *Held* (1916), 32 T. L. R. 542. *Generally, Mentd.* *List v. Sharp* (1897), 45 W. R. 243; *Lowe v. Adams*, [1901] 2 Ch. 598; *Jones v. Tankerville*, [1909] 2 Ch. 440; *Allen v. I. R. Comrs.*, [1914] 2 K. B. 327; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1.

**569.** — — —.]—*COATSWORTH v. JOHNSTON*, No. 583, *post*.

**570.** — — —.]—An agreement in writing, but not under seal, for a lease will operate as a lease & be valid, though the term of the lease agreed to be granted is more than three years.—*FURNESS v. BOND* (1888), 4 T. L. R. 457.

**571.** — — —.]—*MARDELL v. CURTIS* 1890, 43 Sol. Jo. 587.

*Annotation*:—*Follid.* *Zimble v. Abrahams*, [1903] 1 K. B. 577.

**572.** — — —.]—*MANCHESTER BREWERY Co. v. COOMBS*, No. 621, *post*.





of a colliery, deft. co., who were in possession & actually working the colliery, were ordered to pay certain arrears of rent, & in default to give up possession to C. Default being afterwards made, deft. co. accordingly gave up possession to C. The question was raised whether C. was entitled to distrain on goods upon the colliery which were admitted to be the property of the debenture holders of deft. co., & in the possession of the debenture holders' receiver:—*Held*: C., by taking the above mentioned order & insisting on his right of taking possession under it, had elected to treat deft. co. as purchasers, & had obtained an equitable remedy inconsistent with the continuance of the relation of landlord & tenant; C. was now in possession as vendor, & not as landlord; & consequently C. was not entitled to distrain on the goods.—*MURGATROYD v. OLD SILKSTONE & DODSWORTH COAL & IRON CO., LTD., Ex p. CHARLESWORTH* (1895), 65 L. J. Ch. 111; 44 W. R. 198; 12 T. L. R. 58; 40 Sol. Jo. 84.

**582. — Prior performance of conditions.**—A tenant of premises under a lease being desirous of surrendering it & obtaining a new lease, it was on Apr. 5, 1910, agreed between the tenant & the lessor that the lessor should upon the performance of certain conditions by the tenant grant to him such lease for the proposed term, which was to commence as from Lady Day, 1910. The agreed conditions were not in fact performed until after Apr. 29, 1910, the date of the coming into force of the Finance (1909-10) Act, 1910 (c. 8). In June, 1910, the lessor granted to the tenant the new lease in pursuance of the agreement. The Crown thereupon claimed from the lessor reversion duty on the benefit accruing to him by the determination of the old lease after the coming into force of the Act:—*Held*: as the tenant had not performed the conditions before Apr. 29, 1910, he was not entitled at that date to specific performance of the agreement to grant the lease, & could not then be treated, under the doctrine of *Walsh v. Lonsdale*, No. 568, *ante*, as being in the same position as if the lease had been granted; the agreement for the lease not being under the circumstances equivalent to a lease, did not operate as a surrender by operation of law of the old lease; the old lease was not determined until the grant of the new one; & the lessor was consequently liable to reversion duty.—*INLAND REVENUE COMRS. v. DERBY (EARL)*, [1914] 3 K. B. 1186; 84 L. J. K. B. 248; 109 L. T. 827.

**583. Tenant at will.—Entry by tenant—No payment of rent.**—Pltf. entered into possession of a farm under an agreement for a lease for twenty-one years from deft. Before any rent was due or had been paid the landlord gave pltf. notice to quit, & turned him out of possession, because he had done that which amounted to a breach of a covenant contained in the agreement & intended to be inserted in the lease. The tenant brought an action for trespass:—*Held*: pltf. was not entitled to recover; as he was in possession under an agreement for a lease for twenty-one years, & had paid no rent, he was only a tenant at will; his landlord was therefore entitled so to determine that tenancy; & the tenancy was not sub-

ject to or controlled by the provisions of the Conveyancing Act, 1881 (c. 41), s. 14.

Where any rent has been paid by the tenant, the landlord is estopped from denying the existence of a tenancy from year to year upon such of the terms of the agreement as are applicable to such a tenancy.—*COATSWORTH v. JOHNSON* (1885), 55 L. J. Q. B. 220; 54 L. T. 520; 2 T. L. R. 351, C. A.

*Annotation*:—*Consd.* *Swain v. Ayres* (1888), 21 Q. B. D. 289.

## SECT. 6.—TITLE TO BE SHOWN BY LESSOR.

### SUB-SECT. 1.—IN GENERAL.

*See, now*, Law of Property Act, 1925 (c. 20), s. 4 (2).

**584. General rule—Lessor must have title.**—A man cannot make a lease of land, the demesne possession whereof is not in him but in a stranger, at the time of the making of the lease (*BROOKE, J.*).—*ANON.* (1537), 1 Dyer, 20 a; 73 E. R. 58.

*Annotation*:—*Mentd.* *Pigot v. Garnish* (1599), Cro. Eliz. 678.

**585. —**—*JOHNSON v. BARRET* (1647), Aleyn, 10; 82 E. R. 887.

*Annotation*:—*Mentd.* *Harper v. Charlesworth* (1825), 4 B. & C. 574.

**586. Whether warranty of lessor's title implied.**—An agreement to grant a lease contains no implied engagement for general warranty of the land, nor for delivery of an abstract of the lessor's title.—*GWILLIM v. STONE* (1811), 3 Taunt. 433; 128 E. R. 172; *previous proceedings* (1807), 14 Ves. 128.

*Annotations*:—*Consd.* *Temple v. Brown* (1815), 6 Taunt. 60; *Souter v. Drake* (1834), 5 B. & Ad. 992. *Expld.* *Stranks v. St. John* (1867), L. R. 2 C. P. 376. *Refd.* *Wall v. City of London Real Property Co.* (1874), 30 L. T. 53.

**587. —**—*Seemle*: the owner of land agreeing to grant a lease, does not thereby impliedly engage that he has a good title to the fee simple, & that he will deliver a written abstract.—*TEMPLE v. BROWN* (1815), 6 Taunt. 60; 128 E. R. 955.

*Annotations*:—*Consd.* *Souter v. Drake* (1834), 5 B. & Ad. 992; *Stranks v. St. John* (1867), L. R. 2 C. P. 376.

**588. — Without restrictions as to user.**—A declaration in *assumpsit* stated, in substance, that deft. agreed to let & pltf. to take, a certain messuage & premises on certain specified terms, & that afterwards, in consideration of the premises, & that pltf., at the request of deft., had promised deft. to perform his part of the agreement, deft. promised pltf. to perform his part of the agreement, & that he then had power to let the messuage & premises to pltf. without restriction as to the purpose for which the same should be used & occupied:—*Held*: such a promise could not be implied from the relation of the parties, & the consideration alleged was insufficient to sustain it.—*JACKSON v. COBBIN* (1841), 8 M. & W. 790; 1 Dowl. N. S. 96; 10 L. J. Ex. 389; 151 E. R. 1259.

*Annotations*:—*Mentd.* *Kaye v. Outton* (1844), 2 Dow. & L. 291; *Stindt v. Roberts* (1848), 2 Saund. & C. 212.

**589. —**—An agreement to grant a lease contains an implied undertaking on the part of the intended lessor that he has title to grant such lease; & if he has not, he is liable to an action at

## PART II. SECT. 6, SUB-SECT. 1.

**586 i. Whether warranty of lessor's title implied.**—By pltf.'s letter, accepted & signed by defts., it was agreed that "pltf. should let to defts., or their assigns if preferred, for the longest time he could grant." On a

bill praying specific performance:—*Held*: defts. were bound to take such title as pltf. had at the agreement's date; & under its terms defts. were not entitled to call upon pltf. to show his lessor's title.—*MOLLOY v. STERNE* (1838), 1 Dr. & Wal. 585.—*IR.*

**586 ii. —**—An agreement to let to the vendee for six years the premises then occupied by the vendors, "as held under A." does not abrogate the vendors from the duty of proving A.'s title.—*LEATHEM v. ALLEN* (1850), 1 I. Ch. R. 683; 3 Ir. Jur. 73.—*IR.*



**Sect. 6.—Title to be shown by lessor: Sub-sects. 1, 2 & 3.]**

the suit of the intended lessee.—**STRANKS v. ST. JOHN** (1867), L. R. 2 C. P. 376; 36 L. J. C. P. 118; 16 L. T. 283; 15 W. R. 678.

**Annotations**.—**Consd.** Baynes v. Lloyd, [1895] 2 Q. B. 610. **Distd.** Hoare v. Chambers (1895), 11 T. L. R. 185. **Refd.** Low v. Bouverie, [1891] 3 Ch. 82.

**590.** —[—]**HOARE v. CHAMBERS** (1895), 11 T. L. R. 185.

**591. Right of lessee to insist on equitable interest being got in.]—REEVES v. GILL**, No. 715, *post*.

**592. Lessor unable to give covenant binding on successors.]—**The proposals on which the agreement for a lease was based stated that the lease was to be granted under a power; that one of the covenants by the lessor would be, not to let any of the neighbouring land for the making or burning of bricks; & that the lease for carrying the above proposals into effect, was to be in the form of one to be inspected at the office of B. Deft. agreed to accept a lease on the terms of the proposals, & to execute a counterpart of such lease agreeably with the form referred to. By the form referred to, the covenant against brick making was confined to the lessor's life:—**Held**: it was a good objection to the title, that pltf. could not bind the land by the covenant beyond his own life.—**DAWES v. BETTS** (1848), 17 L. J. Ch. 315; 13 L. T. O. S. 481; 12 Jur. 709, L. C.

**Defective title—Ground for refusing specific performance.]—**See Sect. 8, sub-sect. 1, F. (d), *post*.

**SUB-SECT. 2.—RIGHT TO PRODUCTION OF TITLE.**

See, *now*, Law of Property Act, 1925 (c. 20), s. 44.

**593. Right of lessee to require production.]—****WARING v. MACKRETH** (1801), For. 129; 145 E. R. 1135.

**594.** —[—]**—**On a bill by vendor for specific performance of an agreement to take a lease for twenty-one years, at rack rent; the master having reported in favour of the title shown by the abstract, & an exception being taken to the report; the question was, whether, where the agreement is silent, the vendor of a leasehold interest is not bound to produce the title of his lessor. The exception was allowed.—**FILDES v. HOOKER** (1817), 2 Mer. 424; 35 E. R. 1002; *subsequent proceedings* (1818), 3 Madd. 193.

**Annotations**.—**Refd.** Souter v. Drake (1834), 5 B. & Ad. 992; Stranks v. St. John (1867), L. R. 2 C. P. 376. **Mentd.** Portman v. Mill (1831), 1 Russ. & M. 696; Lucas v. James (1849), 7 Haro. 410.

**595. — No title at date of action.]—**Where A., by agreement made on Mar. 31, agreed to grant to B. a lease of certain premises habendum from Sept. 29, then next for twenty-one years, in consideration of £1,000 of which £10 was paid at the time of the agreement, £90 was to be paid on Apr. 13, & the residue on having possession of the premises; & B. being called upon to pay the £90, demanded an abstract of A.'s title, which was refused, whereupon he gave notice that he would rescind the contract, & commenced an action to recover the £10 which he had paid:—**Held**: that he was entitled to recover, it being proved at the trial that at the time when the action was commenced A. had no power to grant the lease contracted for.—**ROPER v. COOMBS** (1827), 6 B. &

C. 534; 9 Dow. & Ry. K. B. 562; 5 L. J. O. S. K. B. 200; 108 E. R. 548.

**Annotations**.—**Consd.** Stranks v. St. John (1867), L. R. 2 C. P. 376. **Refd.** Kintrea v. Preston (1856), 25 L. J. Ex. 287.

**596. — No title at date of agreement.]—**The declaration stated, that pltf., before & at the time of the agreement thereafter mentioned, was lawfully possessed for the residue of a term, whereof twenty-one years from June 24, 1841, were then unexpired, of a certain dwelling-house; & thereupon, on Mar. 21, 1841, by an agreement made between pltf. & deft., it was agreed that pltf. should, on or before June 24, 1841, let the same to deft., by a lease to be granted to deft. for twenty-one years, the term to commence from June 24, 1841. The declaration then stated general performance by pltf., & that he was ready & willing to let the house to deft., & to grant & execute a lease; yet that deft. did not nor would become his tenant, or accept the lease. Pleas, first, that pltf. was not lawfully possessed of the house, for the residue of the term, *modo et forma*; secondly, that pltf., at the time of the agreement, had not a good title to, & could not, on June 24, legally let the house to deft., or grant a lease for the term:—**Held**: (1) the first plea was bad, as containing an immaterial traverse, & the traverse in the second plea was too large, as it included the title of pltf. at the time of the contract, as well as at the time when the lease was to be granted; (2) the averment of pltf.'s readiness & willingness to grant the lease was equivalent to an averment of his having a title to grant it.—**DE MEDINA v. NORMAN** (1842), 9 M. & W. 820; 11 L. J. Ex. 320; 152 E. R. 347.

**Annotations**.—**As to** (2) **Refd.** Harmer v. Cornelius (1858), 5 C. B. N. S. 236; Stranks v. St. John (1867), 15 W. R. 678; British & Beningtons v. N. W. Cachar Tea Co., [1923] A. C. 48.

**597. —[—]**—**SIMPSON v. SADD**, No. 607, *post*.

**598. — Lease with option to purchase.]—****WELCHMAN v. SPINKS**, No. 1368, *post*.

**599. — Statutory restriction—Vendor & Purchaser Act, 1874 (c. 78), s. 2.]—**Pltfs. agreed to grant & deft. to accept a lease of a house & land, the lease to contain stipulations for the free use by deft. of a drive leading to the house. Pltfs. having brought their action to compel deft. to take the lease, deft. by his statement of defence denied pltfs.' title to demise the land & house, & alleged that they were subject to restrictive covenants, & also that the drive was not on land of pltfs., & that they had no power to give an easement over it. Deft. applied for production of pltfs.' title deeds, which they had scheduled as relating only to their freehold title. The judge held that by virtue of above sect. deft. was not entitled to production of the deeds showing pltfs.' title to the house & land, but that he was entitled to production of the deeds showing their title to the right of way:—**Held**: (1) this decision as regarded the deeds showing the title to the house & land was right, but an agreement for a right of way during the lease was an agreement for a lease of land within the meaning of above Act, the deeds showing a title to grant a right of way were therefore in the same position as the other deeds, & pltfs. were not bound to produce them; (2) above sect. did not prevent the purchaser from proving *alimunde* that the title was bad, & if he had raised a definite objection which the ct. could try, to would have had the usual right of a litigant to production of documents in the possession of the other party which were relevant to the issue so raised, but he acquired no such right by a mere denial of pltfs.' title, or by a vague general allegation that

the property was subject to restrictive covenants.—*JONES v. WATTS* (1890), 43 Ch. D. 574; 62 L. T. 471; 38 W. R. 725; 6 T. L. R. 168, C. A.

*Annotation*.—*As to (1) Reffd. Re Brotherton, Brotherton v. Brotherton, Re Markham's Settltmt.* (1907), 77 L. J. Ch. 58.

**600.** ——— **Constructive notice of lessee.**—A purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor, has constructive notice of the contents of such deed, & is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title. The rule that a lessee has constructive notice of his lessor's title has not been altered by sub-sect. 1 of above sect., but a lessee is now in the same position with regard to notice as if he had, before the Act, stipulated not to inquire into his lessor's title.—*PATMAN v. HARLAND* (1881), 17 Ch. D. 353; 50 L. J. Ch. 642; 44 L. T. 728; 29 W. R. 707.

*Annotations*.—*Consd. Garnham v. Skipper* (1885), 53 L. T. 940; *English & Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700. *Apld. Spencer v. Bailey* (1893), 69 L. T. 179. *Consd. Imray v. Oakshette*, [1897] 2 Q. B. 218; *Hooper v. Bromet, Raphael, Third Party* (1903), 89 L. T. 37. *Apld. Re Chafer & Randall's Contract*, [1916] 2 Ch. 8. *Reffd. L. C. & D. Ry. v. Bull* (1882), 47 L. T. 413; *Gainsborough v. Watcombe Terra Cotta Clay Co., Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991; *Nottingham Patent Brick & Tile Co. v. Butler* (1885), 15 Q. B. D. 261; *Hall v. Ewin* (1887), 57 L. J. Ch. 95; *Tritton v. Bankart* (1887), 56 L. T. 306; *Mogridge v. Clapp*, [1892] 3 Ch. 382; *Jones v. Lavington*, [1903] 1 K. B. 253; *Teape v. Douso* (1905), 92 L. T. 319; *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386; *Leschallas v. Woolf*, [1908] 1 Ch. 641; *Wilkes v. Spooner*, [1911] 2 K. B. 473.

**601.** ——— **Stipulation by lessor to deliver abstract of title.**—*Re PURSELL & DEAKIN'S CONTRACT* (1893), 37 Sol. Jo. 840.

**602.** ——— **Term derived out of a leasehold interest.**—Under a contract to sell & assign a term of years derived out of a leasehold interest in land, or to grant a lease for a term of years to be derived out of a leasehold interest with a leasehold reversion, the intended assign or lessee has the right to call for the lease under which the intended assignor or lessor holds.—*GOSLING v. WOOLF*, [1893] 1 Q. B. 39; 68 L. T. 89; 41 W. R. 106; 5 R. 81, D. C.

*Annotation*.—*Reffd. Baynes v. Lloyd*, [1895] 1 Q. B. 820.

#### SUB-SECT. 3.—WAIVER OF PRODUCTION OF TITLE.

**603. Must be pleaded.**—Waiver of production of lessor's title cannot be insisted on by him in his suit for a specific performance of an agreement for a lease, unless it is expressly alleged by the bill.—*GASTON v. FRANKUM* (1848), 2 De G. & Sm. 561; 13 L. T. O. S. 380; 13 Jur. 739; 64 E. R. 250; *subsequent proceedings* (1852), 18 L. T. O. S. 310, L. C.

*Annotations*.—*Reffd. Lawrie v. Lees* (1881), 7 App. Cas. 19. *Mentd. Scargill v. Hurry* (1850), 14 Jur. 847; *Hancocks v. Lablache* (1878), 3 C. P. D. 197.

**604. Onus of proof upon lessor.**—*WELCHMAN v. SPINKS*, No. 1368, *post*.

**605. What amounts to waiver—Failure to call for production.**—*Semble*: where the purchaser, after transmission to him of the original lease, prepares a draft assignment, & makes various objections as to repairs & other matters, but does not require production of the landlord's title, he will be considered to have waived its production.—*CLIVE v. BEAUMONT* (1848), 1 De G. & Sm. 397; 12 L. T. O. S. 530; 13 Jur. 226; 63 E. R. 1121.

*Annotations*.—*Reffd. Gaston v. Frankum* (1848), 2 De G. &

Sm. 561; *Scargill v. Hurry* (1850), 14 Jur. 847; *Simpson v. Sadd* (1854), 4 De G. M. & G. 665; *Corless v. Sparling* (1873), 21 W. R. 876.

**606.** ——— **—**—**LONDONDERRY (MARCHIONESS) v. BAKER**, No. 519, *ante*.

**607.** ——— **Possession taken by lessee—Conduct inconsistent with intention to investigate title.**—The mere taking possession of premises agreed to be leased does not prevent the intended lessee from requiring the intended lessor to show his title; but the question of waiver must be determined by the lessee's conduct, after taking possession, as to whether it was inconsistent with the notion, that he intended to call for the lessor's title or not.

It is not so universally the custom to call for a lessor's title, as in the case of a purchase of a fee simple, & therefore, smaller circumstances will satisfy the ct. that the right was waived.

Every party entitled to a lease has a *prima facie* right to call for his lessor's title.

The taking possession of premises & causing a valuation of the stock in trade therein, is inconsistent with the notion that the lessor's title would be required to be produced.

An intended lessee who advertises for the purpose of disposing of the premises intended to be leased, must be considered as feeling himself bound to accept a lease.

An intended lessee who writes to his lessor's solr. asking him to defer the preparation of the lease, as he has the prospect of finding a partner, is evidence that he has abandoned all notion of requiring a title.

By an agreement dated Nov. 12, 1853, certain leasehold houses were agreed to be demised by B. to D. for the respective residues of the terms of B. therein, less a few days, at fixed rents, payable quarterly. Possession was to be taken on Nov. 21 following, but no time was fixed for delivering the abstract, nor for investigating the title. Possession of part of the premises was taken by D. on Nov. 12, & of the rest on Nov. 21. On Nov. 25, D. wrote to request that the preparation of the leases might be deferred, as he had a prospect of finding a partner, who he thought should be included therein. On Dec. 1 drafts of the leases were sent by pltf.'s solrs., who afterwards made repeated applications that the agreement might be completed. On Mar. 18 the solr. of D. for the first time asked to be furnished with an abstract of title, which was refused. D. then declined to complete the purchase, & gave notice that he would give up possession of the premises on Mar. 31. D., in Dec. 1853, had advertised the premises to let with immediate possession:—*Held*: D. had by his acts waived his right to investigate the title of B., & specific performance of the agreement was decreed against D. with costs.—*SIMPSON v. SADD* (1854), 4 De G. M. & G. 665; 3 Eq. Rep. 263; 24 L. J. Ch. 562; 24 L. T. O. S. 205; 1 Jur. N. S. 457; 3 W. R. 118; 43 E. R. 668, L. C.

**608.** ——— **Antecedent knowledge of title—Treatment of agreement as binding.**—A. & B. agreed to grant mutual leases upon terms stated in a letter by A.'s solr., & accepted by B.'s solr. A.'s solr. sent B.'s a draft of a formal agreement, which was returned by B.'s unaccepted, as he considered the agreement already definite & binding. Both A. & B. had antecedent knowledge of the title, & B. appeared to have acted on his knowledge:—*Held*: there was a waiver of objections to the title on the part of B. & A. was entitled to specific performance.—*HERRING v. MILES* (1854), 3 W. R. 127.

# SECT. 7.—DUTY OF LESSEE TO INVESTIGATE LESSOR'S TITLE.

See, now, Law of Property Act, 1925 (c. 20), s. 44 (2), (4).

**609. Examination of title deeds.**—Whoever wants to be secure when he takes a lease should inquire after & examine the title deeds (LORD MANFIELD, C.J.).—KEECH v. HALL (1778), 1 Doug. K. B. 21; 99 E. R. 17.

*Annotations.*—**Reld.** Moss v. Gallimore (1779), 1 Doug. K. B. 279; Thunder v. Belcher (1803), 3 East, 449; Temple v. Brown (1815), 6 Taunt. 60; Alchorne v. Gomme (1824), 2 Bing. 54; Doe d. Fisher v. Giles (1829), 5 Bing. 421; Pope v. Biggs (1829), 9 B. & C. 245; Evans v. Elliot (1838), 9 Ad. & El. 342; Brown v. Storey (1840), 1 Man. & G. 117; Stranks v. St. John (1867), L. R. 2 C. P. 376; Gibbs v. Cruikshank (1873), L. R. 8 C. P. 454; Kearsley v. Phillips (1883), 11 Q. B. D. 621; Corbett v. Plowden (1884), 25 Ch. D. 678; Underhay v. Read (1887), 20 Q. B. 209; Tarn v. Turner (1888), 39 Ch. D. 456; Baynes v. Lloyd, [1895] 1 Q. B. 820. **Mentd.** Birch v. Wright (1786), 1 Term Rep. 378; Freeman v. Edwards (1848), 2 Exch. 732; Thorp v. Facey (1866), Har. & Ruth. 678; Lows v. Telford (1876), 1 App. Cas. 414; Heath v. Pugh (1881), 6 Q. B. D. 345.

# SECT. 8.—ENFORCEMENT—REMEDIES FOR BREACH.

## SUB-SECT. 1.—SPECIFIC PERFORMANCE.

### A. In General.

See, generally, SPECIFIC PERFORMANCE.

**610. Jurisdiction of court to grant—Further instrument intended.**—TOMLINSON v. HALL (1601), 1 Keb. 194; 83 E. R. 895.

**611.** ———.]—BROWNE v. WARNER, No. 314, ante.

**612.** ———.]—Although an agreement between an intended lessor & lessee may possibly amount at law to a present demise or assignment, yet if upon the face of the instrument it appears that a further instrument is necessary to carry the intention of the parties into execution a Ct. of Equity will decree specific performance of the agreement in that particular.—FENNER v. HEPBURN (1843), 2 Y. & C. Ch. Cas. 159; 63 E. R. 70.

**613.** ——— Agreement for surrender of lease—& grant of new lease—At reduced rent.]—Specific performance decreed of a parol agreement, in part performed, for surrendering a lease, & granting a new lease at a reduced rent. *Qv.*: whether the words "approved by me, J.S." affixed to certain

memoranda by way of approval of an arrangement in which the party is interested, is a signing within the Stat. Frauds.—PARKER v. SMITH (1845), 1 Coll. 608; 63 E. R. 564.

*Annotations.*—**Reld.** Maddison v. Alderson (1883), 8 App. Cas. 467. **Mentd.** Williams v. Evans (1875), L. R. 19 Eq. 547.

**614.** ——— Void lease operating as agreement.]—ZIMBLER v. ABRAHAM, No. 989, post.

**615.** ——— Damages not adequate remedy.]—MOLYNEUX v. RICHARD, No. 785, post.

**616.** Form of decree—Lease to be antedated—Term agreed nearly expired.]—MUNDY v. JOLLIFFE, No. 817, post.

**617.** Grant without prejudice to question of damages.]—Specific performance of the agreement must be decreed. The lease to be settled in chambers in case the parties differ. Defts. undertaking not to plead the decision of this ct. as a defence to any action at law brought by plffs. against defts. to recover damages, plffs. are at liberty to bring any such action against defts., the decision of this ct. being expressly without prejudice to the question of damages (LORD ROMILLY, M.R.).—THOMLINSON v. DIXON (1866), 14 W. R. 528.

**618.** What decree includes—Order to pay rent—From time originally agreed.]—Even before Jud. Act, 1873 (c. 69), in many cases, & certainly since, it has been the practice of the ct. to order a lessee in an action for specific performance to pay his rent which he ought to have paid, if the lease had been prepared, engrossed & executed so as to make the term run from the time originally agreed. . . . That is part of the judgment for specific performance, & not an accessory by way of damages (KEKEWICH, J.).—BOLTON PARTNERS v. LAMBERT (1889), 41 Ch. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; *affd.*, 41 Ch. D. 302, C. A.

*Annotations.*—**Mentd.** Bristol, Cardiff & Swansea Altered Bread Co. v. Maggs (1890), 44 Ch. D. 616; Metropolitan Asylums Board Managers v. Kingham (1890), 6 T. L. R. 217; *Re* Portuguese Consolidated Copper Mines, *Ex p.* Badman, *Ex p.* Bosanquet (1890), 45 Ch. D. 16; Dibbins v. Dibbins, [1896] 2 Ch. 348; *Re* Hemp, Yarn & Cordage Co., Hindley's Case (1896), 74 L. T. 627; Cook v. Williams (1897), 13 T. L. R. 481; *Re* Tiedemann & Ledermann, [1899] 2 Q. B. 66; *Flomring v.* Bank of New Zealand, [1900] A. C. 577; *Re* Gloucester Municipal Election Petition, 1900, Ford v. Newth, [1901] 1 K. B. 683; Reynolds v. Atherton (1921), 125 L. T. 690.

**What court may decree—High Court of Justice.**—See Jud. Act, 1873 (c. 66), ss. 24, 25, & now, Supreme Court of Judicature (Consolidation) Act,

## PART II. SECT. 8, SUB-SECT. 1.—A.

**610 i.** Jurisdiction of court to grant—Further instrument intended.]—BANK OF NOVA SCOTIA v. McDougall & Second, LTD. (1913), 23 W. L. R. 753; 11 D. L. R. 546; 4 W. W. R. 365.—CAN.

**610 ii.** ———.]—BIJOYA KANTA LAHINI CHOWDHURY v. KAILASH CHANDRA BHOUMIK (1919), 1 L. R. 46, Calo. 771.—IND.

**610 iii.** ———.]—M'CAUSLAND v. MURPHY (1881), 9 L. R. 9.—IR.

*n.*—Alleged agreement to grant new lease.]—MURPHY v. WADICK (1878), 4 V. L. R. 224.—AUS.

*o.*—Effect of injury to property.]—DENNISON v. KENNEDY (1859), 7 Gr. 342.—CAN.

*p.*—Both parties to agreement dead.]—A contract was entered into for a lease, & the intended lessee on the faith thereof entered into possession, paid rent & made improvements. Both parties died without executing any writing, & before any dispute as to the bargain arose. On a bill by the representatives of the intended lessee for specific performance, the

parol evidence was not alone sufficient to establish clearly the terms of the transaction; but there was found among the papers of the intended lessor, an unexecuted lease in his own handwriting which the ct. was satisfied contained the terms of the lease bargained for.—**Held**: a decree for specific performance should be made.—MCFARLANE v. DICKSON (1867), 13 Gr. 263.—CAN.

*q.*—Letters constituting offer & acceptance—Letters admissible in evidence though unregistered.]—SIR MAHOMED YUSUF v. SECRETARY OF STATE FOR INDIA (1920), 1 L. R. 45 Bom. 8.—IND.

*r.*—Power to enforce part of contract.]—In making a decree for the performance of part of the contract between the parties, it is not necessary for a ct. of equity to provide for the performance of the other part.—TRANT v. DWYER (1828), 2 Bll. N. S. 11; 4 E. R. 1034.—IR.

*t.* Form of decree—Lease to be antedated.]—A judgment for the specific performance of an agreement for a lease directed the lease to be antedated.—**Held**: the judgment should

also restrain the parties, in any action on the lease, from averring that same was of any other date.—M'ILROY v. TRAILL, [1899] 1 L. R. 459.—IR.

*a.*—Parties unable to agree on terms of lease—Reference to master.]—WELLAND COUNTY LIME WORKS CO. v. SHURR (1912), 23 O. W. R. 397; 4 O. W. N. 336; 8 D. L. R. 720.—CAN.

*b.*—Insertion of disputed covenant implied by law.]—**Semble**: where there is a concluded agreement for a lease, followed by a negotiation as to some of the covenants it is to contain, upon all of which the parties agree with the exception of one repudiated by deft., but by law implied in every lease, "unless otherwise expressly provided," the ct. will decree specific performance & the execution of a lease including the rejected covenant.—BLAKENEY v. HARDIE (1874), 8 I. R. Eq. 381.—IR.

*c.*—Covenant to pay tithes contrary to statute—Rent increased to include tithes—Intention of parties.]—An agreement for a lease, with a covenant by the tenant to pay all tithes, entered into after 2 & 3 Will. 4,

1925 (c. 49), s. 18; & generally, SPECIFIC PERFORMANCE.

— **County court.**—See COUNTY COURTS, Vol. XIII., p. 474, Nos. 232, 233.

— **Mayor's Court, London.**—See MAYOR'S COURT, LONDON.

### B. Of What Agreements.

**619. Yearly tenancy.**—The ct. refused to enforce specific performance of an agreement for a mere tenancy from year to year.—CLAYTON v. ILLINGWORTH (1853), 10 Hare, 451; 68 E. R. 1003.

**Annotations.**—*Distd.* Lever v. Koffler, [1901] 1 Ch. 543; Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608. *Consd.* Wedd v. Porter, [1916] 2 K. B. 91; Blane v. Francis, [1917] 1 K. B. 252.

**620.** —[ ]—LAVERY v. PURSELL, No. 862, *post*.

**621.** —[ ]—Deft. holds under an agreement for a lease under which he has been in possession & paid rent for several years. The whole contract has been performed up to the present time, except that the legal estate has not been actually demised. Deft. would have no defence to an action for specific performance, the sole object of which would be to compel him to accept the legal estate. Present plffs. are the assigns of the benefit of the agreement both by implication from the conveyance of the land subject to the lease, & by the express words of the agreement. Plffs. could, therefore, obtain specific performance in this ct. of the contract so far as it is incomplete. In saying this, I do not forget that this is a yearly tenancy only. Here deft.'s whole contention rests on the ground that plffs. have no legal remedy, & the grant of specific performance is necessary to give them their full rights. It is well settled that the assign of one of the parties to a contract can obtain specific performance of that contract against the other contracting party. Holding, therefore, as I do, that plffs. could obtain specific performance against deft., I find it laid down by the Ct. of Appeal that since the Judicature Acts there are not in such a case as this two estates as there were formerly, one at common law by reason of the payment of the rent, & another in equity under the agreement, but the tenant holds under the same terms, & has the same rights & liabilities as if a lease had been granted (FARWELL, J.).—MANCHESTER BREWERY Co. v. COOMBS, [1901] 2

Ch. 608; 70 L. J. Ch. 814; 82 L. T. 347; 16 T. L. R. 299.

**Annotations.**—*Consd.* Gray v. Spyer, [1922] 2 Ch. 22. *Refd.* Gilbey v. Cossey, [1912] 106 L. T. 607; Wedd v. Porter, [1916] 2 K. B. 91; Blane v. Francis, [1917] 1 K. B. 252; Cole v. Kelly, [1920] 2 K. B. 106. *Mentd.* Torkington v. Magee, [1902] 2 K. B. 427; Rickett v. Green (1909), 79 L. J. K. B. 193; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

**622.** —[ ]—LEVER v. KOFFLER, No. 624, *post*.  
**623. Short term.**—DE BRASSAC v. MARTYN, No. 736, *post*.

**624.** —[ ]—(1) Verbal acceptance of one or two alternatives contained in a written & signed offer is sufficient to constitute an enforceable contract as against the writer. (2) Specific performance of an agreement to let from year to year will be enforced.

Although specific performance is a discretionary remedy it will be granted even in the case of a very short term in a proper case (BYRNE, J.).—LEVER v. KOFFLER, [1901] 1 Ch. 543; 70 L. J. Ch. 395; 84 L. T. 584; 40 W. R. 506; 45 Sol. Jo. 320.

**625. Lease for one day.**—Pltf. must rely on his right to damages for it is not a case for specific performance, & that is a conclusive answer to the appeal. It is almost ludicrous to ask for specific performance of a lease for a single day (LINDLEY, L.J.).—GLASSE v. WOOLGAR & ROBERTS (No. 2) (1897), 41 Sol. Jo. 573, C. A.

### C. Necessity for Performance of Conditions Precedent.

#### (a) By Landlord.

**626. Payment of rent to superior landlord.**—A. agreed to underlet his house to B., the latter paying for the furniture at an appraisalment:—*Held*: B. was excused from the performance of the agreement, because A., at the time he quit the house, was in arrear for rent to his landlord.—PARTRIDGE v. SOWERBY (1802), 3 Bos. & P. 172; 127 E. R. 94.

**627. Liquor license to be obtained by lessor.**—License of different nature obtained.—Whether waiver of condition.—In May, 1860, deft. agreed to take a lease of a public-house from pltf. provided the latter could obtain a retail license, but if on any account it could not be obtained deft. was to be at liberty at any time to quit the premises. Deft. entered into possession, but could obtain no license, except on a promise that no excisable

c. 119, will be enforced by decreeing the execution of a lease reserving a rent compounded of the rent agreed upon, & the rentcharge in lieu of tithes, if that was the parties' intention.—DALY v. DUGGAN (1839), 1 I. Eq. R. 311.—IR.

#### PART II. SECT. 8, SUB-SECT. 1.—B.

**623 i. Short term.**—The ct. will not entertain a bill for specific performance of a contract for a lease of real estate for a year.—MARA v. FITZGERALD (1872), 19 Gr. 52.—CAN.

**d. Agreement for renewal.**—*Landlord having alternative right.*—Where the lessor covenants for a renewal of the term, or in default for payment for improvements, the option rests with the lessor either to renew or pay for the improvements: & the lessee cannot compel a specific performance of the contract to renew.—HUTCHINSON v. BOULTON (1852), 3 Gr. 391.—CAN.

**e. Lease for three lives—No lives named at date of agreement—No provision for naming lives.**—WHEELER v. D'ESTERRE (1814), 2 Dow, 359; 3 E. R. 894.—IR.

**f. — Or thirty-one years.**—A ct. of equity will specifically enforce an agreement for a lease for three lives or thirty-one years, being for a term customary & well understood.—FITZGERALD v. VICARS (1839), 2 Dr. & Wal. 298.—IR.

**g. Lease for one life—Life not named within time prescribed.**—The ct. decreed specific performance of a covenant to grant, on the death of the survivor of three *cœtus que vi*, a new lease for one life, to be named within twelve calendar months after the death of the first of the three lives, although the first life had not been named within the time prescribed by the covenant, the lessee being surprised by the misinformation of the lessor's agent, & therefore unable to name the life at the proper time, & there being no difficulty in ascertaining the compensation.—FIRMAN v. ORMONDE (LORD) (1829), Beat. 347.—IR.

**h. Lease renewable for ever—Conduct of landlord amounting to abandonment of right.**—Where the lessor in a lease of church lands, with a *toties quoties* covenant for renewal

was, as the ct. held, upon the construction of the lease, entitled to enforce the taking out of a renewal by the tenant, but had neglected for a period of twenty-five years to do so, & permitted the tenant to deal with the holding as an ordinary tenancy from year to year:—*Held*: the lessor had so dealt with the property as reasonably to lead the tenant to believe that the covenant for renewal was at an end, & therefore, the covenant should not be enforced in a ct. of equity.—PRISON v. BRATT (1889), 25 L. R. Ir. 5.—IR.

**k. — Implied covenant.**—WARD v. M'ROBERTS (1890), 25 L. R. Ir. 224.—IR.

#### PART II. SECT. 8, SUB-SECT. 1.—C. (a).

**i. Covenant to repair.**—COUNTER v. M'ATHERSON (1845), C. R. 1 A. C. 230.—CAN.

**m. Failure to give exclusive possession.**—An agreement for a lease of a store & the basement thereof loses its binding effect upon the refusal of the lessor to give to the lessee exclusive possession of the basement.—

**Sect. 8.—Enforcement—Remedies for breach: Sub-sect. 1, C. (a) & (b), D. & E.]**

licitors should be sold for consumption on the premises. Deft. took a license on these terms & underlet the premises till May, 1861, when he gave pltf. notice to quit:—*Held*: the condition had not been fulfilled, & deft. had not waived it, & consequently a bill for specific performance of the agreement had been properly dismissed, but it ought to have been dismissed without costs.—*MODLEN v. SNOWBALL* (1861), 4 De G. F. & J. 143; 31 L. J. Ch. 44; 5 L. T. 299; 26 J. P. 21; 7 Jur. N. S. 1260; 10 W. R. 24; 45 E. R. 1138, L. J.

**628. Licence to sub-let to be obtained—Agreed penalty for non-performance.]**—Deft. agreed to grant to pltf. an underlease of certain premises, so soon as a lease should be granted to himself; & he covenanted that if the lessors should refuse to grant a licence to underlet, or in case such licence should not be obtained by a day named, then & in either of such cases deft. would pay pltf. £1,000, which sum it was mutually agreed between the parties should be the damages ascertained & fixed by them for not obtaining such licence. The lessors granted a lease to deft., but he refused to apply for a licence to underlease, & such licence was not in fact granted by the day named. If applied for, the lessors would grant the licence. Upon bill for specific performance of the agreement:—*Held*: the clause providing for the penalty did not absolve deft. from the duty of applying for a licence, & specific performance was decreed.—*LONG v. BOWRING* (1864), 33 Beav. 585; 10 L. T. 683; 28 J. P. 726; 10 Jur. N. S. 668; 12 W. R. 972; 55 E. R. 496.

**629. Agreement to lease when "fit for habitation"—Entry by lessee before completion.]**—B. agreed with C. to take a lease of a house which C. was building when it was "complete, finished & fit for habitation." B. took possession, but afterwards found various objections to it, contending that it was not properly finished. The matter being referred to an expert, he reported that, although there might be some objections, yet the house was "complete, finished & fit for habitation." A decree for specific performance of the agreement was granted.—*FAULKNER v. LLEWELIN* (1863), 9 L. T. 251; 11 W. R. 1055; *affd.*, 9 L. T. 557, L. J.

**630. Acquiescence in non-performance—Delay.]**—(1) A decree for specific performance of a contract cannot be accompanied by directing an inquiry whether a matter which was a consideration for entering into the contract has been, or can be, properly performed. Where a suit is instituted for specific performance of a contract, & the defence set up is, that the contract was made in consideration of certain promises which pltf. had not fulfilled, a delay to defeat that defence must be such as amounts to an acquiescence in the non-fulfilment of the alleged promises. Where the subject of the contract was an agreement to take the lease of a house, & the proposed tenant went into possession at once, & occupied for two years, but, while continuing in occupation, from time to time called on the landlord to fulfil promises which the tenant alleged to have been the inducement for the contract, & paid rent, but always paid it under protest:—*Held*: these circumstances

did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform the contract, but the payments were to be treated as merely made in respect of the actual use & occupation, & in no other character.

(2) Misrepresentation whereby one has been induced to enter into an agreement, may afford a good defence to a suit for specific performance of the agreement, although it be not such a clear & direct misrepresentation as would afford a good ground for a suit to set the agreement aside or for an action for damages upon it.—*LAMARE v. DIXON* (1873), L. R. 6 H. L. 414; 43 L. J. Ch. 203; 22 W. R. 49, H. L.; *varying* S. C. *sub nom.* *DIXON v. LAMARE* (1871), 19 W. R. 942.

*Annotations*:—As to (1) *Reid. Jones v. Joseph* (1918), 87 L. J. K. B. 510; *Abram S.S. Co. v. Westville Shipping Co.*, [1923] A. C. 773. *Generally, Mend. Hembrow v. Talbot* (1892), 36 Sol. Jo. 712.

**(b) By Tenant.**

**631. Lease for lives—Lessee to nominate lives—No nomination after date of commencement.]**—*ALLEN v. WEDGEWOOD* (1616), 3 Bulst. 168; J. Bridg. 39; 1 Roll. Rep. 373; 81 E. R. 142.

**632. Payment of fine on given day.]**—An ecclesiastical corp. is not bound by any agreement, unless it can be manifested by deed. Time is of the essence of a contract for the granting of a lease by such a corp., where part of the consideration is a fine which is to be divided amongst the existing members of the corp. Thus, where the majority of the Dean & Chapter of Ely accepted a proposal for a lease of church property, upon payment of a fine on a given day, & signed an entry in the corp. books, of their agreement to grant such lease, but the intended lessee failed on the day specified to pay the fine, the ct., on a bill filed by such intended lessee, refused to decree a specific performance of the agreement.—*CARTER v. ELY (DEAN)* (1834), 7 Sim. 211; 4 L. J. Ch. 132; 58 E. R. 817.

**633. Payment of money & performance of rules of society.]**—*TROTTER v. WATSON* (1869), L. R. 4 C. P. 434; 1 Hop. & Colt. 216; 38 L. J. C. P. 100; 19 L. T. 785; 17 W. R. 330.

**634. Lease to nominee of another—Under-taking to nominate.]**—Pltf. sued for specific performance of an agreement, alleged to be contained in a correspondence with deft., that deft. would grant a lease to a nominee of pltf. on behalf of a proposed limited co. At the time of the trial no co. had been formed, nor had pltf. appointed a nominee:—*Held*: (1) the decree for specific performance could not be supported, for that the appointment of a nominee to accept the lease was a condition precedent, the performance of which it was necessary for pltf. to allege in his claim; (2) as to pltf.'s right to damages in the alternative, the ct. was of opinion that the correspondence did not amount to a concluded agreement, & therefore the action wholly failed.—*WILLIAMS v. BRISCO* (1882), 22 Ch. D. 441; 48 L. T. 198; 31 W. R. 907, C. A.

*Annotations*:—As to (1) *Reid. Ellis v. Rogers* (1885), 29 Ch. D. 661; *Wylson v. Dunn* (1887), 34 Ch. D. 569.

**D. On Whose Application decreed.**

**635. Assignee of proposed lessee—Covenant including assigns.]**—*BRADSHAW v. SUTTON* (1698), Colles, 25; 1 E. R. 162, H. L.

*CRICHTON'S, LTD. v. GREEN* (1915), 30 W. L. R. 793; 8 W. W. R. 224.—*CAN.*

**PART II. SECT. 8, SUB-SECT. 1.—C. (b).**

*n. Covenant to give security for*

*performance of covenants.]—MURPHY v. SCARTH* (1858), 16 U. C. R. 48.—*CAN.*

*o. Covenant to spend money on buildings.]—WILLIAMS v. LANGLEY* (1855), 7 Ir. Jur. 264.—*IR.*

*p. Covenant to raise & sell ore.]—*

*WAYNE v. HUGHAN* (1890), 9 N. Z. L. R. 295.—*N.Z.*

*q. Covenant to pay rates.]—MERRIE v. MCKAY* (1897), 16 N. Z. L. R. 124.—*N.Z.*



**636. — Bankruptcy of lessee—Trustee in bankruptcy.**—On entering into personal covenants.]—Under an agreement for a lease, containing a covenant against alienations, & a proviso for re-entry for breach of the covenant, the lessee, after having been in possession for many years, conveyed all his property to trustees, for the benefit of his creditors, & subsequently a commission of bkpcy. issued against him, & he was found bkpt. On the trial of an ejectment at law, it was held that the deed was an act of bkpcy., & void, & that it did not operate as a valid assignment of the lease, & was therefore no forfeiture. On a bill by the assignees for the specific performance of the agreement, the ct. decreed that the assignees were entitled to a lease, according to the agreement, on personally entering into those covenants, which the bkpt., if solvent, would have been bound to enter into.—**POWELL v. LLOYD** (1828), 2 Y. & J. 372; 148 E. R. 962.

*Annotations:—*Consd. **Crosbie v. Tooke** (1833), 1 My. & K. 431. **Refd.** **Buckland v. Papillon** (1866), 13 L. T. 736.

**637. — Assignee capable of performing covenants.**—It is no defence to a bill, filed against a landlord for specific performance of an agreement for a farming lease, by a person to whom the benefit of the agreement has been assigned, that the party with whom the landlord contracted has become insolvent, provided the assignee is solvent, & in a condition to enter into the usual covenants, & there is no evidence that the contract was entered into upon considerations personal to the assignor.—**CROSBIE v. TOOKE** (1833), 1 My. & K. 431; 1 Mont. & A. 215, n.; 2 L. J. Ch. 83; 39 E. R. 745, L. C.

*Annotations:—*Fold. **Morgan v. Rhodes** (1834), 1 My. & K. 435. **Consd.** **Buckland v. Papillon** (1866), L. R. 1 Eq. 477.

**638. — — — — —**—Where a landlord agrees to grant a lease to A. his exors., administrators & assigns, upon certain conditions, & A. assigns his interest in the contract to B. & then becomes bkpt., B., on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bkpcy.; & this right is not affected by a proviso, that in case of the bkpcy. of A. the landlord shall have power to re-enter & sell the benefit of the contract & the premises, & hold the proceeds, subject to his own claims, for the use of A.'s estate.—**MORGAN v. RHODES** (1834), 1 My. & K. 435; 1 Mont. & A. 214; 39 E. R. 746, L. C.

*Annotation:—***Refd.** **Buckland v. Papillon** (1866), L. R. 1 Eq. 477.

**639. — On guaranteeing responsibility of assignor.**—**Held:** (1) the transaction between the parties amounted to an agreement, which was in part performed by the continuance of the possession of the tenant after the expiration of the lease, & was therefore capable of being enforced in a ct. of equity; (2) the assignee of a contract to grant a lease, there being no covenant not to assign or the breach of such covenant being waived may sustain a bill in equity against the lessor for specific performance of the contract, provided he guarantee to the lessor the responsibility of the assignor.—**DOWELL v. DEW** (1842), 1 Y. & C. Ch. Cas. 345; 12 L. J. Ch. 158; 62 E. R. 918; *affd.* (1843), 12 L. J. Ch. p. 164; 7 Jur. 117, L. C.

*Annotations:—*As to (1) **Consd.** **Gas Light & Coke Co. v. Towse** (1887), 35 Ch. D. 519. As to (2) **Consd.** **Buckland v. Papillon** (1866), L. R. 1 Eq. 477. **Distd.** **Purchase v. Lichfield Brewery Co.** [1915] 1 K. B. 184. *Generally,* **Mentd.** **Gregory v. Wilson** (1852), 9 Hare, 683; **Crofts v. Middleton** (1855), 2 K. & J. 194.

**640. — Lease to lessee void.**—A director of a co. cannot enter into a contract with such co. for his own advantage. Where, therefore, S., a director of a co., had entered into an agreement to occupy certain refreshment rooms at a railway station at a certain rent:—**Held:** (1) he was incompetent to maintain a suit for specific performance, against the co.; & (2) any sub-lease made by him of such rooms could not be sustained, & bill by sub-lessee dismissed with costs.—**FLANAGAN v. GREAT WESTERN RY. Co.** (1868), L. R. 7 Eq. 116; 38 L. J. Ch. 117; 19 L. T. 345.

*Annotation:—***Generally,** **Mentd.** **County Hotel & Wine Co. v. L. & N. W. Ry.**, [1919] 2 K. B. 20.

**641. Proposed lessee under prior agreement—As against subsequent lessee.**—With notice of prior agreement.]—A. agreed to take a lease of certain lands, but previous to his signing the articles, he had notice that B. has a prior agreement for a lease of the same lands. A. disregarded this notice, & procured the lease to be granted to his son:—**Held:** this notice to the father affected the son, & the prior agreement being established, he was decreed to deliver up the possession.—**COOTE v. MAMMON** (1724), 5 Bro. Parl. Cas. 355; 2 E. R. 727, H. L.

**642. — — — — —**—Without notice of prior agreement.]—**CARTWRIGHT v. HOOGSTOEEL**, No. 301, *ante*.

**643. Principal—On whose behalf lease negotiated.**—**TAYLOR v. SALMON**, No. 661, *post*.

#### E. Against Whom decreed.

**644. Heir of intending lessor.**—The heir is sued to make a lease, for which his elder brother took a fine, or to repay the fine. The bill prays relief against deft. as brother & heir, for that pltf. paid to his brother deceased, a fine of thirty-four pounds for a lease, who died before the same was made; & therefore desires either to have the lease made by the heir, or his money again; thereupon it is ordered, deft. shall answer an injunction.—**KEEM v. MERE** (1579), Cary, 77; 21 E. R. 41.

**645. — Infant.**—A. having agreed to grant a lease to B. died before granting it, leaving an infant heir. B. filed a bill against the infant for specific performance, which was decreed:—**Held:** each party should bear his own costs.—**LONGH-NOTTO v. MORSS** (1872), 26 L. T. 828.

**646. Assignee of lessor—With notice.**—**JACKSON'S CASE** (1609), Lane, 60; 145 E. R. 299.

**647. — — — — —**—If a party enters into an agreement for a lease & then sells the property, the party buying the property with knowledge of that agreement cannot set up his title against the party claiming the benefit of that contract, because if there had been an equity attaching to the property in the owner, the owner is not permitted to give a better title to the purchaser with notice, than he himself possessed (**LORD COTTENHAM, C.**).—**TULK v. MOXHAY** (1848), as reported in 1 H. & Tw. 105; 18 L. J. Ch. 83; 13 L. T. O. S. 21; 47 E. R. 1345, L. C.

*Annotations:—***Mentd.** **Marker v. Marker** (1851), 9 Hare, 1; **Patching v. Dubbins** (1853), Kay, 1; **Child v. Douglas** (1854), Kay, 560; **Coles v. Sims** (1854), 5 De G. M. & G. 1; **Johnstone v. Hall** (1856), 2 K. & J. 414; **Schlumberger v. Lister** (1860), 6 Jur. N. S. 1336; **Brabant v. Wilson** (1865), 35 L. J. Q. B. 49; **Western v. Macdermott** (1866), 2 Ch. App. 72; **Wilson v. Hart** (1866), 1 Ch. App. 463; **Tulk v. Metropolitan Board of Works** (1867), 8 B. & S. 777; **Morland v. Cook** (1868), L. R. 6 Eq. 252; **Catt v. Toulser** (1869), 4 Ch. App. 654; **Keates v. Lyon** (1869), 4 Ch. App. 218; **McLean v. McKay** (1873), L. R. 6 P. C. 327; **Leach v. Schweder** (1874), 9 Ch. App. 465, n.; **Aspden v. Seddon**,

#### PART II. SECT. 8. SUB-SECT. 1.—E.

2. **Purchaser—With notice of tenant's possession.**—**DRAPEK v. HOLBORN** (1874), 24 C. P. 122.—**CAN.**

3. **Grantee of reversion under compromise of action.**—**REILLY v. GARNETT** (1872), 7 L. R. Eq. 1.—**IR.**



**Sect. 8.—Enforcement—Remedies for breach: Sub-sect. 1, F. (b), (c), & (d) i.]**

**E. R. 26; sub nom. GORDON v. SMART, 1 L. J. O. S. Ch. 36.**

**688. —**]—A tenant having violated the conditions of an agreement for a lease of a farm, under which he had taken possession, the landlord brought an ejectment against him, upon a bill being filed by the tenant for a specific performance of the agreement, & to restrain proceedings at law, the ct. refused an injunction, on the ground that the tenant had himself violated the agreement.—**PORRETT v. BARNES (1823), 2 L. J. O. S. Ch. 142.**

**689. — Breach of building agreement.]—**A tenant was in possession of plots of land under an agreement for leases to be granted when he should have fulfilled certain conditions as to building. The intention of the parties was, in the view of the ct., that the agreements should be regarded as a lease. The conditions were, to the landlord's knowledge, not fulfilled within the appointed time, but after that date the landlord demanded rent as under the leases, & the tenant paid it:—**Held:** the landlord could not, on receiving the rent, stipulate that it was received "without prejudice to any breaches of covenant made up to that time in the agreement for leases." Conveyancing Act, 1881 (c. 41), s. 14, applies to an agreement for a lease of which the tenant is entitled, independently of the Act, to demand specific performance.—**STRONG v. STRINGER (1880), 61 L. T. 470; 5 T. L. R. 638.**

**Annotation:—****Refd.** *Wenman v. Lyon (1891), 60 L. J. Q. B. 223.*

**690. Breach of covenant of agreement—Unhusbandlike cultivation.]—**Tenant, having committed breaches of covenant by waste, treating the land in an unhusbandlike manner, etc., not entitled to specific performance of an agreement for a lease.—**HILL v. BARCLAY (1811), 18 Ves. 56; 34 E. R. 238, L. C.**

**Annotations:—****Consd.** *Bracebridge v. Buckley (1816), 2 Price, 200; Hare v. Burgos (1857), 5 W. R. 585; Coatsworth v. Johnson (1886), 54 L. T. 620. Refd.* *Reynolds v. Pitt (1812), 2 Price, 212, n.; Bowser v. Colby (1841), 1 Hare, 109; Walker v. Jeffreys (1842), 1 Hare, 341; Gregory v. Wilson (1852), 9 Hare, 683; Hills v. Rowland (1853), 22 L. J. Ch. 961; Bamford v. Creasy (1862), 3 Giff. 675; Re Brain (1874), L. R. 18 Eq. 389; Finch v. Underwood (1875), 33 L. T. 634; Barrow v. Isaacs, [1891] 1 Q. B. 417; Howard v. Fanshawe, [1895] 2 Ch. 581.*

**691. Breach of covenant to be inserted in lease.]—**Where there is an agreement for a lease, of such a nature that, in the usual course, a certain covenant would be introduced in it, & the intended lessee has done that which would be a breach of such covenant, he cannot compel the specific performance of the agreement.—**TURNER v. LEWIS (1831), 2 Coop. temp. Cott. 215; 47 E. R. 1134; sub nom. TUNNO v. LEWIS, 1 L. J. Ch. 177.**

**692. — Covenant to repair.]—**A strong case is required to induce the ct. to refuse specific performance of an agreement for a lease by a landlord, on the ground that the tenant & proposed lessee has not adhered to the conditions which would be the subject of covenant on his part in the lease; but where a tenant, contrary to the terms of the draft lease, has neglected to insure for eleven years, has allowed the premises to go out of repair yearly for four years, & has refused to permit the lessor or his agents to enter & view the condition of the premises, after notice to repair, the ct. will not, on bill filed by the tenant, after notice to quit has been given by the land-

lord, enforce specific performance of an agreement for a lease, notwithstanding a large sum of money has been paid out according to the agreement, & the premises occupied for upwards of thirty years under the agreement.—**GREGORY v. WILSON (1852), 9 Hare, 683; 22 L. J. Ch. 159; 19 L. T. O. S. 102; 16 Jur. 304; 68 E. R. 687.**

**Annotations:—****Apprvd.** *Rankin v. Lay (1860), 2 De G. F. & J. 65. Consd.* *Coatsworth v. Johnson (1886), 54 L. T. 520. Refd.* *Hills v. Rowlands (1853), 1 W. R. 422; Parker v. Taswell (1858), 2 De G. & J. 559; Bamford v. Creasy (1862), 3 Giff. 675; Ex p. Brain (1874), 22 W. R. 867; Hughes v. Met. Ry. (1876), 1 C. P. D. 120.*

**693. — Breach by underlessee—Involving forfeiture of head lease.]—****LEWIS v. BOND, No. 1479, post.**

**694. — Breach uncertain.]—****PAIN v. COOMBS, No. 466, ante.**

**695. —**]—(1) An agreement was made between A. & B. that A. should grant to B. a lease of a certain farm, upon the same terms as those contained in a lease already granted by A. to C., & that B. should be at liberty to repair & alter the farm buildings, & that A. should find or pay for the requisite materials. B. was let into possession, & paid rent for some years, but no lease was granted, & ultimately he filed a bill for specific performance, & an account of & payment for materials. A. objected that B. had committed breaches of covenant which would have entitled A. to determine the lease. The ct. being of opinion that it was doubtful whether A. could, under the circumstances of the case, have determined the lease for breaches of covenant, decreed specific performance, but ordered the lease to be ante-dated, so that the question might be tried at law.

(2) Though the claim for materials might be a mere money demand, yet as the ct. decreed specific performance of the main part of the agreement, it had jurisdiction to give relief in respect of this claim also.—**LILLIE v. LEGH (1858), 3 De G. & J. 204; 44 E. R. 1247, L. J.**

**Annotation:—***As to (1) Refd.* *Rankin v. Lay (1860), 2 De G. F. & J. 65.*

**696. —**]—A landlord had, in 1827, agreed to grant his tenant a lease, but none had been granted, though the tenant had been in possession. On a bill by the tenant for specific performance, the landlord set up, by way of defence, that the tenant had committed waste. The ct. directed the lease to be executed & ante-dated, & the question of waste to be tried at law.—**POYNTR v. FORTUNE (1859), 27 Beav. 393; 54 E. R. 154.**

**697. —**]—Where, in a suit for specific performance of an agreement for a farming lease, there is a conflict of evidence on the question whether ptff. has committed breaches of covenant which would have created a forfeiture of the lease if granted, the ct. will decree specific performance, directing the lease to be ante-dated, so as to enable deft. to try the question at law. But such decree will not be made unless the conflict of evidence leaves it in doubt whether there has been any breach which would render it proper to refuse specific performance. A breach for that purpose must be serious & wilful.—**RANKIN v. LAY (1860), 2 De G. F. & J. 65; 29 L. J. Ch. 734; 8 L. T. 680; 24 J. P. 645; 6 Jur. N. S. 685; 8 W. R. 591; 45 E. R. 546, L. C.**

**Annotation:—****Mentd.** *Morley v. Clavering (1860), 29 Beav. 84.*

**698. —**]—The ct. does not refuse specific performance of an agreement to grant a

the ct. will not decree a specific performance; but when there is a doubt as to whether there has been any breach

of the contract, & the evidence is conflicting, or the breaches of the agreement are nominal, the ct. may make

a decree leaving resp. to his remedy at law.—**CARTAN v. BURY (1860), 10 I. Ch. R. 387.—IR.**

*Inability to grant possession without resorting to litigation.*—BAYLY v. TYRRELL (1813), 2 Ball & B. 358.—  
18.

**Sect. 8.—Enforcement—Remedies for breach: Sub-sect. 1, F. (d) i. & ii., & (e).]**

**708. — Decree for so much as can be granted—Abatement of rent.]**—Pltf. offered to take a lease of a farm belonging to deft. at a rent of £500 *per annum*, specifying in his tender the closes which he wished to take, with their acreage, which amounted in the whole to 1,249 acres. Deft.'s agent desired to let only 214 acres with this farm, but he accepted pltf.'s offer without looking at the acreage included in it. He had in fact already let one of the closes to another person. Another tender had been made by a former tenant for the same farm, as compromising 235 acres, & deft.'s agent admitted in examination that he thought pltf. had tendered for the same quantity of land as the former tenant. Pltf. commenced an action for specific performance against deft., & was willing to take a lease of the 214 acres at a proportionately reduced rent:—*Held*: Deft. must grant pltf. a lease of 214 acres at a rent reduced from £500, in the proportion of 214 to 235.—*McKENZIE v. HESKETH* (1877), 7 Ch. D. 675; 47 L. J. Ch. 231; 38 L. T. 171; 26 W. R. 189.

*Annotations*:—*Reid*, *Re Aspinalls & Powell's Contract* (1889), 5 T. L. R. 446. *Mentd.* *Paget v. Marshall* (1884), 48 J. P. 85.

**709. — — — — —.]**—By an agreement in writing deft. agreed to grant a lease of certain premises to pltf.s, as yearly tenants, at the rent of £200, with an option to take a lease for seven, fourteen, or twenty-one years. Pltf.s. went into possession under the agreement, & exercised their option by asking for a lease for twenty-one years, when, on examining the title, it was for the first time discovered that deft. was only entitled to one moiety of the premises, the other moiety being vested in her infant son by descent. Pltf.s. claimed a lease of deft.'s moiety at half the agreed rent, & damages:—*Held*: pltf.s. were entitled to a lease on these terms, but without any inquiry as to damages, as there was no evidence of damage hitherto sustained.—*BURROW v. SCAMMELL* (1881), 19 Ch. D. 175; 51 L. J. Ch. 296; 45 L. T. 606; 46 J. P. 135; 30 W. R. 310.

*Annotations*:—*Consd.* *Hexter v. Pearce*, [1900] 1 Ch. 341. *Reid*, *Clayton v. Leech* (1889), 41 Ch. D. 103.

**710. — Lease by mortgagee—No power to lease—No concurrence of mortgagor.]**—A mtgee. of leaseholds, whose mtge. contained no leasing power, agreed to grant a lease of the mortgaged premises. The intended lessee was aware that the intended lessor was only a mtgee., & though the agreement contained no stipulation to that effect, both parties understood that the concurrence of the mtgor. was to be obtained. The mtgor., subsequently, refused to concur. Upon a bill by the intended lessee against the mtgee.:—*Held*: he was not entitled to a specific performance of the agreement, though he offered to take the lease without the concurrence of the mtgor.; & the case was not one in which the ct. would give damages; but the bill was dismissed without costs. *Qu.*: whether the ct. would have enforced specific performance even if there had been no understanding as to the concurrence of the mtgor.—*FRANKLINSKI v. BALL* (1864), 33 Beav. 560; 4 New Rep. 128; 34 L. J. Ch. 153; 10 L. T. 447; 10 Jur. N. S. 606; 12 W. R. 845; 55 E. R. 480.

**711. Waiver of objection—Antecedent knowledge of defect.]**—*FRANKLINSKI v. BALL*, No. 710, *ante*.

**ii. Where Lessor Plaintiff.**

**712. Whether good defence—Objection to title waived by conduct.]**—In a suit for the specific performance of an agreement to accept a lease, the ct., considering deft., the intended lessee, by his conduct to have waived all objections to the vendor's title, decreed a specific performance of the agreement; & referred it to the master to settle the lease. In settling the lease, it became necessary, for indentifying the premises, to produce before the master the original lease under which pltf. was entitled to the property, & from which lease it appeared, that the property in question was held, with other property, at one entire rent, & under some special covenants, no provision with respect to which was made in the agreement between pltf. & deft. On the hearing, for further directions, these facts being brought before the ct. in the shape of exceptions to the report:—*Held*: though deft. had, by his conduct, waived his right to the production of the lessor's title, yet, as, in the course of the proceedings, it had become necessary to produce that title, & that production showed that a sufficient lease could not be made to deft. according to the agreement, the ct. would not enforce a specific performance; & the bill was dismissed, but without costs.—*WARREN v. RICHARDSON* (1830), 1 You. 1; 159 E. R. 881.

*Annotations*:—*Expld.* *Darlington v. Hamilton* (1854), Kay, 550. *Consd.* *Harnett v. Baker* (1875), L. R. 20 Eq. 50; *Re National Provincial Bank of England & Marsh*, [1895] 1 Ch. 190. *Reid*, *Clive v. Beaumont* (1848), 1 De G. & Sm. 397; *Simpson v. Sadd* (1854), 4 De G. M. & G. 665; *Sheard v. Venables* (1867), 36 L. J. Ch. 922; *Best v. Hamand* (1879), 12 Ch. D. 1. *Mentd.* *Madeley v. Booth*, (1848), 2 De G. & Sm. 718; *Hume v. Bentley* (1852), 5 De G. & Sm. 520; *Drysdale v. Mace* (1854), 5 De G. M. & G. 103; *Andrew v. Andrew* (1856), 27 L. T. O. S. 161; *Turner v. West Bromwich Union Grdns.* (1860), 9 W. R. 155; *Osborn v. Osborn* (1870), 18 W. R. 421; *Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515; *Re Marsh's Purchase* (1894), 64 L. J. Ch. 255.

**713. — Agreement to lease by trustees for sale.]**—An agreement by trustees of a will, to grant an underlease of their testator's leasehold property is, *prima facie*, inconsistent with a trust for sale of it. There may be, however, circumstances to justify the agreement; but the ct. cannot enter into the consideration of those circumstances in a suit for specific performance between trustees & the underlessee, the *cestuis que trust* not being parties to it.—*EVANS v. JACKSON* (1836), 8 Sim. 217; *Donnelly*, 147; 6 L. J. Ch. 8; 59 E. R. 87.

*Annotations*:—*Reid*, *Re Walker & Oakshott's Contract*, [1901] 2 Ch. 383; *Re Judd & Poland & Sketcher's Contract*, [1906] 1 Ch. 684; *Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract*, [1922] 2 Ch. 824. *Mentd.* *Re Kennal & Still's Contract*, [1923] 1 Ch. 293.

**714. — Agreement by tenant for life ultra vires—Action by remainderman.]**—Lessees of way-leaves under a lease granted by a copyhold tenant in fee of the land entered into a negotiation for a new lease with the tenant for life under the lessor's will, which gave the tenant for life power of leasing. A correspondence ensued, in the course of which the tenant for life offered to grant a new lease at a certain rent, which offer was accepted by the lessors. The original lease contained a clause usual, if not universal, in the leases in the neighbourhood, giving the lessees the option of determining the lease on notice. The correspondence respecting the new lease was silent as to the insertion of such a clause, but one of the earliest letters alluded to the proposed lease

**PART II. SECT. 8, SUB-SECT. 1.—F. (d) ii.**

**k. Whether good defence—Title defective at time of agreement—No power to compel real owner to join in lease.]**—*PEARCE v. STEVENS* (1904), 24 N. Z. L. R. 357.—N.Z.

as a renewal of the former :—*Held* : (1) the lessees might have understood that such a clause was intended to be inserted in the new lease without putting a perverse or absurd construction on the correspondence, & whether such understanding was correct or incorrect, or was confined or not confined to the lessees they ought not to be ordered to accept the lease without such a clause ; (2) the tenant for life had not, under the will or otherwise, power to grant such a lease, & the reversioner, though able to fulfil the agreement, was not entitled to demand a specific performance of it.—*RICKETTS v. BELL* (1847), 1 De G. & Sm. 335 ; 10 L. T. O. S. 105 ; 11 Jur. 918 ; 63 E. R. 1093.

**715. — Outstanding equitable interest in third party.—Whether release can be insisted on.]**—A. agreed to demise certain premises to B. There was an outstanding equitable interest vested in C. :—*Held* : B. was bound to accept a demise from A. in which C. joined ; & was not justified in insisting on A. obtaining a release from C. in order to enable him alone to make a valid demise.—*REEVES v. GILL* (1838), 1 Beav. 375 ; 48 E. R. 985.

**716. — —.]**—Specific performance of an agreement to take a lease of lands for the purpose of a tannery will not be enforced when the proposed lease contained the usual covenant against carrying on noxious trades, although defts. had represented that they were about to conduct their business in a way which could not be open to objection on that score. Where it appears from the bill that pltf. is unable, from causes which he cannot control, to make a good title, a demurrer will be allowed, & pltf. will not be permitted to bring the cause to a hearing on the chance that he may by that time, or before certificate, be enabled to sue deft.—*REEVES v. GREENWICH TANNING CO., LTD.* (1864), 2 Hem. & M. 54 ; 71 E. R. 380.

**717. — Defendant's refusal grounded on frivolous objections.]**—If a party agrees to let an estate, & files a bill for the specific performance of the agreement, it will be dismissed, with costs, if, in the course of the suit, it should appear that the intended lessor had a defective title ; even though the objections on which the refusal to take the lease was grounded, were frivolous & untenable.—*BASKCOMB v. PHILLIPS* (1859), 29 L. J. Ch. 380 ; 1 L. T. 288 ; 6 Jur. N. S. 363.

(e) *Delay.*

**718. Whether good defence.—General rule.]**—Agreement in writing in 1880, between A. & B. for a lease to B. of a farm belonging to A., for three lives generally, no particular lives being named. C. purchased the farm from A., subject to the agreement, & received rent from B., who occupied the farm under the agreement till 1808, when B. discontinued the payment of rent, because C., who had not seen the agreement till 1807, then refused to perform it. Bill by B. in 1809, for a specific performance, naming the lives of three of the tenant's children, & decreed accordingly in the ct. below ; & the decree affirmed in the House of Lords, with some variations respecting the performance of previous conditions by the tenant.

The estate was purchased subject to the agreement ; & the equity of the case is, that the agreement should have been made good at the time of the purchase ; & though it is objected that the naming of the lives now renders the performance a different thing, which is the case, from what it would have been if the lives had been originally

named, since lives might then have been named, which might have dropped by this time, yet it is clear that the parties were going on as if the one had been entitled to performance, & the other had been bound to perform ; so there seems to have been a mutual default. I have said these few words, because I am anxious that this should not be understood as a decision, that under such an agreement as this, a party may lay by as long as he pleases, & then apply with effect for a specific performance. It is only on the particular circumstances of the case, taking it out of a general rule, that the decision is founded (LORD ELDON, C.).—*KENSINGTON (LORD) v. PHILLIPS* (1817), 5 Dow, 61 ; 3 E. R. 1253, H. L.  
*Annotation* :—*Consd. Pritchard v. Ovey* (1820), 1 Jac. & W. 396.

**719. — Delay by tenant.—Capable of being explained.]**—A. conveyed, or assigned his interest in lands to B. in consideration, among other things, that B. should make or give a lease back again to A. of a half or portion of the lands, & in consideration also of a loan of £200 by B. to A. B. covenanted to execute the lease accordingly, subject to the repayment of the £200 for which B. had a judgment. No lease was actually made, but A. remained in possession of his portion upon his equitable title. B. lent further sums of money to A. & obtained judgments for those sums, & then conveyed the lands, & assigned the judgments to C. C. issued writs of *fi. fa.* on the judgments, & in 1781, procured a sale by the sheriff of A.'s equitable interest ; & on ejectment brought on the demises of the purchaser, & of C., A. was turned out of possession. A. in 1782 filed his bill in Chancery for relief, & execution of a lease to him according to the agreement, but from embarrassment in his circumstances, did not further prosecute the suit till 1801. No steps were taken between 1782 & 1801 to dismiss the bill. In 1808 the bill was dismissed below. The decree of dismissal was reversed by the House of Lords, because the right to a suit in equity was not a proper subject of sale by the sheriff under a *fi. fa.* & the sale was a nullity ; & the delay in prosecuting the suit was well accounted for, & no steps were taken to dismiss the bill ; & at any rate, the right to the lease did not rest merely on the covenant by the landlord to make it, but was part of the consideration of that conveyance or assignment by which the landlord himself acquired his title. Therefore the principle of delay did not apply, & A. was still entitled to have his lease executed in terms of the contract ; & had his relief in equity, without the necessity of resorting for redress to the ct., out of which the *fi. fa.* issued.—*MOORE v. BLAKE* (1816), 4 Dow, 230 ; 3 E. R. 1147, H. L.

**720. — Two years' delay.]**—Bill by a lessee for the specific performance of an agreement for a lease dismissed, because it was not filed until more than two years after deft. had given notice to pltf. of his intention not to perform the contract on account of the latter not having fulfilled it on his part.—*HEAPHY v. HILL* (1824), 2 Sim. & St. 20 ; 57 E. R. 255.

*Annotations* :—*Ridd. Walker v. Jeffreys* (1842), 1 Harv. 341 ; *Parkin v. Thorold* (1852), 10 Beav. 59 ; *Sharp v. Milligan* (1856), 22 Beav. 608.

**721. — — Mining lease.]**—Lands were conveyed to a trustee, in trust to grant a lease of the mines under the same to certain persons for forty-two years, & at the request of the lessees, made at any time thereafter, to grant a further lease of the same mines for twenty-one years, to commence at the expiration of the first term ; the first lease to contain a covenant for



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renewal for the second term. The lease of forty-two years was made accordingly. Shortly before the expiration of the first term, the lessees applied for the renewal, which was refused. No proceedings were taken to enforce the performance of the covenant or trust for upwards of two years after the refusal:—*Held*: so far as the title to renewal depended on the covenant, the delay or acquiescence would be a defence in equity. *Semble*: the lessees had an equitable interest in the trust, which would not be divested by the delay alone, but the lessees, in support of their title to a decree for performance of the trust, must show that they had, by performing the covenants on their part, paid the price for which, on the instruments, the lessors had stipulated. The performance of the covenants by the lessees being doubtful, & the lessees declining to try issues as to that fact, the bill was dismissed with costs.—*WALKER v. JEFFREYS* (1842), 1 Harc. 341; 11 L. J. Ch. 209; 6 Jur. 338; 66 E. R. 1064.

*Annotations*:—*Consd.* *Watson v. Charlesworth*, [1905] 1 K. B. 74. *Refd.* *Parkin v. Thorold* (1852), 16 Beav. 59; *Macbryde v. Weekes* (1856), 22 Beav. 533. *Mentd.* *Kimber v. Eneworth* (1842), 1 Harc. 293; *Southcomb v. Exeter* (18p.) (C. 41 L. T. 742).

**722. ——— Five months' delay.—After repudiation of agreement by landlord.]**—Pltf. filed a bill for specific performance of a contract to lease certain coal mines to him. The contract was entered into in Feb. 1872. There was delay in completion, not, however, as far as appeared, attributable to pltf. In Sept. 1872, deft. gave notice that he would rescind the contract unless pltf. complied with certain requisitions within fourteen days, & on Oct. 29, 1872, he stated his intention of abiding by that notice. The bill was filed on Apr. 2, 1873. A demurrer allowed on the ground that, the notice having put the parties at arm's length, pltf. had been guilty of unreasonable delay in taking proceedings.—*LUXHAM v. LLEWELLYN* (1873), 28 L. T. 577; 21 W. R. 570, L. C.; *subsequent proceedings*, 21 W. R. 766. *Annotation*:—*Refd.* *Glasbrook v. Richardson* (1874), 23 W. R. 51.

**723. ——— Nineteen years' delay.]**—In 1855 A. agreed with B. that "in the event of B. marrying his daughter," he would grant him a ninety-nine years' lease of a shop, at C. "should he at any time require it" at a rent of £30 *per annum*. B. was let into possession of the shop & married A.'s daughter & duly paid the rent to A. & his assigns until Mar. 1874, when his then landlord gave him notice to quit. On a bill filed for specific performance of the agreement:—*Held*: B. by his laches & his acts had precluded himself from the relief to which he might have been entitled.—*DAVENPORT v. WALKER* (1876), 34 L. T. 168.

*Annotation*:—*Apld.* *Powis v. Dynevor* (1877), 35 L. T. 940.

**724. ——— Thirty-two years' delay.]**—The fixed rule of equity that specific performance of an agreement for a lease will not be granted after long lapse of time will not be relaxed merely on

account of possession & payment of rent during the whole of such time.

In 1884 pltf. verbally agreed with the agent of a predecessor in title of D., to build a shop, & hold the same on lease at a rent of 5s. *per annum*. Pltf. built the shop & occupied & paid rent for it up to action brought, but no lease was executed, nor were negotiations for a lease had. In 1876 pltf. sued D. for specific performance:—*Held*: specific performance ought not to be decreed.—*POWIS v. DYNEVOR* (LORD) (1877), 35 L. T. 940.

**725. ——— Tenant in possession.]**—*HEREFY v. GIBLETT*, No. 447, *ante*.

**726. ——— Payment of rent.]**—*SHARP v. MILLIGAN*, No. 669, *ante*.

**727. ——— Delay by landlord.—Delay in making out title—& giving possession.]**—Bill for the specific performance of an agreement to take a lease, for forty-two years, of iron & coal mines & machinery, for the purpose of trade, dismissed on account of delay on the part of the lessor to make out his title, & to give possession at the time stipulated in the agreement.—*PARKER v. FRITH* (1819), 1 Sim. & St. 199; 57 E. R. 80.

*Annotation*:—*Distd.* *Macbryde v. Weekes* (1856), 22 Beav. 533.

**728. ——— Where time of essence of contract.—Mining lease.]**—In contracts for the lease of working mines, time, though not named, is, from the fluctuating nature of the property, considered as of the essence of the contract, & the intended lessee may therefore fix a reasonable time for completion, & on the lessor's default, may rescind the contract.

A. on Oct. 4, contracted to grant a mining lease to B., & no time was mentioned for completion. On Dec. 10, B. gave notice to A. that unless he completed the contract within a month, he would rescind the contract:—*Held*: on A.'s default, B. was justified in giving the notice, the time was reasonable, & a bill by A. for specific performance was dismissed with costs, although there were matters essential for the completion, which did not depend on A. but on third parties.

A purchaser, offering to perform his part of a contract, required, by notice, the vendor to complete within a month:—*Held*: the purchaser could not afterwards set up, as a defence to suit for specific performance, misrepresentation of the vendor, of which he was aware at the time of giving the notice.

A. agreed to grant a lease to B. After considerable delay on the part of A., B. gave A. notice, that unless he completed within a month, he would rescind the contract. The day before the expiration of the time thus limited, A. forwarded to B. the drafts, but he furnished no abstract nor showed that he was in a situation to complete. B. rescinded the contract:—*Held*: it was effectual, & the ct. dismissed A.'s bill for specified performance with costs.—*MACBRYDE v. WEEKES* (1856), 22 Beav. 533; 28 L. T. O. S. 135; 2 Jur. N. S. 918; 52 E. R. 1214.

*Annotations*:—*Expld.* *Green v. Sevin* (1879), 41 L. T. 721. *Refd.* *Stuckney v. Keeble*, [1915] A. C. 386.

**PART II. SECT. 8, SUB-SECT. 1.—F. (e).**

**725 I. Whether good defence.—Delay by tenant.—Tenant in possession.]**—Delay is no bar to a claim for specific performance of an agreement for a lease where the lessee has already been in substantial enjoyment of what he is entitled to.—*SMITH v. RITCHIE* (1) (1919), 15 Tas. L. R. 60.—*AUS.*

**725 II. ———.]**—*CARTAN v. BURY* (1860), 10 I. Ch. R. 387.—*IR.*

**1. ——— Subsequent agreement to reduce rent.]**—A landlord filed a bill for the specific performance of a contract to accept a lease at the rent mentioned in the agreement, but which had been afterwards, by parol, reduced; & at the bar he undertook to execute a lease at the reduced rent. The ct. decreed accordingly.—*CLARKE v. MOORE* (1844), 1 Jo. & Lat. 723.—*IR.*

**m. ——— Delay by landlord.]**—Specific execution of a contract to grant

a lease decreed, the contract having been performed in all respects, save the execution of the lease: & time, if of the essence of the contract, not being the ground upon which the landlord refused, out of ct., to execute the lease.—*BURKE v. SMYTH* (1846), 3 Jo. & Lat. 193.—*IR.*

**n. ——— Lease for lives renewable for ever.—Ignorance of death of last life.]**—A landlord's ignorance of the death of the last life in a lease renewable for ever displaces the pre-

**729. — Tenant in possession—Payment of rent.]**—At the expiration in July, 1857, of a lease under which by assignment he was in possession of property, B. signed an agreement to accept from A. a new lease for thirty-one years, at the same rent as was reserved by the old lease, & payment of £800 on the day fixed for the completion, Aug. 1, 1857, with interest if the lease should not be completed on the day fixed. A draft lease was sent to B. for his approval but was not returned & no steps were taken by A. to press for completion. B. remained in possession & paid rent, but no payment of the £800 or interest was ever made or demanded. In 1871 A. died. On bill by her legal personal representative:—*Held*: as B.'s possession & payment of rent must be referred to the new agreement, & not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the £800 from Aug. 1, 1857.—*SHEPHEARD v. WALKER* (1875), L. R. 20 Eq. 659; 44 L. J. Ch. 648; 33 L. T. 47; 23 W. R. 903; *subsequent proceedings* (1876), 34 L. T. 230.

*Annotations*:—*Distd.* Davenport v. Walker (1876), 34 L. T. 168; Powis v. Dynevor (1877), 35 L. T. 940.

**730. — — — — —.]**—*POWIS v. DYNEVOR* (LORD), No. 724, *ante*.

**731. — Delay acquiesced in by both parties.]**—*KENSINGTON (LORD) v. PHILLIPS*, No. 718, *ante*.

#### (f) Expiration of Term.

**732. Determination by notice—According to proviso in agreement.]**—Bill for specific performance of a contract to make a lease to deft. dismissed; pltf. having after answer given a notice to quit according to a proviso for determining the lease.—*WESTERN v. PERRIN* (1814), 3 Ves. & B. 197; 35 E. R. 453; *sub nom.* *WESTON v. PIMM*, 1 Swan. 225, n.

*Annotation*:—*Distd.* Wilkinson v. Torkington (1837), 2 Y. & C. Ex. 726.

**733. Expiration by effluxion of time.]**—Specific performance refused of an agreement to grant a lease for a term expired before the hearing of the cause, the acts of waste committed during the possession of the premises not entitling pltf., in an action on the covenants to be inserted in the lease, to more than nominal damages.—*NESBITT v. MEYER* (1818), 1 Swan. 223; 1 Wils. Ch. 97; 36 E. R. 366.

*Annotations*:—*Distd.* Wilkinson v. Torkington (1837), 2 Y. & C. Ex. 726. *Consd.* Walters v. Northern Coal Mining Co. (1855), 5 De G. M. & G. 629. *Refd.* De Brasseac Martyn (1863), 2 New Rep. 512. *Refd.* Mundy v. Jolliffe (1839), 9 L. J. Ch. 95; Lavery v. Pursell (1888), 4 T. L. R. 353.

**734. —.]**—*WILKINSON v. TORKINGTON*, No. 857, *post*.

**735. —.]**—The case must be very special indeed which should induce the ct. to decree specific performance of an agreement for a lease after the stipulated term has expired.

In 1841 a long lease of a coal mine, pursuant to an agreement was made by O. to a trustee for a joint stock co., at a certain fixed rent, & a taleage rent; the lease was determinable every third year, upon the lessee giving a year's notice. The co. worked the mine for a short time, & then ceased to work it. The co. was ordered to be wound

up in 1850, & in 1852 the official manager, protesting against the validity of the lease as binding the co., gave notice to terminate it the following year. Upon bill filed in 1853 by the party claiming under O. against the co., seeking to have it declared that ten years' arrears of rent formed an equitable debt from the co., & that the co. were bound to make compensation for all breaches of covenant:—*Held*: looking at the bill as a bill for specific performance of an agreement to take the lease, no relief in the nature of specific performance could be granted, pltf. not having taken any steps until just before the expiration of the term.—*WALTERS v. NORTHERN COAL MINING CO.* (1855), 5 De G. M. & G. 629; 25 L. J. Ch. 633; 26 L. T. O. S. 107; 2 Jur. N. S. 1; 4 W. R. 140; 43 E. R. 1015, L. C.

*Annotations*:—*Apld.* De Brasseac v. Martyn (1863), 2 New Rep. 512. *Refd.* Gilbert v. Cossey (1912), 56 Sol. Jo. 363. *Mentd.* Cox v. Bishop (1857), 8 De G. M. & G. 845; Re Royal British Bank, Ex p. Walton, Ex p. Bue (1857), 26 L. J. Ch. 545; Wright v. Pitt (1870), L. R. 12 Eq. 408; Ramage v. Womack, [1900] 1 Q. B. 116.

**736. —.]**—Pltf. being entitled to specific performance of an agreement for a lease of a house for a short term, filed a bill to enforce his right, but allowed the term to run out before the cause was heard; the bill also prayed damages. The ct. refused to decree specific performance, or to award damages, but ordered the deposit paid on the signing of the agreement to be returned to pltf. Pltf. in such a case ought to apply to the ct. to have his cause advanced.—*DE BRASSEAC v. MARTYN* (1863), 2 New Rep. 512; 9 L. T. 287; 27 J. P. 742; 11 W. R. 1020.

*Annotation*:—*Refd.* Lever v. Koffler, [1901] 1 Ch. 543.

#### (g) Forfeiture involved by Grant of Lease.

**737. Lease of copyhold for twenty-one years—No evidence as to forfeiture.]**—Agreement to grant

a lease of copyhold premises for twenty-one years, & to put the same in repair, there being no evidence that to grant such lease would work a forfeiture, or that a licence of the lord could not be obtained. Decreed to be specifically performed. Though the ct. will not ordinarily decree specific performance of an agreement to repair, it is the habit of the ct. to decree specific performance of agreements involving the execution of leases, or other instruments containing covenants to repair.—*PAXTON v. NEWTON* (1854), 2 Sm. & G. 437; 65 E. R. 470.

**738. Forfeiture arising from conduct of defendant—Independent of contract.]**—The ct. will not refuse specific performance of a contract as against a lessee, upon the mere ground that he will thereby incur a forfeiture of his lease, but will look to the circumstances which give rise to the danger of forfeiture; & if it finds that the danger arises out of circumstances independent of the contract, & by reason of the conduct of the lessee, the ct. will decree specific performance, & leave the lessee to suffer the consequences.—*HELLING v. LUMLEY* (1858), 3 De G. & J. 493; 28 L. J. Ch. 249; 33 L. T. O. S. 18; 23 J. P. 356; 5 Jur. N. S. 301; 7 W. R. 152; 44 E. R. 1358, L. J. J.

*Annotation*:—*Refd.* Willmott v. Barber (1880), 15 Ch. D. 96.

#### (h) Hardship.

*See, generally, SPECIFIC PERFORMANCE.*

**739. General rule.]**—*ELY (DEAN & CHAPTER)*

assumption of laches by him.—*WARD v. M'ROBERTS* (1890), 25 L. R. Ir. 224.—*IR.*

**o. — Conduct amounting to abandonment.]**—Specific performance of an agreement refused, the party seeking performance having been held under the circumstances to have abandoned

the contract.—*GARRETT v. HEMBROUGH (EARL)* (1839), 2 Dr. & Wal. 441.—*IR.*

**PART II. SECT. 8, SUB-SECT. 1.—F. (f).**

**738 i. Expiration by effluxion of time.]**—*CALLAGHAN v. PEPPER* (1840),

2 L. Eq. R. 399.—*IR.*

**738 ii. —.]**—*DALTON v. BARRY* (1860), 12 Ir. Jur. 271.—*IR.*

**PART II. SECT. 8, SUB-SECT. 1.—F. (h).**

**739 i. General rule.]**—The ct. is not bound to enforce a bargain which



**Sect. 8.—Enforcement—Remedies for breach: Sub-sect. 1, F. (h), (i) & (j).]**

v. STEWARD (1740), Barn. Ch. 170; 2 Atk. 44; 27 E. R. 600, L. C.

*Annotation:—*Mentd. Robinson v. Duleep Singh (1879), 11 Ch. D. 794.

740. —[—]—HEXTER v. PEARCE, No. 684, ante.

741. **Underlessee ignorant of covenants in head-lease—Possession taken—Repairs by landlord.**—In an agreement to take a lease, the landlord was to put the premises in repair. The tenant took possession, & on his application the repairs were made after delay. A lease was then tendered, containing certain covenants in the landlord's lease:—*Held*: the delay in doing the repairs, & the tenant's previous ignorance of the covenants, would not excuse him from accepting the lease.—NASH v. COCHRANE (1839), 3 Jur. 973, L. C.

742. **Premises out of repair—Knowledge of lessee.**—Deft. agreed to take from pltf. a lease of a house, the walls of which were cracked & eighteen inches out of the perpendicular. Pltf. executed extensive repairs according to a specification drawn up by deft. While the repairs were going on the district surveyor told deft. that the walls were unsafe; but notwithstanding this, deft., after communicating with pltf., allowed the repairs to continue & afterwards entered into possession. Deft. subsequently received notice from the same surveyor, that in consequence of certain alterations which were being made to the adjoining house, it was no longer safe to remain in the house occupied by him, & he thereupon left, & delivered up the keys to pltf., which pltf. returned. Pltf. was afterwards obliged to pull down & rebuild the party wall. Pltf. filed his bill for the specific performance of the agreement to take a lease, & the ct. made a decree accordingly.—COOK v. WAUGH (1860), 2 L. T. 784, L. C.

743. **Repairing lease—House delivered in defective repair—Undue burden on tenant.**—A. agreed to take from B. a lease of an unfinished house, containing covenants on the part of A. to repair & keep in repair. B. agreed to finish the house. The ct. declined compelling A. to take the lease, the house having been finished in such a defective manner as to make it unreasonable.—TILDESLEY v. CLARKSON (1862), 30 Beav. 419; 31 L. J. Ch. 362; 6 L. T. 98; 26 J. P. 276; 8 Jur. N. S. 163; 10 W. R. 328; 54 E. R. 951.

*Annotations:—*Distd. Oxford v. Provand (1868), L. R. 2 P. C. 135; Hembrow v. Talbot (1892), 36 Sol. Jo. 712. *Refd.* Thorley v. Glossop (1876), 34 L. T. 169.

744. **Covenant not to assign without licence—Excessive consideration demanded by lessor.**—HILTON v. TIPPER, No. 863, post.

(1) *Illegality.*

745. **Statutory illegality—Covenant to renew—Lease granted before disabling statute.**—BETESWORTH v. ST. PAUL'S (DEAN) (1728), 1 Bro. Parl. Cas. 240; Cas. temp. King, 66; 2 Eq. Cas. Abr. 20; 1 E. R. 541, H. L.

*Annotations:—*Refd. Talby v. Official Receiver (1888), 13 App. Cas. 523. *Mentd.* Moore v. Mench (1875), 34 L. T. 11.

746. — **Agreement to lease at less than best rent—Mining lease.**—CARNE v. MITCHELL, No. 751, post.

747. — **Objection not raised at hearing—Taken subsequently to grant of decree.**—Where

one of the terms of an agreement for a lease by a rector of glebe lands was, that the rent should be payable half-yearly, instead of quarterly, as prescribed by the enacting statute, & a decree for a specific performance of the agreement had been made, no question having been raised by the lessee on this ground, but the objection was afterwards raised in chambers:—*Held*: the ct. could not alter the stipulation so as to render it consistent with the statute, & notwithstanding the decree made for specific performance, the ct. could not dispense with compliance with the stipulations of the Act, or compel deft. to take the lease with a reservation of the rent half-yearly. *Semble*: in such a case the proper course is to dismiss the bill without costs.—JENKINS v. GREEN (No. 2) (1859), 27 Beav. 440; 28 L. J. Ch. 820; 33 L. T. O. S. 24; 23 J. P. 277; 5 Jur. N. S. 304; 7 W. R. 304; 54 E. R. 173; *subsequent proceedings*, 28 Beav. 87; *sub nom.* GREEN v. JENKINS (1860), 1 De G. F. & J. 454, L. C. & L. JJ.

748. — **Agreement in ignorance of disabling statute.**—In Jan. deft. offered for sale by public auction certain cottage properties upon the terms that the purchaser of each cottage lot should have the right to have granted to him a lease thereof for ninety-nine years from Feb. 22, 1916, at a nominal yearly rent varying from 15s. to £1, & according to a form of lease set forth in the particulars of sale. At the auction R. became the purchaser of one of the lots, a ninety-nine years' lease of a cottage, at the price or premium of £55 & at a rent of £1 per annum; & D. became the purchaser of another lot, a similar lease of a cottage then in his own occupation, at the price or premium of £57 10s., & at the same yearly rent. The cottages were put up for sale by deft. in ignorance of the passing of 5 & 6 Geo. 5, c. 97, which received the Royal assent on Dec. 23, 1915. On becoming aware of the passing of the Act deft. declined to complete, & thereupon D. & R. commenced actions for specific performance of their contracts. No possession had been taken by either R. or D. under the contracts. It was clear that both the cottages were dwelling-houses to which the Act applied, & that the purchase money, if paid, would be a "premium" within the meaning of sect. 1, sub-sect. 2, of the Act:—*Held*: notwithstanding that the term to be granted was ninety-nine years, the leases would create tenancies within the Act, & the payments therefore of the sums for which R. & D. had purchased their cottages were premiums which deft. was prohibited by sect. 1, sub-sect. 2, from retaining; & the agreements to pay the premiums being illegal, & no possession having been taken under the contracts by either R. or D., deft. was entitled to be relieved altogether from the contracts upon repaying to R. & D. all moneys he had received under them.—REES v. BUTE (MARQUIS), DAVIES v. BUTE (MARQUIS), [1916] 2 Ch. 64; 85 L. J. Ch. 421; 114 L. T. 1029; 32 T. L. R. 425; 60 Sol. Jo. 528.

749. **Immorality—Letting flat to kept woman.**—Pltf. by his agent let a flat to deft. for a term of three years. The agent knew that deft. was the mistress of a certain man, & he assumed that the

would work great hardship on deft.—DOWSETT v. RAIID (1912), 15 C. L. R. 695.—AUS.

PART II. SECT. 8, SUB-SECT. 1.—F. (1).

*p.* Statutory illegality—Intent of

parties unobjectionable.]—When the plain intent of an agreement is unobjectionable, specific performance will be decreed according to that intent, though its terms were contrary to a statute.—DALY v. DUGGAN (1839), 1 E. R. 311.—IR.

*q.* Agreement partly illegal.]—Resp.,

the holder of certain conditionally purchased & conditionally leased lands, entered into an agreement to lease to applt. the lands so held:—*Held*: even if the agreement were unlawful or invalid or incapable of enforcement as to the conditional lease, applt. would have been entitled to

rent would come through her being a kept woman & would come from the man whose mistress she was; & he knew that the man went constantly to the flat to visit her. After the expiration of the term deft. continued as tenant from year to year. In an action to recover the rent:—*Held*: as the flat was let for an immoral purpose pltf. was not entitled to recover.

If a woman takes a house in order to live in it as the mistress of a man & to use it for that purpose, & the landlord at the time when the lease is executed knows that it is taken for that purpose, the landlord cannot recover the rent. He could not obtain specific performance of an agreement for a lease in such a case, nor could he sue upon it, as the law will not allow a contract which is tainted with immorality to be enforced (*BUCKNILL, J.*).—*UPFILL v. WRIGHT*, [1911] 1 K. B. 506; 80 L. J. K. B. 254; 103 L. T. 834; 27 T. L. R. 160; 55 Sol. Jo. 189, D. C.

(j) *Impossibility of Performance.*

**750. Premises destroyed by fire—After possession taken.]**—Where applt. had entered into a contract to demise certain premises for a term to resps., & previously to the commencement of the term to repair the old premises, & build a new warehouse; & resps. entered accordingly at the day agreed upon, but before applt. had completed the building & repairs, & before the lease was executed; & a fire soon after destroyed the premises:—*Held*: resps. were not bound to execute a lease & rebuild the destroyed premises, applt. not having completed his contract, & till such completion the premises were at his risk.

In ordinary cases of absolute & unconditional contracts the risk is the risk of the purchaser, because that which is the subject of the risk is in equity considered to be the property of the purchaser. But treating the contract to take a lease as a contract to purchase, the warehouse was never in that sense, purchased by the lessees until it was completed by the lessor; & until that had been done therefore, it was not the property of the lessees. They had never contracted to take an unfinished warehouse, they had never engaged to do any repairs, or to accept or to restore any unfinished or dilapidated buildings.—*COUNTER v. MACPHERSON* (1845), 5 Moo. P. C. C. 83; 4 L. T. O. S. 449; 13 E. R. 421, P. C.

**751. Present impossibility—Power subsequently acquired.]**—This bill was filed for the purpose of enforcing a contract for a lease of mines, at a rent of one-fifteenth of the minerals obtained. Deft. had subsequently granted a lease to another party at the same rent. The bill charged, that, under an Act of Parliament, it was directed that the best rent should be obtained by the owner of the mines, & although one-fifteenth was a fair rent when pltf.'s contract was entered into, that afterwards the mines having become more valuable, that amount was not then a fair rent, & the lease granted by deft. was therefore contrary to the Act. Upon a demurrer for want of equity:—*Held*: (1) a party coming for performance of a contract could only have it as it actually existed, & as the rent reserved in pltf.'s contract was not the best that could be obtained, it was contrary to the Act, & in effect fraudulent. Pltf., therefore, could not have his contract enforced, & the demurrer was allowed; (2) it was an undeniable proposition,

that when a party entered into a contract without having the power of performing it, & afterwards acquired the right to do so, he was then bound to perform it.—*CARNE v. MITCHELL* (1846), 15 L. J. Ch. 287; 10 Jur. 909.

**752. Condition precedent—Obtaining surrender of underlease—Probability of surrender.]**—A. contracted to purchase a leasehold estate subject to an underlease, of which seven years were unexpired, to B.'s father. A. agreed with B., on having a surrender of this underlease, to grant him a new lease, & B. agreed to procure a surrender of the underlease from his father, & to accept such new lease. B.'s father refused to surrender his underlease:—*Held*: (1) A. could not obtain specific performance of this agreement, there being no allegation that B. had professed himself legally competent to enforce a surrender; & the question as to compensation to A. being determinable by action at law for damages; (2) B. could not be compelled to accept a lease in the terms proposed at the expiration of the underlease.—*BEESTON v. STUTELY* (1858), 27 L. J. Ch. 156; 31 L. T. O. S. 112; 22 J. P. 385; 6 W. R. 200.

*Compare No. 863, post.*

**753. Stipulations as to repairs & fixtures—Effect of possession & expenditure.]**—C. in Aug. 1850, agreed to grant a lease of a farm & premises, etc., to pltf. for twenty-one years, & to put the premises into such a state of repair as he & pltf. should jointly agree upon. Pltf. entered into possession of, & expended considerable sums of money on, the farm, etc. In 1857, C. sold the farm & premises to deft., J., who mortgaged them to the other defts. In consequence of disputes between C. & pltf. no lease was granted. C. died in Nov. 1859, leaving W. & B. exors. In Nov. 1860, pltf. filed a bill against J. & others, praying, *inter alia*, that certain repairs might be done, & that damages might be awarded for nonperformance of the agreement. To that bill a general demurrer was filed & allowed. Pltf. then, having waived the stipulations which by the death of C. had become incapable of being performed, endeavoured to obtain a lease from J., but failed in doing so. An action of ejectment was then commenced against him, & he thereupon filed a bill in this ct. for an injunction & waiving the performance of certain conditions in the agreement, praying that J. might be decreed to make the repairs which were not dependent on the joint agreement of pltf. & C. & for specific performance. Defts. demurred, on the grounds that pltf. had not distinctly waived any part of the stipulations in the agreement, though he asked that defts. might be decreed to perform the repairs, & that this bill was identical with the one before the other ct.:—*Held*: the demurrer must be overruled, the stipulations as to repairs not being of the essence of the agreement, & therefore the fact of those stipulations having become incapable of being performed was no answer to a prayer for specific performance where there had been possession & expenditure.—*NORRIS v. JACKSON* (1862), 3 Giff. 390; 5 L. T. 576; 8 Jur. N. S. 930; 10 W. R. 228; 66 E. R. 464.

**754. Covenant—Not to carry on noxious trade—Agreement for lease for tannery—Lessee representing intention to conduct business in unobjectionable manner.]**—*REEVES v. GREENWICH TANNING CO., LTD.*, No. 716, ante.

specific performance as to the conditional purchaser.—*LANGLEY v. FORTER* (1906), 4 C. L. R. 167.—*AUS. r.*—*Semble*: where parties

enter into an agreement for the letting of lands, which is legal to a certain extent, the ct. will decree the performance of the agreement as far as it is

capable of legal execution.—*CAROLAN v. BRABAZON* (1846), 3 Jo. & Lat. 200.—*IR.*

**Sect. 8.—Enforcement—Remedies for breach:**  
*sect. 1, F. (j), (k), (l) & (m).]*

**755. — As to erection of buildings—Term nearly expired—Without commencement of work.]**—Lessor agreed with lessee to grant a lease of certain specified property if within a specified time lessee erected certain specified buildings, the time having nearly expired & the buildings not having been begun:—*Held*: at suit of lessor, the ct. could not decree specific performance of this contract.—*FEMALE ORPHANS' ASYLUM v. WATERLOW* (1868), 16 W. R. 1102.

**756. — & repair—Not executed before premises destroyed.]**—*COUNTER v. MACPHERSON*, No. 750, *ante*.

**757. Term to extend beyond landlord's interest—Interest increased after action brought.]**—Deft. having agreed to take part of a house upon certain conditions, with right to a lease for twenty-one years, afterwards repudiated the contract upon discovering that pltf. had power only to grant a lease for twenty years & a quarter, & that the performance of some of the conditions was beyond pltf.'s control. Pltf. filed his bill for specific performance. After the bill was filed, but before the hearing of the cause, he was in a position to perform the contract fully:—*Held*: deft. was not bound to wait; & the bill was dismissed with costs.—*FORRIER v. NASH* (1865), 35 Beav. 167; 6 New Rep. 361; 11 Jur. N. S. 789; 14 W. R. 8; 55 E. R. 858.

**Annotations:—***Consd.* Bellamy v. Debenham, [1891] 1 Ch. 412. *Reid.* Brewer v. Broadwood (1882), 22 Ch. D. 105. *Mentd.* Wylson v. Dunn (1887), 34 Ch. D. 569; Lee v. Soames (1888), 58 L. T. 366; Bolton Partners v. Lambert (1889), 41 Ch. D. 295; Warren v. Moore (1897), 14 T. L. R. 138; Re Cooke & Holland's Contract (1898), 78 L. T. 106; Smith v. Butler (1900), 48 W. R. 583; Brinkley v. Snell, [1916] 2 A. C. 599; Re Hailes & Hutchinson's Contract, [1920] 1 Ch. 233.

**(k) Insolvency of Tenant.**

**758. Whether good defence.]**—*WILLINGHAM v. JOYCE*, No. 706, *post*.

**759. —.]**—Upon a contract for a lease the solvency or insolvency of the tenant is an objection of weight; depending upon the circumstances. Upon that & other circumstances an injunction against an ejectment by the landlord was dissolved.—*BUCKLAND v. HALL* (1803), 8 Ves. 92; 32 E. R. 287, L. C.

**760. —.]**—*PEARSON v. KNAPP*, No. 685, *ante*.

**761. —.]**—*MORGAN v. RHODES*, No. 638, *ante*.

**762. —.]**—*PRICE v. ASHETON*, No. 787, *post*.

**763. —.]**—Insolvency is a ground upon which the ct. will refuse specific performance of an agreement to grant a lease, but there must be proof of general insolvency, & a particular default in the payment of rent to the landlord of the premises, last occupied by the person contracting for the lease, will not disentitle him to the performance of the contract, where there is the testimony of unexceptionable witnesses to his responsibility.

A. having a life interest in premiums vested in trustees who had a power of leasing, agreed to

grant a lease for twenty-one years to B. The trustees refused to grant a lease to B. on the ground that he was in insolvent circumstances, & that the grant of such lease would be a breach of trust against their *cestui que trust*.

The ct. being of opinion that B. was entitled to specific performance, & that the trustees had given A. some authority to act, ordered the trustees to execute a lease to B. to the extent of A.'s interest.

—*NEALE v. MACKENZIE* (1837), 1 Keen, 474; 1 Jur. 149; 48 E. R. 389.

**Annotation:—***Mentd.* Bell v. Barchard (1852), 16 Beav. 8.

**764. Degree of insolvency necessary—General insolvency.]**—*NEALE v. MACKENZIE*, No. 763, *ante*.

**765. — Mere default in payment of rent.]**—*NEALE v. MACKENZIE*, No. 763, *ante*.

**(l) Misrepresentation.**

**766. Whether specific performance granted—False statements as to financial position.]**—Bill for specific performance of an agreement to grant a lease to pltf. would on evidence of his fraud, misrepresentation & insolvency, have been dismissed with costs, if not compromised.—*WILLINGHAM v. JOYCE* (1796), 3 Ves. 168; 30 E. R. 951.

**767. — Concealment amounting to fraud.]**—Injunction against proceeding with alteration in a house under an agreement for a lease upon circumstances that would probably prevent specific performance; viz. surprise, the effect of fraudulent misrepresentation & concealment & the particular nature of the alterations, for the conversion of a private house to the purpose of a coachmaker's business wholly changing the nature of the subject.—*BONNETT v. SADLER* (1808), 14 Ves. 526; 33 E. R. 622, L. C.

**768. — Wilful concealment of fact of agency.]**—The interest which a third party may have against the specific performance of a contract, may preclude the execution of it, as between *cestui que trust* & trustee; as where an insolvent tenant made over his lease to another, who treated for a renewal under a secret agreement in trust for the original tenant, the ct. would not execute that agreement as against the landlord; & the principle, that a trustee shall derive no benefit from his trust must fail, rather than be executed against a third party, so imposed upon; though, except for that interest, it would have been executed as between the other parties.—*FEATHERSTONHAUGH v. FENWICK* (1810), 17 Ves. 298; 34 E. R. 115.

**Annotations:—***Reid.* Portlock v. Gardner (1842), 11 L. J. Ch. 313; Cassels v. Stewart (1881), 6 App. Cas. 64; Stevenson v. Akt. Für Cartonnagen Industrie, [1918] A. C. 239. *Mentd.* Rigden v. Pierce (1822), 6 Madd. 353; Cook v. Collingridge (1823), Jac. 607; Heath v. Sansom (1832), 4 B. & Ad. 172; Wedderburn v. Wedderburn (1838), 4 Mv. & Cr. 41; Willett v. Blanford (1842), 1 Haro, 253; Blisset v. Daniel (1853), 10 Haro, 493; Darby v. Darby (1856), 3 Drew. 495; Wedderburn v. Wedderburn (1856), 22 Beav. 84; Neilson v. Mossend Iron Co. (1880), 11 App. Cas. 298; Re Biss, Biss v. Biss, [1903] 2 Ch. 40.

**769. — Inaccurate representations as to property—Founded on sources of information available to all parties.]**—A., B., & C. being jointly interested in certain property, A. contracts with B. to take

**PART II. SECT. 8, SUB-SECT. 1.—F. (k).**

**758 i. Whether good defence.]**—*FLOOD v. FINLAY* (1811), 2 Ball. & B. 9.—*IR.*

**758 ii. —.]**—An agreement to grant a lease, subject to such clauses as the landlord chooses to insert, will not be specifically performed when the land-

lord insists on a clause for avoiding the lease on subletting, & the tenant has already sublet.—*PLUNKETT v. DRASE* (1846), 10 L. Eq. R. 124.—*IR.*

**758 iii. —.]**—The ct. will not decree the specific performance of a contract for a lease to an insolvent tenant.—*M'NALLY v. GRADWELL* (1865), 16 L. Ch. R. 512.—*IR.*

**PART II. SECT. 8, SUB-SECT. 1.—F. (l).**

**i. Whether specific performance granted—Suppression of facts.]**—Specific performance of an agreement for a lease, in consideration of the surrender of an old lease, refused: the tenant suppressing that the life, on which the old lease depended, was, when the agreement

a lease of the whole of it; & the contract expresses that B. is to be bound by the contract, only so far as it is to be performed by him; but that A. is to be answerable to B. even for what is to be done by C.:—*Held*: (1) B. will be precluded from enforcing the contract against A. by the circumstance that C. under a deed, which the parties either were not aware of or had forgotten, has taken proceedings in a ct. of equity, which deprive A. of that possession & enjoyment of the property, the subject of the contract, which it was the purpose of the contract to give him; (2) it is a defence to a bill for specific performance, if pltf. has made inaccurate representations with respect to the property which was the subject of the contract, although those representations proceeded upon, & had reference to, sources of information which were open to all parties, & which might have enabled them to detect the alleged inaccuracies; (3) in such a case the ct. will not decree specific performance, even though defts. have taken possession of the property, & materially altered its management or lessened its value.—*HARRIS v. KEMBLE* (1831), 5 Bli. N. S. 730; 2 Dow. & Cl. 403; 5 E. R. 480, H. L.; *affg.* (1829), 7 L. J. O. S. Ch. 79, L. C.

*Annotations*:—As to (2) & (3) *Consd.* Rawlins v. Wickham (1858), 3 De G. & J. 304. *Generally*, *Mentd.* Burnes v. Pennell (1849), 2 H. L. Cas. 497.

**770.** — Demand for performance by defendant.—With knowledge of misrepresentation.]—*MACBRYDE v. WEEKES*, No. 728, *ante*.

**771.** — Misrepresentation as to value.]—In a suit for the specific performance of an agreement for a lease of certain clay, sand & other substances, of which deft. had recently become the owner, it was alleged by deft. that there had been misrepresentation & concealment as to value:—*Held*: the bill could not be sustained on that ground, but as there was evidence that deft. had been taken by surprise, & had been induced by pltf. to sign the agreement in ignorance of the value of his property, & upon the representation that deft. would make a fair allowance should the property turn out more valuable, the bill was dismissed. There being no fiduciary relation between a vendor & a purchaser in a negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge, which would influence the price of the subject sold. Simple reticence does not amount to legal fraud; but if a purchaser in any manner induces a vendor to believe the existence of a non-existing fact, which might influence the price of the subject contracted to be sold, the contract cannot be supported.—*WALTERS v. MORGAN* (1861), 3 De G. F. & J. 718; 4 L. T. 758; 45 E. R. 1056, L. C.

*Annotations*:—*Consd.* Turner v. Green, [1895] 2 Ch. 205. *Mentd.* Seddon v. North Eastern Salt Co., [1905] 1 Ch. 326.

**772.** — — —.]—Bill for specific performance of an agreement to take a lease of a limestone quarry. In the course of the treaty pltf. had represented that the limestone was of a certain quality, the fact being that a quarry in the immediate neighbourhood had been worked & the stone ascertained not to be of the specified quality. The result of this trial was not known to either party, but might have been ascertained on inquiry; & it further appeared that pltf. had no

knowledge of the quality of the limestone. Deft. afterwards & before signing the agreement made a cursory inspection of the old quarry, & satisfied himself that the stone was limestone, but ascertained nothing as to its quality:—*Held*: the misrepresentation was a bar to a decree for specific performance; & the bill dismissed without costs. *Qu.*: whether the agreement was or was not void.—*HIGGINS v. SAMELS* (1862), 2 John. & H. 460; 7 L. T. 240; 70 E. R. 1130.

*Annotations*:—*Reid*, Colby v. Gadsden (1867), 17 L. T. 97; Mullens v. Miller (1882), 31 W. R. 559.

**773.** — Degree of misrepresentation.—Whether sufficient to ground action for damages.]—*LAMARE v. DIXON*, No. 630, *ante*.

(m) Mistake.

**774. Mistake of fact—By agent.]**—On a bill for the specific performance of an agreement by which A., as agent for B., contracted to let to C., a piece of ground for a term of years at a yearly rent; it appearing from the evidence that B. intended to let the ground for the building of houses of a particular class, & that if he had authorised A. to act as agent in the letting of the ground, which was disputed, he had told him the purposes for which it was to be let: *Held*: as the agreement did not contain any reference to building, nor any covenant to build, it was not under the circumstances such an agreement as ought to be performed; & a decree for a specific performance was refused.—*HELISHAM v. LANGLEY* (1841), 1 Y. & C. Ch. Cas. 175; 62 E. R. 812.

**775.** — Misunderstanding as to terms.]—B., the owner of an intended public-house, had offered it to D., a firm of brewers, upon lease at a certain annual rent & £500 premium. D. not having accepted the offer, B. wrote to F., another brewer, offering a lease upon similar terms with the omission of the £500 premium, & asking an early answer, as he was giving all the brewers an offer in rotation. An interview took place between B. & the agent of F., who took down the terms in his pocket-book, omitting the £500 premium as a term not mentioned; F. after the report of his agent, agreed to take the lease, entered into possession, & commenced alterations. A draft agreement for a lease was sent to him from B., in which the £500 premium was inserted as a condition. F. insisted that the premium formed no part of the terms offered by B. in his letter or mentioned at the interview, & filed a bill for specific performance of the agreement, B. refusing to carry it out except upon payment of the premium. Specific performance refused without costs, B. being entitled to relief from the contract on the ground of mistake, having through inadvertence omitted in his letter the premium as a term, though he clearly intended to make the same offer to F. as he had made to D., which was proved to have included the premium. *WOOD v. SCARTH* (1855), 2 K. & J. 33; 26 L. T. O. S. 87; 1 Jur. N. S. 1107; 4 W. R. 31; 69 E. R. 682.

*Annotations*:—*Reid*, Orlons v. Cohen (1865), 2 Hem. & M. 354. *Mentd.* Shardlow v. Cotterell (1881), 18 Ch. D. 280; Sheers v. Thimbleby (1897), 75 L. T. 709; Black v. Leeds Industrial Co-op Soc., [1923] 1 Ch. 431.

**776.** — — —.]—Pltf. agreed to take a lease of a public-house from deft., a brewer, but the

was signed, in *extremis*, & as the new lease would, under a power of leasing at the highest rent, be void, the surrender of the old lease forming part of the consideration.—*ELLARD v. ILANDAPP* (LORD) (1810), 1 Hall & B. 241.—*IR.*

PART II. SECT. 8, SUB-SECT. 1.—*F. (m).*

a. *Mistake of fact—Misunderstanding as to nature of document.]*—Where deft. who has signed a written agreement for a lease alleges that he

mistook the nature of a document & never intended to enter into any contract at all he will not in the absence of negligence be estopped from denying the agreement unless his conduct was such that any reasonable man in the

**Sect. 8.—Enforcement—Remedies for breach: Subsect. 1, F. (m), (n) & (o).]**

written contract said nothing as to the restrictive covenants of a brewer's lease. Pltf. instituted a suit to obtain an unrestricted lease. The restricted parol agreement being established by extrinsic evidence:—*Held*: the bill must be dismissed. Pltf. having then elected to take a brewer's lease, a decree was made, pltf. paying the costs of the suit.—*BARNARD v. CAVE* (1858), 20 Beav. 253; 7 W. R. 158; 53 E. R. 895.

**777.** ———.]—(1) Real Property Act, 1845 (c. 106), s. 3, does not prevent an instrument which, as containing words of present demise & not being under seal, is void as a lease from being used as an agreement.

(2) Where terms for letting farms provided that all materials required for buildings proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant leading tiles; that gates, buildings, "etc.," should be left in repair by the tenant, the landlord finding new gates when required; that the landlord reserved to himself all customary rights & reservations, such as liberty to cut & plant timber, search for & work mines or minerals, "etc.," allowing the tenant for any reasonable damage:—*Held*: these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically.

(3) Although specific performance of an agreement may not be enforced against a deft. who reasonably misunderstood its terms, a mere case of inadvertent omission to propose an intended term is different; & therefore where an occupant of land under an expiring tenancy had always paid the tithe rentcharge, & afterwards entered into a written agreement with the landlord for a lease at the old rent, but without any stipulation being introduced as to the tithe rentcharge:—*Held*: the landlord could not insist on such a stipulation being inserted as a condition of specific performance being enforced against him.—*PARKER v. TAWWELL* (1858), 2 De G. & J. 559; 27 L. J. Ch. 812; 31 L. T. O. S. 226; 22 J. P. 432; 4 Jur. N. S. 1006; 6 W. R. 608; 44 E. R. 1106, L. C.

*Annotations*:—As to (1) *Fold*. *Tidey v. Mollett* (1864), 16 C. B. N. S. 298. *Consd.* *Martin v. Smith* (1874), L. R. 9 Exch. 50. *Fold*. *Zimbley v. Abrahams*, [1903] 1 K. B. 577. *Refd.* *Re Fireproof Doors*, *Umney v. Fireproof Doors*, [1916] 2 Ch. 142. As to (2) *Refd.* *Willmott v. Barker* (1880), 15 Ch. D. 96. *Generally*. *Mentd.* *Ball v. Bridges* (1874), 30 L. T. 430.

**778.** ———.]—Contract by a railway co. to grant a lease of the whole of a house No. 1 & part of a house No. 2:—*Held*: under the circumstances part of the house No. 1 being evidently intended to be retained by the co., only that other part of it designated in a certain plan was meant to be included in the lease & a bill to compel a lease of the whole house dismissed.

The doctrine of part performance does not apply here. That can only apply when there has been a definite & well understood agreement. If after that the parties enter, such entry constitutes a part performance (*LORD ROMILLY, M.R.*).—*RICHARDS v. NORTH LONDON RY. CO.* (1871), 20 W. R. 194.

**779.** ———.]—Incomplete title of lessor—Lessee entitled to lease of so much as lessor can let.—*MCKENZIE v. HESKETH*, No. 708, *ante*.

**780.** Mistake of law—Agreement at rent to be fixed by arbitration—Arbitration proceeding on

ground not sustainable.]—*M.* being possessed of a house & lands for a term of years under a lease, by the covenants of which he was bound to keep & deliver up the premises in repair, at the expiration of the term, entered into an agreement with *C.*, who had acquired the reversion in the premises, subject to the term, that *C.* should grant to him a new lease; & thereupon an agreement between *M.* & *C.* was executed, whereby *C.* agreed to grant to *M.* a lease of the premises for a term of forty-seven years, at such yearly rent as should be put upon the same by two chosen arbitrators, & in case of difference between them, that an umpire should be named by them, & the rent fixed by a majority of the three. The arbitrators having differed, an umpire was called in, who with the arbitrator for *M.* the tenant, received evidence to show that, at the date of the agreement between *M.* & *C.*, the premises were in a very ruinous state, & that it would require £800 to put them in repair. Upon this view of the case, & assuming as the basis of their award that *M.* was not bound to repair, & that he had agreed to expend £800 in repairs, they adjudged & awarded that a rent of £60 *per annum* should be paid by *M.* to *C.* during the term of forty-seven years. But the arbitrator for *M.*, the tenant, had differed from the umpire as to the amount of rent, & refused to concur in a larger rent than £43, until he was prevailed on by the entreaty of *M.*'s wife to concur with the umpire, in fixing the rent at £60:—*Held*: *M.* was not entitled to a specific performance of the agreement, under the circumstances attending this award.—*CHICHESTER v. M'INTIRE* (1830), 4 Bli. N. S. 78; 1 Dow. & Cl. 400; 5 E. R. 28.

**781.** ———.]—*POWELL v. SMITH*, No. 381, *ante*. See, generally, *MISTAKE*.

(n) Supervision of Court—Grant involving Performance under.

**782. Covenant as to improvements & repairs.]—***MIDDLETON v. GREENWOOD* (1864), 2 De G. J. & Sm. 142; 3 New Rep. 694; 10 L. T. 149; 10 Jur. N. S. 350; 46 E. R. 329, L. J.J. *Annotation*:—*Mentd.* *Elmore v. Pirrie* (1887), 57 L. T. 333.

**783. Covenant for employment of lessor.]—**An agreement was entered into between *F.* & *O.* that *F.* should grant to *O.* a lease of a coal wharf at a certain rent, & should be employed throughout the tenancy at a salary of £200 a year, & a commission on the coal sold at the wharf. Disputes having arisen, *O.* filed a bill against *F.* for specific performance of the agreement to grant the lease:—*Held*: specific performance could not be decreed, inasmuch as that part of the agreement of which the ct. could decree specific performance was inseparably connected with stipulations which the ct. could not enforce.—*OGDEN v. FOSBICK* (1862), 4 De G. F. & J. 426; 1 New Rep. 143; 32 L. J. Ch. 73; 7 L. T. 515; 9 Jur. N. S. 288; 11 W. R. 128; 45 E. R. 1249, L. J.J.

*Annotations*:—*Consd.* *Peto v. Brighton, Uckfield & Tunbridge Wells Ry.* (1863), 1 Hem. & M. 468. *Distd.* *Blackett v. Bates* (1865), 2 Hem. & M. 270. *Refd.* *Blackett v. Bates* (1865), 2 Hem. & M. 610; *Wilkinson v. Clements* (1872), 8 Ch. App. 96; *Firth v. Frith*, [1906] A. C. 254. *Mentd.* *Firth v. Ridley* (1864), 33 Beav. 516; *Measures v. Measures* (1910), 79 L. J. Ch. 707.

**784. Building stipulations contained in agreements.]—***KAY v. JOHNSON*, No. 865, *post*.

**785.** ———.]—Deft. was lessee for a term of ninety-nine years from 1894, at the yearly rent of

position of pltf. would in all the circumstances have concluded without any reasonable doubt that deft. intended to enter into the contract in question.—*LEE v. AH GEE*, [1920] V. L. R. 278.—*AUS.*



£50, of lands in a mining district, except the mines & mineral rights, his lease containing a covenant by him within three years from the commencement of the term to build seven dwelling-houses similar to adjacent houses already built, to keep them in repair, & to deliver them up at the end, or sooner determination, of the term in such repair. The lease contained an exception & reservation in favour of the persons who would if the lease had never been executed, for the time being be entitled to the same, of the above-mentioned mines, & mineral rights, with power to occupy the surface for working such mines without leaving any support for any buildings that might be erected thereon, & generally use the surface, making reasonable compensation to the lessee for the damage done. Deft. was also the lessee under an earlier lease of the mines & minerals, with full working powers, including the right to make pit hills & spoil banks on the surface. He declined to perform the covenant to build, on the ground that his powers under the mining lease & the reservation in the surface lease were inconsistent with the covenant to build. Pltf., as mtgee. in fee of the premises comprised in the surface lease, required specific performance of the covenant to build in order to protect the security for his debt:—*Held*: the covenant to build was binding on the covenantor & unaffected, by his powers as to covering the surface, & pltf. was entitled to specific performance, notwithstanding the general rule, on the grounds that the work was sufficiently defined, there was a definite contract to build, & damages would not afford an adequate remedy.—*MOLYNEUX v. RICHARD*, [1906] 1 Ch. 34; 75 L. J. Ch. 39; 93 L. T. 698; 54 W. R. 177; 22 T. L. R. 76.

**786. Lease giving right to continuous performance of certain duties—Over number of years.**—By an award made in June, 1863, under a reference at *Nisi Prius*, the arbitrator awarded that deft. should execute to pltf. a lease of the right to use such part of a certain railway made by pltf. as was upon the land of deft., the lease to be in the words set out in the award; & that deft. should have a right of running carriages over the whole line on certain terms, & might require pltf. to supply engine-power, while pltf. should have an engine on the railway; & that pltf. should during the term keep the whole railway in good repair. The lease did not provide for these privileges awarded to deft. Pltf. applied at law to set aside the award, & ultimately in Apr. 1864, the application was refused. In July, 1864, pltf. filed his bill for specific performance of the award:—*Held*: specific performance could not be decreed, inasmuch as the provisions in favour of deft. could not be enforced at once, but gave deft. a right to have certain duties continuously performed by pltf. for a number of years, & the ct. could not undertake to see to such performance.—*BLACKETT v. BATES* (1865), 1 Ch. App. 117; 35 L. J. Ch. 324; 13 L. T. 656; 12 Jur. N. S. 151; 14 W. R. 319, L. C.

*Annotations*:—*Reld*. Wolverhampton & Walsall Ry. v. L. & N. W. Ry. (1873), L. R. 10 Eq. 433; Phillips v. Jackson (1887), 56 L. J. Ch. 550; Ryan v. Mutual Tontine Westminster Chambers Assocn., [1893] 1 Ch. 116, C. A. *Mentd*. Danubian Sugar Factories v. I. R. Comrs., [1901] 1 K. B. 245.

## (o) Uncertainty as to Terms.

**787. General rule—Performance not decreed.**—

(1) Bill for specific performance of an agreement to renew a lease, dismissed; the agreement being too vague & uncertain to be executed by the ct. (2) The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease.—*PRICE v. ASSHETON* (1835), 1 Y. & C. Ex. 441; 160 E. R. 180.

*Annotations*:—*As to* (1) *Copd*. Lewis v. Stephenson (1898), 67 L. J. Q. B. 296. *Reld*. Rickards v. Rickards (1844), 13 L. J. Ch. 344.

**788.** ———.—*CALLAGHAN v. CALLAGHAN*, No. 676, *ante*.

**789.** ———.—*SMITH v. HENLEY*, No. 889, *post*.

**790.** ———.—[Certain members of a family, interested under a will, entered into an arrangement for obtaining an Act of Parliament, empowering the trustees to grant a lease of the estates devised. It was insisted by one of the parties, as one of the terms for his assent to the Act, & it was assented to by the intended lessee, that the party should have the right of becoming the tenant to the lessee of the mansion house, to hold the same from year to year, for so long a time during the existence of any lease under the Act, as he should choose, at the fair annual rental of the same, to be paid by him:—*Held*: the terms of the arrangement were too vague & uncertain for the ct. to carry them into effect.—*THELLUSON v. RENDLESHAM* (LORD) (1816), 8 L. T. O. S. 403; 11 Jur. 29.

**791.** ———.—[Specific performance of an alleged agreement to grant a lease will be decreed only upon clear evidence of an agreement sufficiently clear in its terms. When an agreement has anything imperfect or uncertain in its terms, & possession has been taken, which possession has been protected, as in the case of a railway by an Act of Parliament, the ct., under such circumstances, must have something very strong to induce it to strain its jurisdiction by an endeavour to fix terms not finally arranged. *MEYNELL v. SURTEES* (1854), 3 Sm. & G. 101; 24 L. T. O. S. 120; 1 Jur. N. S. 80; 3 W. R. 36; 65 E. R. 581; *affd.* (1855), 25 L. J. Ch. 257, L. C.

*Annotation*:—*Reld*. Bonecke v. Chadwick (1856), 4 W. R. 687.

**792.** ———.—[Where a bill prayed specific performance of an agreement to let a certain spot at a certain rent, but the main relief sought was not in respect of the main subject of the agreement, but in respect of certain vague stipulations contained in it, & there had been a departure from the original terms of the agreement, & non-performance by defts. had been dealt with by pltf. as matter of compensation:—*Held*: the ct. could not decree specific performance, & motion for an injunction by pltf. to restrain certain acts alleged to be in violation of the agreement, refused.—*PARIS CHOCOLATE CO. v. CRYSTAL PALACE CO.* (1855), 3 Sm. & G. 119; 25 L. T. O. S. 7; 1 Jur. N. S. 720; 3 W. R. 267; 65 E. R. 588.

**793.** ———.—(1) T. & W., being tenants for life of an estate, with a power of leasing under an Act of Parliament, had for many years employed F. as their solr., & also as the agent &

The circumstance of the lives not being named in the agreement, or of its not being thereby provided by whom they are to be named, does not create such uncertainty as to render it invalid, provided the lives nominated by the party seeking its performance were in existence at the date of the agreement.

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## PART II. SECT. 8, SUB-SECT. 1.—F. (o).

**787 i. General rule—Performance not decreed.**—*Re FICE & ONTARIO PUBLIC WORKS DEPARTMENT* (1921), 50 O. L. R. 501; 64 D. L. R. 535.—CAN.

**787 ii.** ———.—*WYSE v. RUSSELL*, Vol. XXX.

*SELL* (1882), 11 L. R. Ir. 173.—IR.

**787 iii.** ———.—*WILLIAMS v. KENNEALLY* (1912), 46 I. L. T. 292.—IR.

**b. What is sufficient certainty—Lease for lives—Lives not named.**—



*Sect. 8.—Enforcement—Remedies for breach: Sub-sect. 1, F. (o) & (p).]*

manager of the estate. In 1857 the tenancies of two farms on the estate became vacant, & F. entered into occupation from Michaelmas, 1857, of the same as manager. Some attempts made by F. to let the two farms were unsuccessful; & at length a correspondence was entered into between T. & W. & their manager F. in the course of which a proposal of F. himself becoming tenant was entertained. On Apr. 9, 1858, a letter was written by T. & W., at the request, as they alleged, of F., in part of which they said, "We therefore most willingly accept you as our tenant for the Lodge farms." On Apr. 16, T. wrote to F., inclosing a memorandum of points agreed upon by T. & W. Part of the letter was as follows: "Messrs. T. & W. are of opinion that the Lodge farms should be in F.'s hands in preference to others. . . . They will grant a fourteen years' lease to F., but it should contain such provisions as not to interrupt the sale of the upper six hundred acres, & to be of a kind to justify us to out young people." F. remained in possession, & alleged that he considered that he was to be tenant for fourteen years at the previous rent. T. & W. alleged that they considered the agreement to be subject to their consenting to accept such rent & conditions as F. might lay before them. In May, 1858, an account of the receipts & payments of F. in respect of the estate was sent in to T. & W. They were dissatisfied with the account, & in Nov. 1858, ceased to employ F. as their solr. In Apr. 1859, they gave F. notice to quit possession of the farms. F. remained in possession. A bill was filed by T. & W. for a declaration that there was no agreement; or, if any, to have it set aside; & to recover possession; & a cross-bill was filed by F. for specific performance:—*Held*: there was not anything in the correspondence & evidence sufficiently certain, definite & conclusive to constitute a binding agreement.

(2) A parol agreement for a lease, made by a tenant for life, with a power of leasing, & purporting to bind those in remainder, cannot bind the remaindermen.

The reason why a parol agreement in part performed is taken out of the operation of Stat. Frauds has no application where the lease is to bind the persons entitled in remainder. A man who permits expenditure on the faith of his parol agreement is considered guilty of fraud in taking advantage of its not being in writing. But the remainderman, who has entered into no agreement, written or parol, & done no act on the faith of which the other party could have relied, is guilty of no fraud & cannot be bound (*STUART, V.-C.*).—*TROTMAN v. FLESHER, FLESHER v. TROTMAN* (1861), 3 Giff. 1; 4 L. T. 108; 7 Jur. N. S. 386; 60 E. R. 297.

794. ———.]—*Pltf.*, by letter, offered to work the ironstone lying under the lands of *deft.* at P., & to pay a fixed rent & a royalty. The land steward, by letter, accepted the offer, & agreed to grant a lease for twenty-one years, if, after a year's trial, it was asked for. *Pltf.* applied for the lease, but he refused to give any security that the undertaking would be carried out & the covenants in the lease observed, or to join any responsible person with him in the undertaking. The land steward, accordingly, declined

to proceed with the lease, or to assign the area over which the ironstone was to be worked. Upon a bill for the specific performance of the agreement:—*Held*: the agreement was indefinite, the land steward in the absence of assurance that the undertaking would be carried out & the covenants in the lease observed, was not bound to assign the area for the mineral workings; & the bill was dismissed, but, under the circumstances, without costs.—*LANCASTER v. DE TRAFFORD* (1862), 31 L. J. Ch. 554; 7 L. T. 40; 10 W. R. 474.

795. ———.]—*DOLLING v. EVANS*, No. 427, ante.

796. ———.]—By two letters of May 10, & 13, 1892, to the *corp.* of Oxford, C. offered to surrender his existing lease, to pull down an old building & erect a new building on the site of a line marked out by a specified surveyor, at a cost of £4,000 & to carry out the work within twelve months, provided that the city would grant him a new lease for seventy-five years, at a ground rent of £100 *per annum*; & he would agree to a line being drawn in the rear giving up part of his cellar for the purpose of straightening the dividing line between the properties; this proposal to include all claims he might have for compensation for the loss of business & other things incidental to the taking down & rebuilding. On May 13, 1892, the Public Improvements Committee of Oxford, through the town clerk, accepted these proposals "subject to the approval of council." By another letter of May 27, 1892, to the *corp.*, C. added a new term to his previous proposal. At a meeting of the council on June 1, 1892, at which C. was present, the council ratified the agreement made by the committee, & rejected the further term proposed by the letter of May 27, 1892. The committee had not been appointed under the common seal of the *corp.*, nor was the ratification of the contract under seal. On July 21, 1892, C. withdrew his offer, & repudiated the contract. In an action by the *corp.* for specific performance:—*Held*: (1) the contract, being one which required to be made under the common seal of the *corp.*, & not having been made or ratified under seal, could not be specifically enforced against *deft.*; (2) specific performance would be withheld on the ground that no date was fixed for the surrender of the old lease & the commencement of the new term, & there was a want of definiteness in the provisions of the contract.—*OXFORD CORPN. v. CROW*, [1893] 3 Ch. 535; 69 L. T. 228; 42 W. R. 200; 8 R. 279.

*Annotation*:—As to (1) *Ratd. Hoare v. Lewisham Corpn.* (1901), 85 L. T. 281.

797. *Direction of issues to ascertain terms.*—Where on an agreement for a lease, the particular rent, commencement, & duration of the lease are uncertain, or depend upon the approbation of a third person; a *ct.* of equity will direct proper issues to ascertain these several facts, before any specific performance of the contract is decreed.—*PLUNKET v. KINGSLAND (LORD)* (1746), 1 Bro. Parl. Cas. 322; 1 E. R. 596.

798. *What is sufficient certainty—Terms contained in written document—Referred to in agreement—Admissibility of parol evidence.*—Agreement for a lease of a farm, referring to a paper containing the terms. Bill for specific performance according to such clauses, as had been read to *pltf.*: parol evidence to prove that was refused, & the bill dismissed. Bill being dismissed with-

—*FITZGERALD v. VICARS* (1839), 2 Dr. & Wal. 298.—*IR.*

c. — Parol evidence not ad-

mitted to supply omission.]—*RIDDICK v. GLENNON* (1853), 6 Ir. Jur. 39.—*IR.*

d. — Terms contained in draft

memorandum.]—*KOLIA v. AMBEROODEN & SONS* (1921), 41 N. L. R. 275.—S. A. F.

out costs, as a hard case, parties made trustees without their knowledge, & as such being necessary parties to the bill cannot have costs against pltf., but left to their remedy against their principal: otherwise perhaps, if pltf. had prevailed; because then those costs might have been given over against other defts.—*BRODIE v. ST. PAUL* (1791), 1 Ves. 326; 30 E. R. 368.

*Annotations*:—*Reid*, Rich v. Jackson (1794), 4 Bro. C. C. 514; *Ogilvie v. Foljambe* (1817), 3 Mer. 53; *Ridgway v. Wharton* (1854), 2 Eq. Rep. 839. *Mentd.* *Cooth v. Jackson* (1801), 6 Ves. 12; *Higginson v. Clowes* (1804), 15 Ves. 516; *Andrew v. Andrew* (1855), 3 Sm. & G. 130; *Lee v. Dawson* (1861), 4 L. T. 464.

**799.** — **Conflicting testimony**—As to terms of agreement.]—Bill for specific performance of a parol agreement to renew, pltf. having built a house; the only witness for pltf., proved an agreement different from that in the bill; two defts. by answer stated an agreement different from both; in strictness the bill ought to be dismissed; but specific performance was decreed according to the answers, with costs against pltf.—*MORTIMER v. ORCHARD* (1793), 2 Ves. 243; 30 E. R. 615, L. C.

**800.** — — — — —.]—(1) Upon a treaty for a lease of a house, the lessor sent to the lessee a letter specifying the terms on which he would let it. The lessee immediately took possession, but he signed no contract. The lessor having instituted a suit for specific performance, the lessee insisted that, in addition to the terms contained in the letter, the lessor had verbally promised to put the house into thorough repair; this the lessor denied. The ct. doubted whether the specific performance could be enforced, & gave deft. the option, either of a decree for specific performance on the terms of the letter, or a decree to deliver up possession & to pay an occupation rent. But if he refused to exercise the option, the ct. directed a decree on the latter branch of the alternative.

(2) In the absence of any agreement on the subject, a person who agrees to take a house must take it as it stands, & cannot call on the lessor to put it into a condition which makes it fit for his living in.—*CHAPPELL v. GREGORY* (1863), 31 Beav. 250; 55 E. R. 631.

**801.** — — — — — As to meaning of terms.]—A landlord gave to his tenant a memorandum in the form of a letter to the following effect, "Sir, Agreeable to our covenants with regard to the farm which you hold of me I acknowledge myself bound to grant you a running lease of seven, fourteen, or twenty-one years, whenever you may require the same to be completed according to those respective terms." The meaning of "covenants" was uncertain, owing to a conflict of testimony between the landlord & tenant: *Held*: the memorandum of agreement was too vague to call for a decree for specific performance.—*JEFFREY v. STEPHENS* (1860), 2 L. T. 716; 6 Jur. N. S. 947; 8 W. R. 427.

*Annotation*:—*Reid*, *Smith v. Wheatcroft* (1878), 9 Ch. D. 223.

**802.** — **Conditions to be judged proper by third party**—Agency of such party not of essence of contract.]—Decree for specific performance of an agreement to grant a lease; rejecting one term, for such conditions, etc., as shall be judged proper by G.; & substituting a reference to the master; the agency of G. not being of the essence of the contract.—*GOURLAY v. SOMERSET (DUKE)* (1815), 19 Ves. 429; 34 E. R. 576.

*Annotations*:—*Mentd.* *Morgan v. Milman* (1853), 3 De

G. M. & G. 24; *South Wales Ry. v. Wyrthos* (1854), 5 De G. M. & G. 880; *Darnley v. L. C. & D. Ry.* (1865), 3 De G. J. & Sm. 24; *Hart v. Hart* (1881), 18 Ch. D. 670; *Evershed v. Evershed* (1882), 46 L. T. 690.

**803.** — **Commencement not stated.**]—*GILBERT v. HALL*, No. 425, *ante*.

**804.** — **Amount of rent not fixed**—**Ascertainable as percentage.**]—*POWELL v. LOVEGROVE*, No. 400, *ante*.

**805.** — **Lease of "coals, etc., or minerals."**]—*PRICE v. GRIFFITH*, No. 686, *ante*.

**806.** — **Stipulation for "handsome decoration."**]—An agreement to take a lease of a house if put into thorough repair, & the drawing-rooms "handsomely decorated according to the present style":—*Held*: too uncertain for the ct. to enforce.—*TAYLOR v. PORTINGTON* (1855), 7 De G. M. & G. 328; 3 Eq. Rep. 781; 1 Jur. N. S. 1057; 19 J. P. 627; 44 E. R. 128, L. J. J.

*Annotations*:—*Distd.* *Dow v. Verity* (1869), 38 L. J. Ch. 486. *Reid*, *Parker v. Taswell* (1858), 2 De G. & J. 559; *Samuda v. Lawford* (1862), 4 Giff. 42.

**807.** — **Stipulation to build "according to plan to be approved."**]—An agreement for a lease to be granted in consideration of the intended lessee building a house as thereafter mentioned, & when the house should be built, contained an agreement by the lessee to build a house with out-buildings of the value of £1,400 at the least, according to a plan to be approved by the lessor: *Held*: the agreement to build the house was too uncertain to support a bill for specific performance, & it was dismissed with costs. *BRACE v. WEHNERT* (1858), 25 Beav. 348; 27 L. J. Ch. 572; 31 L. T. O. S. 310; 22 J. P. 418; 4 Jur. N. S. 549; 6 W. R. 425; 53 E. R. 670.

*Annotations*:—*Consd.* *London Corp. v. Southgate* (1868), 38 L. J. Ch. 141. *Reid*, *Soames v. Edge* (1860), John. 669; *Cubitt v. Smith* (1864), 10 Jur. N. S. 1123; *Wilkinson v. Clements* (1872), 8 Ch. App. 96.

**808.** — **Uncertainty as to subordinate matters.**]—*PARKER v. TASWELL*, No. 777, *ante*.

**809.** — **Stipulation for "substantial & decorative repairs."**]—*SAMUDA v. LAWFORD*, No. 807, *post*.

**810.** — **Undertaking "to spend money on improvements."**]—Pltf., being the lessee of an hotel from a co., applied for a renewal of his lease, on the understanding that he would spend money on improvements. A meeting of the co., informally convened, agreed to grant the renewed lease, & pltf. continued in possession, & expended money on improvements:—*Held*: the agreement could not be enforced, as pltf.'s undertaking to improve the premises was a material part of the arrangement, & was too uncertain to be inserted as a covenant in the lease. *GARDNER v. FOOKS* (1867), 15 W. R. 388.

**811.** — **Proviso that "wishes of plaintiff should be consulted"**—**Erection of buildings.**]—*OXFORD v. PROVAND*, No. 363, *ante*.

**812.** — **Lease "at rent & terms agreed upon"**—**Terms contained in previous written agreement.**]—*BAUMANN v. JAMES*, No. 386, *ante*.

**813.** — **Undertaking to "do all repairs, painting, decorating, etc."**—**Collateral parol agreement unsubstantiated.**]—*DEAR v. VERITY*, No. 816, *post*.

(p) Variation.

See, generally, SPECIFIC PERFORMANCE.

**814.** **Term omitted from written agreement.**]—**Specific performance refused of a written agreement for a lease, because it was proved by parol**

PART II. SECT. 8. SUB-SECT. 1.—  
F. (p).

§ 814. Term omitted from written

agreement.]—Specific execution of a written agreement for a lease decreed at the suit of the tenant, with several additions contemporaneously agreed

on by parol, set up by the answer but omitted in the bill.—*WARREN v. THUNDER* (1846), 9 L. Eq. R. 371.

IR.

**Sect. 8.—Enforcement—Remedies for breach: Sub-sect. 1, F. (p), & G.; sub-sect. 2, A. (a).]**

evidence, that one of the terms of the actual agreement, that pltf. should make on the premises, which included a malt-house, five hundred coombs of malt annually, was not inserted in the written agreement. The insertion of such a covenant in a lease of a malt-house cannot be insisted on without an express agreement, it not being a usual covenant.—*GARRARD v. GRINLING* (1818), 1 Wils. Ch. 460; 2 Swan. 244; 37 E. R. 196.

**815. —**—*MARTIN v. PYCROFT*, No. 529, ante.

**816. —**—*An agreement to grant a lease of a house was contained in three letters, which specified the term & the amount of rent, & stipulated that the intended lessee, pltf., was to do all repairs, painting, decorating, etc. The intended lessor, deft., refused to grant a lease on the footing of the agreement, on the ground that pltf. had at the time of entering into the agreement also verbally undertaken to expend £1,000 on the premises in a particular manner, & to allow covenants to compel him to do so to be inserted in the lease; that pltf. had not performed that part of his agreement, & had objected to such covenants; & further, that the agreement as contained in the letters was too uncertain for the ct. to enforce. On a bill filed for specific performance of the agreement as contained in the letters:—Held: the alleged parol collateral agreement was not substantiated by the evidence, & there was no ground for saying that the terms of the letters were uncertain, & therefore pltf. was entitled to a decree, with costs.*—*DEAR v. VERITY* (1869), 38 L. J. Ch. 486; 21 L. T. 185; 17 W. R. 716, L. J. J.

**817. Agreement proved different from that alleged.**—*Pltf. by his bill stated an agreement for a lease containing certain provisions & prayed a specific performance. The contemporaneous evidence adduced in proof of the agreement, made no mention of one of the alleged provisions; but that provision was contained in a draft of the lease not known to either party, until discovered some years afterwards in the possession of the lessor's steward. The tenant had been in possession from the time of the agreement:—Held: (1) there was not such a variation between the agreement stated, & that which the evidence went to prove, as to prevent the ct. from making a decree for pltf., on the ground of part performance.*

Cts. of Equity exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of Stat. Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement (*COTTENHAM, L.C.*).

(2) Where the party cannot obtain the rights to which the ct. has declared him entitled, without antedating a deed which the ct. orders to be executed, the ct. will order such deed to be dated at the time at which it ought to have been executed.—*MUNDY v. JOLLIFFE* (1839), 5 My. & Cr. 167; 9 L. J. Ch. 95; 3 Jur. 1045; 4 Jur. 621; 41 E. R. 334, L. C.

*Annotations:—As to (1) Connd. Sutherland v. Briggs* (1841), 1 Haro. 26. *Reid. Dale v. Hamilton* (1846), 5 Haro. 369; *Gregory v. Wilson* (1852), 9 Haro. 683; *Phillips v. Alderton* (1875), 24 W. R. 8.

**818. Underlease containing covenant not in head lease.**—*SNELLING v. THOMAS*, No. 1486, post.

*G. Effect of Non-Compliance with Decree.*

**819. Rescission of contract—With stay of proceedings.**—*After a decree for specific performance of a contract to take a lease of a house, & an order on further consideration for payment of the sums certified to be due from him, for costs & damages, deft. having absconded without paying the amount, the ct., on motion by pltf., ordered the contract to be rescinded, & all further proceedings in the suit stayed, except as to the recovery of the sums already ordered to be paid.*—*WATSON v. COX* (1873), L. R. 15 Eq. 219; 42 L. J. Ch. 279; 27 L. T. 814; 21 W. R. 310.

*Annotations:—Connd. Hutchings v. Humphreys* (1885), 54 L. J. Ch. 650. *Reid. Henty v. Schröder* (1879), 12 Ch. D. 666.

**820. —**—*An action was brought for the specific performance of a contract by deft. to grant a lease to pltf. of a certain shop & premises. Deft. counterclaimed certain sums for additions made to the premises at the request of pltf., & for rent agreed to be paid in advance. The contract was, at the trial of the action, ordered to be specifically performed, & it was ordered that pltf. should pay to deft. the sums counterclaimed by him, with a deduction, & the costs of the action. Pltf. did not make the payments ordered, or execute the lease tendered to him, & deft. thereupon moved to rescind the contract:—Held: the contract could be rescinded, but on the terms of all proceedings in the action being stayed, including the order for payment of the sums above mentioned, but not the order for the payment of costs.*—*HUTCHINGS v. HUMPHREYS* (1885), 54 L. J. Ch. 650; 52 L. T. 690; 33 W. R. 563.

*Annotation:—Mentd. Jones v. Laphorne* (1893), 37 Sol. Jo. 264.

**821. Attachment.**—*Where a person has been directed to execute a lease, but refuses to do so, the ct. can only enforce such execution by attachment, Trustee Act, 1850 (c. 60), having omitted to provide for such a case.*—*GRACE v. BAYNTON* (1877), 25 W. R. 508.

*See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 47.*

**822. Appointment of person to execute in place of defendant.**—*A decree was made for specific performance of an agreement to grant a new lease of certain premises, & deft. was ordered to execute such new lease to pltf. Deft. having refused to obey the order, pltf. moved for leave to issue a writ of attachment against her:—Held: there having been a decree for specific performance, the ct. had jurisdiction, under Trustee Act, 1850 (c. 60), s. 30, to appoint a person to execute the lease in place of deft., & the motion was directed to be amended accordingly. The motion having been amended, an order was made declaring deft. a trustee of the premises within Trustee Act, 1850 (c. 60), & a person was appointed in place of deft. to execute the lease to pltf.*—*HALL v. HALE* (1884), 51 L. T. 226.

## SUB-SECT. 2—DAMAGES.

### A. Action for Damages.

#### (a) In General.

Damages generally, *see* DAMAGES, Vol. XVII., pp. 78 et seq.

## PART II. SECT. 5, SUB-SECT. 2.—A. (a).

### e. Work & labour expended in

*contemplation of lease.*—*Where no binding lease had been made:—Held: pltf. were not entitled to recover the*

*value of their work & labour expended in cultivating the lands during the time they were in possession thereof.—*

**823. Cannot be brought after specific performance decreed.]**—After a decree for specific performance of an agreement for a lease, & the lease has been executed in pursuance of such decree, *pltf.* brought an action at law to recover from *deft.* damages for the delay in the performance of that agreement. Although *deft.* would have been clearly entitled to an injunction in a new suit yet the decree having been wholly executed, the *ct.* cannot make such an order in the original cause.—*FORD v. COMPTON* (1786), 1 Cox, Eq. Cas. 296; 29 E. R. 1174, L. C.

**824. Concurrent with action for specific performance — Different causes of action.]**—A party filed a bill for the specific performance by the lessor of an agreement for a lease, & brought an action at law against him for damages, which had accrued up to the commencement of the action, from the non-performance by the lessor of certain parts of his agreement:—*Held*: the action & suit were not for the same matter, & might both be continued.—*FENNINGS v. HUMPHRY* (1841), 4 Beav. 1; 10 L. J. Ch. 251; 5 Jur. 455; 49 E. R. 237.

*Annotation*:—*Apld.* Anglo-Danubian Co. v. Rogerson (1867), L. R. 4 Eq. 3.

**825. Liquidated damages or penalty — Sum provided in contract for breach.]**—An agreement not under seal, for the lease of a public-house, contained a clause that the party neglecting to comply with his part of the agreement should pay the sum of £100, mutually agreed upon to be the damages ascertained & fixed on breach thereof:—*Held*: the party making a default was not liable beyond the damages actually sustained.—*RANDALL v. EVEREST* (1827), 2 C. & P. 577; Mood. & M. 41, N. P.

*Annotation*:—*Refd.* *Crisdee v. Bolton* (1827), 3 C. & P. 240.

**826. ———.]**—In a contract for a lease it was a condition precedent that the intending lessors should complete by a fixed date certain specified works & render the house to be leased fit for habitation; the sum of 150 Rupees to be paid in respect of every day thereafter that the works remained uncompleted:—*Held*: in an action for damages, the omission to complete the works was a continuous breach of contract after the fixed date, & the stipulated daily sum was not a penalty, but was recoverable down to the date of action as liquidated damages; &, as the contract had been in effect abandoned, further damages down to the date of judgment were on the evidence rightly assessed as within the contemplation of both parties.—*DE SOYSA v. DE PLESS POL*, [1912] A. C. 194; 81 L. J. P. C. 126; 105 L. T. 642, P. C.

—*See, generally*, DAMAGES, Vol. XVII., pp. 136 *et seq.*

**827. Necessity for tender of lease for execution.]**—(1) A contract provided, that a lease should be drawn, prepared, & executed at the sole expense of the lessor. In an action on the agreement by the lessee:—*Held*: it was not necessary to aver that a lease was tendered to the lessor for execution.

(2) As the lease was to be prepared at the sole expense of *deft.*, he was to prepare it, & not the lessee. . . . Where all that is stipulated for is, that it shall be prepared at the expense of the lessor,

& there is no context to explain it, it must be intended that the lessor is to prepare it also (*PARKE, B.*).—*PRICE v. WILLIAMS* (1836), 1 M. & W. 6; 1 Gale, 362; Tyr. & Gr. 197; 5 L. J. Ex. 129; 150 E. R. 323.

*Annotations*:—*Generally, Mend.* Newborough v. Schroder (1849), 7 C. B. 342; Rickard v. Graham, [1910] 1 Ch. 722.

**828. Necessity to aver readiness to execute.]**—In a declaration upon an agreement by *deft.* to take a house of *pltf.*, & to execute a lease for the same term as *pltf.* held, less ten days, an averment that *pltf.* accepted *deft.* as tenant & tendered a lease for the same term, etc., for *deft.*'s signature, was held sufficient without averring *pltf.*'s readiness & willingness to execute a lease, or showing that he had authority to grant the lease.—*COLLINS v. WILLMOTT* (1864), 5 New Rep. 110; 11 L. T. 340; 13 W. R. 204.

**829. Money expended by tenant in expectation of lease—Parol agreement.]**—A. took a house of B., & undertook to do certain repairs & improvements, upon condition of having a lease for twenty-one years. This was a parol agreement. He entered, did the repairs, but the landlord refused to grant the lease. A. continued in possession, & brought *assumpsit* for work & labour:—*Held*: the action would not lie.—*HOPKINS v. RICHARDS* (1846), 8 L. T. O. S. 117.

**830. Assessment of damages — Question for jury.]**—By agreement under seal between *pltf.* & *deft.*'s testator, the latter agreed to grant a lease for sixty years of certain tenements then in *pltf.*'s possession, as tenant from year to year. After testator's death *deft.* repudiated the alleged agreement, contending it was a forgery, & recovered judgment in an action of ejectment in the county *ct.* *Pltf.* thereupon gave the following notice, "I hereby give you notice this day that I give up possession of all the land, according to the judge's order, that I now hold of the late J. S." *Pltf.* having brought an action in this *ct.* on the agreement, the judge considered it was for him to put a construction on this notice, & told the jury that it amounted to an abandonment of all *pltf.*'s claim under the agreement, & that if they found the agreement had been signed by testator, he was only entitled to nominal damages:—*Held*: this was a misdirection; the meaning of the notice & the amount of damages ought to have been left to the jury.—*SMITH v. SYMONDS* (1860), 1 L. T. 290.

**831. Agreement to let theatre from certain date — Theatre closed — Refusal of licence.]**—*Pltf.* in Jan. 1902, entered into an agreement with *deft.*, who was the proprietor of a provincial theatre, whereby the latter agreed to let him the theatre for a fortnight from Mar. 31, 1902. The agreement contained a clause which rendered it null & void in the event of the theatre being closed on account of any public calamity, Royal demise, epidemic, fire, or accident, "or when theatrical performances are suspended from any cause whatever." The theatre was licensed by patent from the Lord Chamberlain, & the patent was granted annually on Mar. 25. In Mar. 1902, the renewal of the patent was postponed in consequence of certain alterations having been ordered in the theatre which entailed its being closed.

*MACRIPILIS v. BAIRD*, [1924] S. R. Q. 303.—AUS.

*l. ———.]*—*DRAFER v. HOLBORN* (1874), 24 C. P. 122.—CAN.

*g. When right arises — Definite breach — Uncertain description of premises.]*—In an action of covenant for

not making a lease of premises, it is no ground for arresting the judgment that the premises are not particularly set forth, if the breach be as definite as the terms of the covenant require.—*ROWAND v. TYLER* (1835), 4 O. S. 257.—CAN.

*h. Necessity of tender of lease for*

*execution.]*—To an action for breach of an agreement to execute a lease, it is no answer to allege that *pltf.* intended lessee, had not prepared the lease & tendered it for execution to *deft.*, the intended lessor.—*CANTLEY v. POWELL* (1876), 1 R. 10 C. L. 200.—IR.



**Sect. 8.—Enforcement—Remedies for breach: Sub-sect. 2, A. (a) & (b) i.]**

In an action to recover damages for breach of contract:—*Held*: deft. was liable, as the theatre was not closed in consequence of any event covered by the clause in the contract.—*BLOW v. LEWIS* (1902), 19 T. L. R. 127.

**(b) Non-Performance by Lessor.**

**i. Defective Title of Lessor.**

**832. General rule—Damages recoverable for breach of covenant.]—***TISDALE v. ESSEX* (1816), Moore, K. B. 861; 1 Roll. Rep. 397; 3 Bulst. 204; 1 Brownl. 23; Hob. 34; 72 E. R. 956.

*Annotations*:—*Reid*. *Hayes v. Rickerstaff* (1669), Vaugh. 118; *Lucy v. Levison* (1873), Freem. K. B. 103; *Norman v. Foster* (1873), 1 Mod. Rep. 101; *Gregory v. Mayo* (1876), 3 Keb. 755. *Mentd.* *Coggs v. Bernard* (1703), 2 Ld. Raym. 909; *Ross v. Hill* (1846), 2 C. B. 877.

**833. ——— Innocent misrepresentation.]—**Pltf. entered into an agreement with deft., the lessee of a house, to take his house for three years. The agreement contained a clause which entitled pltf. to carry on in the house a boarding establishment. Deft. knew that, as between him & the freeholder, the property was subject to a restrictive covenant against user for any purpose other than that of a private dwelling-house, & he undertook to obtain, & did obtain, the consent of the freeholder, to the proposed letting to pltf. for the purpose she required. Deft. was not then aware that the conveyance of the fee simple in the land contained a covenant with the vendor that no house erected on the land, should be used for the purpose of any trade or business. After the execution of the agreement pltf. entered into possession, & after she had spent a considerable sum of money on the premises & had commenced to carry on the boarding establishment, she was informed of the existence of the restrictive covenant, & was then compelled to give up the boarding establishment. Pltf. thereupon sued for rescission of the agreement on the ground of misrepresentation & breach of warranty by deft., & she also claimed damages. At the trial deft. submitted to the agreement being rescinded, & thereupon no other order was made:—*Held*: there was an absolute covenant by deft. against all the world that pltf. should be at liberty to carry on a boarding establishment in the house, & there having been a breach of that warranty deft. was liable for the damage sustained by pltf.—*MILCH v. COBURN* (1911), 27 T. L. R. 372; 55 Sol. Jo. 441, C. A.

**834. Measure of damage—Loss of bargain—Knowledge of lessor of defect of title.]—**Where a party agrees to grant a good & valid lease, having full knowledge that he has no title, pltf., in an action for the breach of such agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain; & deft. cannot, under a plea of payment of money into ct., give evidence that pltf. was aware of the defect of title.—*ROBINSON v. HARMAN* (1848), 1 Exch. 850; 18 L. J. Ex. 202; 13 L. T. O. S. 141; 154 E. R. 363.

*Annotations*:—*Consd.* *Sikes v. Wild* (1861), 1 B. & S. 587. *Apld.* *Look v. Furze* (1866), L. R. 1 C. P. 441; *Eugell v.*

*Fitch* (1869), L. R. 4 Q. B. 659; *Godwin v. Francis* (1870), 39 L. J. C. P. 121; *Bain v. Fothergill* (1874), L. R. 7 H. L. 158; *Abrahams v. Reich*, [1922] 1 K. B. 477. *Reid*. *Pounnett v. Fuller* (1858), 17 C. B. 680; *Stranks v. St. John* (1867), L. R. 2 C. P. 376; *Wigzell v. School for Indigent Blind* (1882), 8 Q. B. D. 357; *Joyner v. Weeks*, [1891] 2 Q. B. 31; *Quirk v. Thomas*, [1916] 1 K. B. 516; *Watts v. Mitsui*, [1917] A. C. 227; *Montevideo Gas & Drydock Co. v. Clan Line Steamers* (1921), 37 T. L. R. 544.

**835. ———.]—**Pltf. & defts., who occupied adjoining premises, had entered into an agreement, in pursuance of which defts. pulled down part of pltf.'s premises, erected new buildings on the site thereof for themselves, & derived substantial & permanent benefit from the agreement. They also, in pursuance of the agreement, made a passage & side entrance to his premises for pltf., but other persons, whose land it was, shut up the passage, & rendered the entrance impossible. Defts. were in the *bona fide* belief, until after all these buildings were completed, that they were owners in fee simple in possession of the land on which they built the passage, & no negligence or want of due care could be imputed to them, nor to pltf., for acting on that assumption. The agreement also provided that defts., within two months of the completion of the buildings, should execute a lease to pltf. of, amongst other land, that which formed the passage, & that the lease should contain covenants similar to those in an indenture of lease recited in the agreement, so far as the same were applicable. The said recited indenture contained, amongst others, the ordinary covenant for quiet agreement:—*Held*: the agreement between the parties was absolute, although the covenant to be inserted in the lease, & to run with the land, was to be restricted to the usual form; & pltf. was entitled to the pecuniary amount of the difference between the present state of things, & what it would have been if the contract had been performed, & pltf. had got a title to this entrance.—*WALL v. CITY OF LONDON REAL PROPERTY CO., LTD.* (1874), 30 L. T. 53; 38 J. P. 422.

**836. ——— No stipulation as to investigation of lessor's title.]—**A tenant for life of settled land agreed to let a "park" without having first obtained the consent of the trustees of the settlement or an order of the ct. The lessees had not stipulated for the investigation of the lessor's title, nor had they ever asked him to execute a lease. There was no evidence to show that the lessor could have obtained the necessary consent or order, had he endeavoured to do so. The lessor had subsequently died, & the lessees were refused specific performance:—*Held*: under the circumstances the estate of the lessor was not liable to the lessees for damages.—*PEASE v. COURTNEY*, [1904] 2 Ch. 503; 73 L. J. Ch. 760; 91 L. T. 341; 53 W. R. 75; 20 T. L. R. 653; 48 Sol. Jo. 622.

*Annotation*:—*Mentd.* *Re Wythes' S. E.* (1908), 98 L. T. 277.

**837. ——— Premium paid on delivery of possession—Possession kept for two years.]—**By agreement between A. & B., reciting that B. had, as he was advised & believed, legally & effectually put an end to a certain lease granted to C., & dated July 18, 1839, of a certain farm, etc., by entry thereon under a power therein contained, by reason of the

**PART II. SECT. 8, SUB-SECT. 2.—**  
**A. (b) i.**

**k. General rule—Damages recoverable for breach of contract.]—**Where deft. had agreed orally to let to pltf. certain premises for a year, to commence at a future day, & on the day deft. put pltf. into possession of part of the demised

premises, but could not give him the possession of the residue, in consequence of which pltf. suffered loss, & sued deft. on the agreement:—*Held*: he was entitled to recover.—*CLARKE v. SERRICKS* (1846), 2 U. C. R. 635.—*CAN.*

**l. ———.]—**Although an agreement to lease a homestead cannot be enforced owing to the absence of the

consent of the wife of the intended lessor, his failure to fulfil the agreement entitles the other party to damages.—*SCOTT & SHEPPARD v. MILLER*, [1931] 3 W. W. R. 163.—*CAN.*

**m. Measure of damage—Breach due to infirmity of title—Necessary legal expenses.]—**When an agreement was made to lease certain premises deft.

bkpey. of C.; & that B. had agreed to grant a lease of the farm, etc., to A., for twenty-one years from Sept. 29, 1844, at same rents, etc., as same had been held by C., it was agreed that B. should grant & A. accept a lease, at a certain rent, payable quarterly, said lease to commence on Sept. 29, 1844, if deft. could then legally make & execute the same, or so soon after as deft. should be in a situation to grant same; that such lease should contain the same covenants, etc., as the lease to C.; & that A. should pay to B., on possession being delivered to him, £500 as a premium for the lease so to be granted. A. was let into possession, & occupied the farm for about two years, paying the rent; & he also, within that time, paid B. £250 in part of the £500 premium; but, the flat against C. having been superseded, B. was unable to grant the lease to A. A. thereupon brought an action for the breach of contract, alleging in his declaration, that he had always been ready & willing to accept a lease, that Sept. 29, 1844, & a reasonable time for B. to grant the lease, had elapsed, & that B. was in a situation to grant a lease. A. also sought to recover back the £250 as money had & received, upon a failure of consideration:—*Held*: (1) the recital in the agreement, & proof of declarations made by B. that C.'s lease was void & good for nothing, were *prima facie* evidence, as against B., that he had power to grant the lease; but, it appearing also by the recitals in the agreement, that the lease to C. was supposed to be void by reason of C.'s bkpey., such *prima facie* case was rebutted by proof of the *supersedeas* of the flat against C.; & consequently, B. was entitled to the verdict upon an issue as to his ability to grant the lease; & (2) the production of the *supersedeas* was sufficient proof of the issuing of the flat against C., & of the fact of its having been superseded; A. was entitled to recover back the £250, as money paid upon a consideration which had failed.—*WRIGHT v. COLLS* (1849), 8 C. B. 150; 19 L. J. C. P. 60; 13 L. T. O. S. 488; 13 Jur. 1056; 137 E. R. 465.

**838. — Costs of preparing agreement.—Investigation of title.**—Covenant on an agreement made Sept. 27, 1848, whereby deft. agreed to demise to pltf., on or before Nov. 29, then next, a ferry & certain messuages & premises, at yearly rents; & deft. thereby agreed, within fourteen days from the date thereof, to furnish an abstract of his title to the several premises, & deduce a good title thereto; & pltf. agreed to pay to deft., on or before Nov. 29, £3,150 & interest. Averment, that pltf. was always ready & willing to perform all things in the agreement on his part to be performed. Breach, that deft. did not within fourteen days, or at any time, deduce a good title. Pleas, that pltf. was not ready & willing to perform all things on his part to be performed; & that deft. did deduce a good title. It appeared that, on Sept. 17, 1850, pltf., who was a solr. & the promoter of a co., for making a ferry, erecting gas works, bathing houses, etc., at Hayling Island, entered into an agreement with deft., the owner of land there, for a demise to pltf. of a ferry, land, houses & premises; & deft. agreed, within fourteen days from the date thereof, to furnish an abstract of his title to the premises, & deduce a good title thereto; & pltf. agreed to pay deft., on or before Nov. 29, £3,150. After the agreement, the co. was

provisionally registered by pltf. as its promoter. Two abstracts of title were sent by deft. to pltf., which being objected to, on Nov. 10, deft. sent a further abstract, which disclosed a mtgo. of the premises intended to be demised to trustees of deft.'s marriage settlement, one of whom was imbecile: there were also two judgments entered up against deft. In consequence of these objections to the title, the association could not proceed with its objects, & was finally dissolved. The £3,150 was not paid to deft.:—*Held*: pltf. was entitled to a verdict on the above issues, & to recover as damages the costs of preparing, stamping & entering into the agreement; the expenses of investigating the title, & endeavouring to procure a good title, & procure the lease to be granted; but not the expenses of raising the £3,150, & loss of interest; nor the expenses of preparing the co.'s deed of settlement, & registering it provisionally, nor the loss of profits from the granting of the lease & the establishment of the association, nor the profits he would have derived from being employed as solr. by the association, nor as to any advantage which he might have derived from his time, labour, etc., bestowed in the formation of the association.—*HANSLIP v. PADWICK* (1850), 5 Exch. 615; 19 L. J. Ex. 372; 16 L. T. O. S. 416; 155 E. R. 269.

**839. —**—A bill was filed for the specific performance of a contract to grant a lease of certain premises. Deft. was unable to grant a lease of the entirety, & offered previously to the filing of the bill to release pltf., & to reimburse him the amount of certain repairs that he had done; pltf. claimed, however, to be paid for costs & expenses incurred by him in & about the entering into the contract, & for other damage sustained by him: *Held*: pltf. was entitled to an additional inquiry as to the costs & expenses incurred by him up to the filing of the bill; & pltf. ought to have proceeded at law for damages by reason of the breach of the contract. As a reasonable offer had been made to pltf. before the institution of the suit, he was properly directed to pay the costs.—*BAUMAN v. MATTHEWS* (1861), 4 L. T. 783, L. C.

**840. — Prospective damage.**—*BURROW v. SCAMMELL*, No. 709, ante.

**841. Lien of lessee for expenses incurred.**—A. agreed to grant a lease to B., who was to enter at once & expend money on improvements with a proviso that if A. failed within three months to grant a valid lease he would repay to B. the amount of his outlay, & from & after such failure B. should be at liberty to quit, & the agreement should cease except as to B.'s right to repayment. A. being unable to grant a lease for want of title:—*Held*: B. had a lien on A.'s interest on the premises for his outlay & costs of suits, & decree accordingly.—*MIDDLETON v. MAUNAY* (1864), 2 Hem. & M. 233; 10 L. T. 408; 12 W. R. 706; 71 E. R. 452.

*Annotations.*—*Apld.* *Turner v. Marriott* (1867), L. R. 3 Eq. 744. *Reid.* *Hindley v. Emery* (1865), L. R. 1 Eq. 52. *Mentd.* *Wilson v. Church* (1879), 13 Ch. D. 1.

*See, generally, LIEN.*

**842. Knowledge by lessee of possible defect of title.**—*HOWE v. HUNT*, No. 858, post.

**843. —**—*GAS LIGHT & COKE CO. v. TOWSE*, No. 701, ante.

was bound *ad* under the mistaken belief that an existing lease of the premises could be terminated upon one month's notice to the lessee. Deft. was unable to carry out the agreement

with pltf., who sued for damages for the breach:—*Held*: the breach being due to infirmity of title, the utmost pltf. could recover by way of damages was the amount of their proper &

necessary preparatory legal expenses.—*ROTMAN v. PENNETT* (1920), 47 O. L. R. 433; 18 O. W. N. 177; 54 D. L. R. 692.—*CAN.*



**Sect. 8.—Enforcement—Remedies for breach: Sub-sect. 2, A. (b) ii., (c) & (d), & B. (a).]**

**ii. Wilful Default of Lessor.**

**844. Right of lessee to recover—General rule.]**

—**SMART v. JONES**, No. 1862, *post*.

**845. — Tenant demanding possession after date agreed for commencement of tenancy.]**—In an action against deft. for the breach of an agreement, by which he was to let to pltf. a messuage for a year from Mar. 25, pltf. to take the fixtures at a valuation in the usual way & to pay for the same on entry & a plea alleging the custom of the country for the incoming tenant & the landlord each to appoint an appraiser to value the fixtures, & for the valuation to be completed before the time when, by the terms of the demise, the tenant was to have possession; & that deft. gave notice that his valuer would attend on Mar. 19, but that pltf. did not on that day, or before Mar. 25, cause any valuer to attend on his behalf, or any valuation to be made, by reason whereof deft. refused to allow him to take possession:—**Held**: it was competent to pltf. to give evidence of a demand of possession, & of a tender of the value of the fixtures, & of a refusal by deft. after Mar. 25; inasmuch as though pltf. agreed to take the premises from Mar. 25, he was not bound to enter upon that day.—**EDMAN v. ALLEN** (1839), 6 Bing. N. C. 19; 8 Scott, 261; 9 L. J. C. P. 49; 3 Jur. 1032; 133 E. R. 8.

**846. Measure of damages—Loss of profit.]**

If the agreement for a letting be delivered over, after signature, to the party interested, with an express verbal stipulation, that it is still to be subject to the landlord's being satisfied with the reference given him by the tenant, on the result of his inquiries, it seems it may be a proper question for the jury, to say, on an action for not performing the agreement, whether, inquiry having been made, the answer given by the party referred to, was such as reasonably satisfied the condition; although the landlord declared that it was not satisfactory to him, & thereupon refused to let the tenant into possession, under the contract, on that ground. Pltf. in such an action may give evidence of particular loss sustained by breach of such an agreement, if he have stated loss generally in his declaration. Therefore evidence of loss of business by pltf.'s wife in her trade of milliner, held admissible in such a case as evidence of general damage, where no special damage on that ground was laid in the declaration, nor any customers named, nor any averment of her business introduced.—**WARD v. SMITH** (1822), 11 Price, 19; 147 E. R. 388.

**847. —**—A. agrees with B. to grant the latter a lease of a house, as soon as he becomes possessed thereof, to bear date from Dec. 21, 1825, for fourteen or twenty-one years. At the date of the agreement the house was under a lease which would not expire till Midsummer, 1827; the legal estate being in trustees, first, to pay debts, & secondly, to pay an annuity to T., & subject thereto to the use of A. if he attained twenty-four. In June, 1825, after A. had attained twenty-four, but before the outstanding lease had expired, he & the trustees joined in a fresh lease to C. for

twenty-three years:—**Held**: the measure of damage would only be the value of a lease for so much of the term as upon a calculation of the probable period of the annuitant's death would be likely to be subsisting at the arrival of that period.—**FORD v. TILEY** (1827), 6 B. & C. 325; 9 Dow. & Ry. K. B. 448; 5 L. J. O. S. K. B. 169; 108 E. R. 472.

**Annotations**:—**Mentd.** Ireland v. Biorham (1835), 2 Scott, 207; Lovelock v. Franklin & Cox (1846), 15 L. J. Q. B. 146; Matthews v. Lowther (1850), 5 Exch. 574; Hochster v. De La Tour (1853), 2 E. & B. 678; Frost v. Knight (1870), L. R. 5 Exch. 322.

**848. — Expenditure on repairs.]**—A. entered into a written agreement with B. to let him a house for a year, & therein stipulated that if B. expended money in repairing the house, & A. did not at the end of the year grant to or procure for B. a lease of the house for seven years, A. would repay to B. half the amount of the repairs, not exceeding £40, within the year. B. expended money in repairs, & had paid the workmen, & A. neither granted nor procured the lease:—**Held**: B. could not, on a common count for money paid, recover the half of the amount of the repairs under the agreement, but the declaration must be special.—**THURNELL v. SYMONDS** (1843), 1 Car. & Kir. 44.

**849. —**—Pltf., in a letter, proposed to take a lease of deft.'s house for a term of years, if deft. would carry out certain alterations. A correspondence & interview followed, & it was ultimately agreed that the alterations should be made, pltf. to pay £75 towards them. Pltf. wished to have the drawing-room painted in a particular way, & deft. consented that pltf. should send in his own workmen to paint it, which he accordingly did, & also laid down gas-pipes, etc., with deft.'s consent. Ultimately pltf. was prevented from taking possession of the house owing to the default of deft. in carrying out the alterations to be performed by him, & brought an action for breach of the agreement, with the common counts for work done, etc. The correspondence disclosed no agreement sufficient to satisfy Stat. Frauds:—**Held**: pltf. could, under the common counts, recover for the value of the work done by deft.'s consent.—**PULBROOK v. LAWES** (1870), 1 Q. B. D. 284; 45 L. J. Q. B. 178; 34 L. T. 95; 40 J. P. 452.

**850. — Costs of investigation of title.]**

Where the declaration for breach of an agreement to assign a lease alleged that pltf. had been "put to great expenses, amounting to a large sum of money," etc., in investigating the title:—**Held**: he might, by way of damage, recover the amount of a bill of costs due to his attorney for investigating the title, though such bill was not paid before action brought.—**RICHARDSON v. CHASEN** (1847), 10 Q. B. 756; 11 Jur. 890; 116 E. R. 287.

**(c) Non-Performance by Lessee.**

**851. Right of lessor to recover—Loss of rent.]**

Counts for use & occupation & money had & received, are sustainable where deft. has received rents & obtained attornments from tenants in possession, under an executory contract for a lease to be executed to him by pltf. at a rent & from a period to be afterwards ascertained.—**NEALE v.**

**8 O. R. 39.—CAN.**

**o. —**—**McLENNAN v. MILLINGTON** (1897), 5 B. C. R. 345.—**CAN.**

**PART II. SECT. 8, SUB-SECT. 2.—**

**A. (c).**

**p. Right of lessor to recover.]**—**DINGWALL v. BURNETT**, [1912] S. C. 1097.—**SCOT.**

**PART II. SECT. 8, SUB-SECT. 2.—**

**A. (b) ii.**

**n. Measure of damages.]**—In an action by a tenant against his landlord for refusing to give him possession of the demised premises, the proper measure of damages is the difference between what the tenant agreed to pay for the premises & what they were

really worth; it is not open to the tenant to show that he rented the premises for the purpose of there carrying on a certain business, of which the landlord was aware, that he could not procure other premises, & to claim the profits which he might have made in such business if he had been let into possession.—**MARRIN v. GRAVER** (1885),

SWIND (1832), 3 Cr. & J. 377; 149 E. R. 120; *sub nom.* NEALE v. SWEENEY, 2 Tyr. 464.

*Annotation:—**Held.* Lowe v. Ross (1850), 15 L. T. O. S. 94.

852. — [—] (1) Pltf. agreed with F. to let him land on a building lease for ninety-eight years from Christmas, 1835, at a peppercorn rent for three years, & then at £115 a year, payable quarterly; F. to build on the land & cover in eight messuages within the first three years, & to accept a lease, etc.: proviso for re-entry on default. F. entered, but did not build the houses; whereupon pltf. brought ejectment, & recovered possession on June 12, 1839. The demise in the ejectment was laid on Jan. 1, 1839:—*Held*: pltf. could not, in *assumpsit* against F. on the agreement, recover rent from Dec. 25 to Jan. 1. For, *semble*: Apportionment Act, 1834 (c. 22), s. 2, as to apportionment of rents, does not apply to the case of a landlord determining the relation of landlord & tenant by his own act; (2) if it did, no rent was due here, the re-entry taking effect from the day of the demise, & having therefore put an end to the tenancy before a quarter's rent accrued; but the remedy was by action for mesne profits.

(3) After re-entry, pltf. agreed with a new tenant to let him the premises for the residue of F.'s term, at a peppercorn for the year ending midsummer 1840, £70 for the year ending midsummer 1841, & £140 a year for the rest of the term. Pltf., in the above action, claimed, as damages, the difference between the rent which he would actually receive down to midsummer 1841, & that which would have accrued down to the same period if F. had kept his agreement:—*Held*: the jury were not bound to award that amount, but might give their verdict on an estimate of pltf.'s real damage, taking into consideration the increased rent secured to him by the second agreement.—*OLDERSHAW v. HOLT* (1840), 12 Ad. & El. 590; Arn. & H. 1; 4 Per. & Dav. 307; 10 L. J. Q. B. 221; 4 Jur. 1012; 113 E. R. 935.

*Annotations:—*As to (1) *Consd.* Bridges v. Potts (1864), 17 C. B. N. S. 314; Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117. As to (3) *Consd.* Wiggall v. School for Indigent Blind (1882), 8 Q. B. D. 357. *Apld.* Marshall v. Mackintosh (1898), 78 L. T. 750. *Refd.* Joyner v. Weeks, [1891] 2 Q. B. 31; Stephens v. Junior Army & Navy Stores (1914), 111 L. T. 1055.

853. — [—] By a building agreement dated June 10, 1896, deft. agreed with pltf. to pull down & re-erect Holloway's Hotel, Dover-street, in carcase before Dec. 25, 1896, & thereupon to take a lease of it from pltf. for eighty years from June 24, 1896 at a peppercorn rent for the first year, & at a rent of £1,100 for the second & every subsequent year of the term. Deft. undertook to finish his part of the agreement by Dec. 1896. By clause 2 of the agreement "on default by the lessee of the stipulation contained in this clause," he shall forfeit all benefit under this agreement which shall thereupon cease & be determined, & all the materials & buildings on the premises shall be forfeited to & become the absolute property of the lessor." By clause 11: "If the new buildings shall not be erected or completed within the time & in the manner aforesaid before Dec. 25, 1896, or if the lessee shall fail to observe or perform any of the stipulations herein & in the form of lease contained or on his part to be observed & performed, or if he shall not proceed with the works with proper diligence, then & in any of the cases the lessor shall be entitled to re-enter upon & to take immediate possession of the piece of

land & premises with all buildings, erections, plant, & materials thereon without making to the lessee any allowance or compensation in respect thereof, & without any process at law or any notice to the lessee or any other person or persons to quit the premises or to determine the holding thereof." Deft. went into possession on June 10, 1896, but beyond pulling down about £200 worth of materials did nothing, & on Jan. 19, 1897, pltf. re-entered. Deft. contended that the effect of these two clauses was to limit pltf. to such compensation as he could get by re-entry & taking possession of the materials on the premises, & that he could recover no damages. Pltf. on re-entry could only relet from June, 1899, at £900 a year rent:—*Held*: in addition to the re-entry, pltf. could recover as damages the loss of two years' rent at £1,100, & the loss of £200 a year at twenty-five years' purchase.—*MARSHALL v. MACKINTOSH* (1898), 78 L. T. 750; 40 W. R. 580; 14 T. L. R. 458; 42 Sol. Jo. 553.

854. — *Sum agreed to be paid as condition precedent to grant of lease.*—By an agreement between pltf. of the first part, & defts. of the second part, the former agreed, that, upon payment to them by the latter of £1,410 by instalments on certain days, they would grant defts. a lease of a certain parcel of land; & defts. agreed to accept such lease & execute a counterpart thereof. A declaration, after setting out the agreement verbatim, alleged that all things & conditions had happened, & had by pltf. been observed & performed which were necessary to entitle them to be paid by defts. the several sums on the days named, & that the several days had elapsed before the suit; & assigned for breach non-payment of the moneys or any part thereof:—*Held*: the declaration disclosed a sufficient cause of action, the granting of the lease not being a condition precedent to pltf.'s right to demand payment of the money. *BAGGALLAY v. PETTIT* (1850), 5 C. B. N. S. 637; 28 L. J. C. P. 169; 23 J. P. 405; 5 Jur. N. S. 808; 141 E. R. 250.

855. — *Nominal damages.*—*MAYER v. SOUTHEY* (1892), 8 T. L. R. 395.

(d) *Agreement by Agent without Authority.*

See AGENCY, Vol. I., pp. 665, 666, Nos. 2705-2707.

## B. Damages in lieu of or in addition to Specific Performance.

(a) *Damages in lieu of Specific Performance.*

See, generally, SPECIFIC PERFORMANCE.

856. *Power of court to award—Discretion of court.*—In an action for specific performance of an agreement by deft. to grant pltf. a lease of the sporting rights over deft.'s farm for five years the et., in the circumstances of the case, did not decree specific performance, but directed an inquiry as to damages.—*ENDERBY v. CLARK* (1918), 34 T. L. R. 351.

857. — *Expiry of term—Plaintiff entitled to substantial relief.*—Where a bill had been filed for the specific performance of an agreement to grant a lease, & for an account of arrears of rent on the footing of the agreement, & the term for which the lease was to be granted had expired before the hearing of the cause:—*Held*: pltf. having a substantial right to relief, was entitled to a decree for an account of the arrears, although, under the circumstances, specific performance of the agreement could not be granted.—*WILKINSON v.*

## PART II. SECT. 8, SUB-SECT. 2.—

B. (a).

q. *Power of court to award—*

*Expiry of term.*—A sub-lessee, having been evicted on the expiration of the term granted by his lease, sued on a

covenant to grant an additional term. That term, however, having nearly expired at the date of the decree, an

**Sect. 8.—Enforcement—Remedies for breach: Sub-sect. 2, B. (a) & (b). Sect. 9: Sub-sect. 1.]**

**TORKINGTON (1837), 2 Y. & C. Ex. 726; 7 L. J. Ex. Eq. 30.**

**Annotation:—Apld. De Brassac v. Martyn (1863), 2 New Rep. 512.**

**858. — Knowledge by plaintiff of defect in lessor's title.]—**Where deft. recklessly entered into a contract with pltf. to grant him a lease of certain premises, & pltf. laid out money on the faith of that contract but it was afterwards found that deft. could not grant the lease, which pltf. might have known, the ct. allowed damages to be assessed, & gave pltf. the costs subsequent to the hearing.—**Howe v. HUNT (1862), 31 Beav. 420; 32 L. J. Ch. 36; 7 L. T. 124; 26 J. P. 563; 8 Jur. N. S. 834; 10 W. R. 813; 54 E. R. 1201.**

**Annotation:—Distd. Middleton v. Magnay (1864), 2 Hem. & M. 233.**

**859. — No agreement capable of specific enforcement.]—**I have no jurisdiction to deal with the question of damages, as I have held that there has been no agreement established which is capable of being specifically performed. Where the existence of an agreement is made out, the ct. may think it better to give relief in damages than to perform the agreement, but the relief thus given is by the words of Chancery Amendment Act, 1857 (c. 27), "in addition to or in substitution for" specific performance, & implies the existence of an agreement between the parties capable of being specifically performed. Here, as there is no such agreement, I have no jurisdiction at all over the matter, & I cannot award any compensation to pltf. for the disappointment he may have been subjected to from not having succeeded in obtaining a definite agreement from pltf. or his agent (WOOD, V.-C.).—**LEWERS v. SHAFTESBURY (EARL) (1866), L. R. 2 Eq. 270; 12 Jur. N. S. 389; affd. (1867), 16 L. T. 135, L. C.**

**Annotation:—Refd. Larios v. Bonany y. Gurety (1873), L. R. 5 P. C. 346.**

**860. — —.]—(1)** In a purchaser's action for specific performance a pltf. cannot recover damages for breach of contract unless he establishes misrepresentation on the part of deft. The object & intention of Chancery Amendment Act, 1858 (c. 27), which gives the ct. jurisdiction to award damages in substitution for specific performance in all cases in which the ct. has jurisdiction to entertain an application for specific performance, was not to give any new right to damages, but to prevent the mischief arising from two distinct methods of procedure which previously to the time of its passing were in existence. In no case where damages could not previously have been recovered at law can they now be obtained under Chancery Amendment Act, 1858 (c. 27).

**(2) Semble: In a contract for a lease the words "immediate possession if required" do not fix the commencement of the term.—ROCK PORTLAND CEMENT CO., LTD. v. WILSON (1882), 52 L. J. Ch. 214; 48 L. T. 386; 31 W. R. 193.**

**Annotation:—As to (2) Refd. Edwards v. Jones (1921), 124 L. T. 740.**

**861. — —.]—Jud. Act, 1873 (c. 60), s. 25 (11), does not extend the equity jurisdiction so as to enable the ct. to grant damages in a case wherein before the Act damages were not recoverable, e.g. in the case of an oral agreement not capable of specific performance in equity, & in respect of which, in an action at law for damages, deft. could have successfully pleaded Stat. Frauds.**

**—Re NORTHUMBERLAND AVENUE HOTEL CO., LTD., SULLY'S CASE (1885), 54 L. T. 76; 2 T. L. R. 210; affd. on other grounds (1886), 33 Ch. D. 16.**

**Annotations:—Follid. Lavery v. Pursell (1888), 39 Ch. D. 508. Menid. Re Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co. (1888), 38 Ch. D. 156; Re Johannesburg Hotel Co. (1890), 6 T. L. R. 360; Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146; Steel Manufacturers' Nickel Syndicate v. Soc. Generale d'Explorations Coloniales & Consolidated Nickel Mines (1903), 48 Sol. Jo. 178; Barker v. Stickney, [1918] 2 K. B. 356.**

**862. — —.]—Held: the jurisdiction to give damages in substitution for or in addition to specific performance has not been extended to cases where specific performance could not possibly have been directed & accordingly the contract having from lapse of time become at the hearing incapable of specific performance the equitable doctrine of part performance, as avoiding the operation of Stat. Frauds, did not enable pltf. to obtain relief in damages.**

As is well known, the Ct. of Chancery would not grant specific performance of an agreement for a holding for a year, the reason being that it was one of those matters which were best dealt with by damages (CHITTY, J.).—**LAVERY v. PURSELL (1888), 39 Ch. D. 508; 57 L. J. Ch. 570; 58 L. T. 846; 37 W. R. 163; 4 T. L. R. 353.**

**Annotation:—Refd. Jarvis v. Jarvis (1893), 63 L. J. Ch. 10.**

**863. — In event of specific performance becoming impossible—Failure to procure licence to underlet.]—**A., a lessee under a lease containing a covenant not to assign or underlet without a licence from the lessor, & a proviso for re-entry on breach of the covenant, agreed to grant an underlease, but his lessor requiring a consideration for a licence which A. considered excessive, he, A., refused to complete. In a suit by the proposed underlessee against A. for specific performance, the ct. made a decree for specific performance, with a reference as to damages in case deft. should be unable to procure the licence. In every case where there is a valid contract & an unexceptional subject, & the parties are under no disability, the ct. has power to decree damages.—**HILTON v. TIPPER (1868), 18 L. T. 626; 16 W. R. 888.**

**Annotation:—Refd. West v. Gwynne (1911), 80 L. J. Ch. 578.**

**(b) Damages in addition to Specific Performance.**

**864. Power of court to award—Failure to build house & accept lease.]—**Pltf. agreed to grant a lease to deft., when & so soon as he, deft., should have built a new house on the land; & deft. agreed to accept such lease when required, & by a certain day to pull down an old house then standing on the land, & build a new one on the site.—**Held: Chancery Amendment Act, 1858 (c. 27), applied, & pltf. was entitled to damages for the non-building of the house, & to specific performance of the contract to accept the lease.—SOAMES v. EDGE (1860), John. 609; 70 E. R. 588.**

**Annotations:—Distd. Norris v. Jackson (1860), 1 John. & H. 319. Consd. Middleton v. Magnay (1864), 2 Hem. & M. 233. Follid. London Corpn. v. Southgate (1868), 38 L. J. Ch. 141. Consd. Elmore v. Pirrie (1887), 57 L. T. 333.**

**865. — —.]—**An agreement for a lease of certain premises containing a stipulation that the lessees should execute certain building works, & that the lessors should advance £1,000 on mtge. to a limited co., was executed by the directors & secretary of the co. as lessees. The £1,000 was advanced, & the lessor, pltf., has in correspondence treated the co. as liable to perform the stipulations of the agreement, & evidence was given that the

account, in the nature of an inquiry quantum damnis factus, was directed instead of specific performance.—

**M'NULTY v. HAMILL (1815), Beat. 544.**

**—IR.**

**r. — Failure of tenant to re-**

**build & repair.]—RUSSEBROOKE v. O'SULLIVAN, [1906] 1 I. R. 232.—IR.**

directors & secretary were trustees of the benefit of the agreement for the co. :—*Held* : nevertheless, the directors & secretary who signed the agreement were personally liable, & decree made for specific performance of the agreement to take a lease, but specific performance of the building stipulations refused, & an inquiry as to damages granted in respect thereof.—*KAY v. JOHNSON* (1864), 2 Hem. & M. 118; 71 E. R. 406.

**866.** ———.]—*Deft.* agreed with *pltf.* by a certain day to pull down an old house & build a new one on the site, agreeably to plans to be submitted by *pltf.*'s contractor, & under the inspection & to the satisfaction of their architect; & *pltf.* agreed, when the new building should be completed, to grant a lease of the premises for a certain term at a fixed rent, *deft.* agreeing to accept such lease when required. A demurrer to a bill praying specific performance & damages was overruled on the ground that *pltf.* waiving the specific performance of that part of the agreement which related to the building of the house, might be entitled to damages for the breach thereof, & to specific performance of the other part, viz., the contract to accept the lease. Such waiver might be made at the bar & need not be offered by the bill. *Semble* : though the contract did not in terms so provide, the lease which *pltf.* were entitled to call on *deft.* to accept might contain covenants to build in accordance with the spirit of the contract.—*LONDON CORPN. v. SOUTHGATE* (1868), 38 L. J. Ch. 141; 20 L. T. 107; 17 W. R. 197.

**867.** ——— Agreement to let house & do repairs.]—*Pltf.* having agreed to take a house for three years, & *defts.*, having agreed to put the same in substantial & decorative repair, & keep the same so during the term; & *defts.*, having refused to perform their contract, specific performance was decreed, with an inquiry as to whether the agreement as to decorative repair had been performed, & if not, that damages should be awarded.—*SAMUDA v. LAWFORD* (1862), 4 Giff. 42; 6 L. T. 890; 27 J. P. 36; 8 Jur. N. S. 739; 66 E. R. 612.

**868.** ——— Delay in performance.]—*MIDDLETON v. GREENWOOD* (1864), 2 De G. J. & Sm. 142; 3 New Rep. 694; 10 L. T. 149; 10 Jur. N. S. 350; 46 E. R. 329, L. J.J.

*Annotation* :—*Consd.* *Elmore v. Pirrie* (1887), 57 L. T. 333.

**869.** ——— Agreement to let house for use in particular trade—Damages for loss of profits from trade.]—(1) A memorandum of agreement to grant a lease not stating any time for the commencement of the lease, construed as an agreement for a lease to commence immediately from the date of the agreement, & held sufficient under Stat. Frauds. (2) *Pltf.* agreed with *deft.* to take a lease of premises belonging to *deft.* for the purpose, as *deft.* knew, of carrying on a trade which *pltf.* was about to commence. In consequence of *deft.*'s wilful refusal to fulfill his agreement, *pltf.* was unable for fifteen weeks to commence his trade :—*Held* : in addition to judgment for specific performance of the agreement, damages must be awarded in respect of *pltf.*'s loss of profits from his trade during the fifteen weeks; & £250 damages were awarded.—*JACQUES v. MILLAR* (1877), 4 Ch. D. 153; 47 L. J. Ch. 544; 37 L. T. 151; 25 W. R. 846; *sub nom.* *JACQUES v. MILLAR*, 42 J. P. 20.

*Annotations* :—*As to* (1) *Overd.* *Marshall v. Berridge* (1881)

19 Ch. D. 333. *Consd.* *Wood v. Aylwood* (1887), 57 L. T. 54. *Reid.* *Rz Lander & Bagley Contract*, (1892) 3 Ch. 41. *As to* (2) *Consd.* *Wesley v. Walker* (1878), 38 L. T. 284; Royal Bristol Permanent Bldg. Soc. v. Bomash (1887), 35 Ch. D. 390; *Jones v. Gardiner*, (1902) 1 Ch. 191.

**870.** Measure of damages.—Rent payable while lessee out of possession.]—*Deft.* being the owner of a piece of building land, which he held under restrictions as to the kind of buildings to be erected thereon, signed a receipt for £5 embodying an agreement for a lease for ninety-nine years. The receipt stated that a rent of £20 should be payable quarterly, & that the ground rent should commence from a fixed date, but did not state when the lease should commence. In giving judgment for specific performance :—*Held* : (1) the expression "ground rent" in the agreement did not import any stipulation that the land should be built upon, & therefore, did not imply the execution of a future building lease; (2) the lease was to commence from the time when the ground rent began to be payable; & (3) the damages payable in respect of the breach of the agreement were a sum equivalent to the rent payable during the time that *pltf.* was kept out of possession.—*WESLEY v. WALKER* (1878), 38 L. T. 284; 26 W. R. 308.

**871.** ——— Abatement of rent during non-performance.]—*HYAM v. TERRY* (1881), 25 Sol. Jo. 371.

*Annotation* :—*Reid.* *Rowe v. London School Board* (1887), 36 Ch. D. 619.

## SECT. 9. STAMPS.

### SUB-SECT. 1.—NECESSITY FOR.

*See* Stamp Act, 1891 (c. 39), ss. 72-75 (1); Finance (1900-10) Act, 1910 (c. 8), & generally, REVENUE.

**872.** Minute of term of letting by auction—Signed by auctioneer.]—A written paper, signed by the auctioneer, & delivered to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they are let to the bidder, & the rent payable, must be stamped pursuant to Probate & Legacy Duties Act, 1808 (c. 149).—*RAMSHOTTON v. MORTLEY* (1814), 2 M. & S. 446; 105 E. R. 446.

*Annotations* :—*Distd.* *Doe d. Marlow v. Wiggins* (1843), 4 Q. B. 367. *Apld.* *Glover v. Halkett* (1857), 2 H. & N. 487. *Reid.* *Hawkins v. Warre* (1825), 3 B. & C. 690; *Hughes v. Budd* (1849), 4 Jur. 654.

**873.** Not signed by auctioneer.]—A written paper, delivered by the auctioneer to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, & the rent payable, but not signed by the auctioneer or any of the parties :—*Held* : not to be such a minute of the agreement as was required to be stamped, pursuant to Probate & Legacy Duties Act, 1808 (c. 149), nor such a writing as would exclude parol evidence. Lease dated two days before release good to support release which refers to a lease as of the day next before the date of release.—*RAMSHOTTON v. TUNBRIDGE* (1814), 2 M. & S. 431; 105 E. R. 412.

*Annotations* :—*Fold.* *Hawkins v. Warre* (1825), 3 B. & C. 690. *Distd.* *Doe d. Marlow v. Wiggins* (1843), 4 Q. B. 367. *Reid.* *Duffell v. Spottiswoode* (1823), 2 C. & P. 435; *Strother v. Barr* (1828), 5 Bing. 136; *Whitford v. Tatlin* (1834), 4 Moo. & S. 166.

**874.** Bill of exchange incorporating agreement.]—A bill of exchange expressing the terms of an

## PART II. SECT. 9. SUB-SECT. 1.

*t. Agreement under hand.*]—An agreement for a lease, though under hand & not by deed, must be stamped.—*GIVEN v. DERHAM* (1887), 5 N. Z. L. R. 454 (S. C.).—N.Z.



*Sect. 9.—Stamps: Sub-sects. 1 & 2, A. & B.; sub-sects. 3 & 4. Part III. Sect. 1: Sub-sects. 1, 2, 3 & 4, A.]*

agreement between a landlord & incoming tenant, cannot be read in evidence without an agreement stamp.—*NICHOLSON v. SMITH* (1822), 3 Stark. 128, N. P.

*Annotation:—Reid. Millen v. Dent* (1847), 16 L. J. Q. B. 374.

**875. Offer only.]—***DRANT v. BROWN*, No. 879, post.

**876. —.]—**Deft.'s steward proved that a lease had been executed by deft. but not by pltf., the terms of which had been reduced into writing by the assent of both parties, & he stated that to be the final agreement between the parties. Pltf., in order to negative this statement, tendered in evidence another unstamped paper in the handwriting of deft.'s steward, the effect of which was to show that it was subsequently proposed by him that pltf. was to hold at a rent different from that mentioned in the lease:—*Held*: as this paper was not signed by the parties, it did not amount to an agreement or minute of an agreement, but to a proposal only, & therefore it did not require a stamp, & was properly received in evidence.—*HAWKINS v. WARRE* (1825), 3 B. & C. 690; 5 Dow. & Ry. K. B. 512; 107 E. R. 889.

*Annotation:—Reid. Matheson v. Ross* (1849), 2 H. L. Cas 286.

**877. —.]—**In order to establish a derivative settlement by renting a tenement, an unstamped document was tendered in evidence. It was in form a proposal by A. to become tenant of B. on certain terms. A. occupied as tenant from the time of the proposal; & B. afterwards wrote to his agent a formal acceptance of the terms proposed by A.; but that acceptance was never communicated to A.:—*Held*: the document was admissible without a stamp.—*R. v. ST. JAMES'S, WESTMINSTER* (1852), 18 L. T. O. S. 222; 16 J. P. 745.

**878. —.]—**If, after two parties have orally agreed to certain terms, one of them desires that these shall be put into writing, & the other writes them out in the form of a proposal, which is orally accepted; this, though necessary to be put in as matter of evidence, does not require a stamp as an agreement.—*LAING v. SMITH* (1862), 3 F. & F. 97.

**879. Acceptance.]—**A. entered into a written agreement with B. for the hire of a piece of land for the purpose of making bricks. C. afterwards made an offer in writing to let another piece of land to A. upon the terms contained in the agreement between him, A. & B., & at a subsequent time A. verbally accepted this offer. In an action by C. for a breach of some of the terms of this contract:—*Held*: the written offer made by C. was admissible in evidence without being stamped.

This was a mere proposal; if it had been accepted by writing, that must have been stamped, but being accepted by parol, the agreement was in law a parol agreement (*HOLROYD, J.*).—*DRANT v. BROWN* (1825), 3 B. & C. 605; 5 Dow. & Ry. K. B. 582; 3 L. J. O. S. K. B. 111; 107 E. R. 879.

*Annotations:—Distd. Turner v. Power* (1828), 7 B. & C. 625. *Consd. Hudketh v. Yarnold* (1850), 9 C. B. 625; *Ward v. Londesborough* (1852), 12 C. B. 252. *Reid. Bowen v. Fox* (1828), 2 Man. & Ry. K. B. 167; *Chanter v. Dickinson* (1845), 5 Man. & G. 253; *Chadwick v. Clarke* (1845), 1 C. B. 700; *Clay v. Crofts* (1851), 17 L. T. O. S. 281; *Hegarty & Clark v. Milne & Smith* (1854), 18 Jur. 496; *Smith v. Neale* (1857), 3 C. B. N. S. 67. *Mentd. Williams v. Lake* (1859), 6 Jur. N. S. 45.

**880. Approval of draft agreement.]—**A draft agreement for a lease had on the back of it the following memorandum, "We approve of this draft," & this was signed by the parties:—*Held*:

it did not require any stamp.—*DOE d. LAMBOURN v. PEDGRIPH* (1830), 4 C. & P. 312, N. P.

*Annotations:—Reid. Chadwick v. Clarke* (1845), 1 C. B. 700. *Mentd. Thornbury v. Bevil* (1842), 1 Y. & C. Ch. Cas. 554.

**881. Surrender of old lease.—In consideration of fine & new lease.]—**On surrender of a lease for lives, purporting to be made in consideration of £120 & of a new lease to be granted to the surrenderor for his life, the deed does not require an agreement stamp in addition to the *ad valorem* stamp; the stipulation for a new lease not being a "matter or thing besides what" is "incident to the sale & conveyance," within Stamp Act, 1815 (c. 184), sched., Part I., title Conveyance.—*DOE d. PHILLIPPS v. PHILLIPPS* (1840), 11 Ad. & El. 796; 3 Per. & Dav. 603; 113 E. R. 616.

#### SUB-SECT. 2.—AMOUNT OF STAMP.

##### A. How Calculated.

**882. Rent—Not value of occupation.]—***DOE d. MARLOW v. WIGGINS*, No. 157, ante.

##### B. Sufficiency of Amount.

See REVENUE.

#### SUB-SECT. 3.—ADMISSIBILITY OF UNSTAMPED AGREEMENT.

See, generally, EVIDENCE, Vol. XXII., pp. 263 et seq.

**883. General rule—Inadmissible.]—**A joint-stock co., of which pltf. & deft. were both directors, occupied a house belonging to pltf. A draft agreement, prepared by pltf.'s attorney, was submitted to the solrs. of the co. & by them approved & returned; & at a subsequent meeting of the directors, a resolution was made empowering the solrs. to sign the agreement on behalf of the co. The agreement, however, was never executed. In debt for use & occupation pltf. offered the draft in evidence not as an agreement binding *per se*, it being neither dated, stamped, nor signed, but for the purpose of showing that the occupation of the premises was to be by the other directors, exclusive of himself:—*Held*: the draft was inadmissible, for want of a stamp inasmuch as it could only be relied on as proof of the special agreement, pltf.'s position precluding him from maintaining an action against a co-director upon an implied contract.—*CHADWICK v. CLARKE* (1845), 1 C. B. 700; 14 L. J. C. P. 233; 5 L. T. O. S. 174; 9 Jur. 539; 135 E. R. 717.

**884. —.]—**The terms of the tenancy were contained in an agreement signed by deft., & by one of two tenants in common, this action being by the exor. of the other tenant in common. The agreement, being unstamped, was inadmissible in evidence.—*WILTON v. DUNN* (1851), 16 L. T. O. S. 125, 365.

**885. Stamped agreement incorporating unstamped lease.]—**By a paper entitled a memorandum of agreement, signed by pltf. & deft., it was recited that deft. & W. had agreed to abandon the annexed contract for taking & letting certain lands; that pltf. & deft. agreed, the former to take, the latter to let, the lands, upon the conditions contained in the annexed contract; "The said rent to be annually paid by quarterly payments, & to be in amount £220; & we further bind ourselves to the other to execute a similar agreement to the one recited & referred to." This agreement had a £3 stamp. The annexed agreement had no stamp, & was, in effect, a lease from

deft. to W. setting out regularly the terms of the tenancy, etc.:—*Held*: the stamped agreement incorporated the unstamped one, & the two together might be given in evidence as a lease on the terms contained in the unstamped one.—*PEARCE v. CHESLYN* (1835), 4 Ad. & El. 225; 1 Har. & W. 768; 5 Nev. & M. K. B. 652; 5 L. J. K. B. 113; 111 E. R. 772.

**886. Unstamped counterpart—Original stamped.**—If plffs. put in one part of a written agreement for a lease which is signed by deft. only, & is duly stamped, deft. may put in the other part of the agreement, which is signed by one of plffs. "for self & the other exors.," although that part of the agreement is not stamped.—*TURNER v. HARDEY* (1842), Car. & M. 449, N. P.

*Annotation.*—*Reid*. *Wright v. Webb* (1846), 7 L. T. O. S. 433.

**887. To show terms of collateral agreement.**—Where a document, void as a lease, is tendered in evidence to show the terms of a collateral agreement it requires a stamp as an agreement.—*GOLDEN v. TAYLOR* (1860), 2 F. & F. 110.

**888. Document invalid.**—An agreement in writing for a lease by a married woman, not regarding the husband, must, if tendered in evidence, be stamped although not valid as an agreement, as it purports to be an agreement.—*GROVER v. LEWIS* (1862), 3 F. & F. 266.

**Document amounting to proposal only.**—*See* Nos. 876, 879, *ante*.

**Document amounting to acceptance.**—*See* No. 879.

#### SUB-SECT. 4.—LOST AGREEMENTS.

**889. Presumption as to stamping—Onus of proof—When onus shifted.**—Where an instrument, an agreement for a lease, has been lost, the rule is to presume that it was duly stamped, & the onus of proving the contrary lies upon the party who objects that the lost document

was unstamped; but where circumstances are proved which raise a strong presumption that the document was never stamped, the burden of proving it to have been stamped lies on the party adducing secondary evidence of the lost instrument. Where a lost instrument is shown to have been unstamped, secondary evidence of its contents cannot be received. Where there has been a treaty & a subsequent written agreement, the parties cannot, after the loss of the written agreement, rely on the treaty & part performance, as a parol agreement in part performed. When plff. relies upon an agreement admitted in deft.'s answer, such admission must be distinct & clear, so that the ct. can, with reasonable certainty, make out the terms of the contract it is asked to enforce. The answer may be read on the question of costs, but evidence not used on the hearing cannot be looked at.—*SMITH v. HENLEY* (1844), 1 Ph. 391; 13 L. J. Ch. 221; 3 L. T. O. S. 49; 8 J. P. 228; 8 Jur. 434; 41 E. R. 680, L. C.

*Annotation.*—*Reid*. *Blair v. Ormond* (1847), 1 De G. & Sm. 428.

*See, generally*, EVIDENCE, Vol. XXII., p. 272, Nos. 2571–2577.

**890. Agreement unstamped—Admission of secondary evidence.**—An agreement in writing, unstamped, for the letting a tenement at a certain rent, having been lost:—*Held*: parol evidence of its contents was not admissible, for the sake of proving thereby the value of the tenement.—*R. v. CASTLE MORTON (INHABITANTS)* (1820), 3 B. & Ald. 588; 106 E. R. 776.

*Annotations.*—*Expld.* *R. v. Holy Trinity, Kingston-upon-Hull* (1827), 7 B. & C. 611; *Strother v. Barr* (1828), 5 Bing. 136; *Matheson v. Ross* (1849), 2 H. L. Cas. 286. *Reid*. *Hart v. Hart* (1841), 1 Har. L., *Crowther v. Solomon* (1848), 6 C. B. 758.

**891.** ————]—*SMITH v. HENLEY*, No. 889, *ante*.

— — — —]—*See, generally*, EVIDENCE, Vol. XXII., p. 275, Nos. 2615–2621.

## Part III.—Leases.

### SECT. 1.—CAPACITY TO GRANT AND TAKE LEASES.

#### SUB-SECT. 1.—ALIENS.

**Right to acquire property.**—*See* ALIENS, Vol. II., pp. 134–138, Nos. 97–129.

#### SUB-SECT. 2.—CHARITIES.

**Grant of lease by charity.**—*See* CHARITIES, Vol. VIII., pp. 280, 360, Nos. 536, 1567–1578.

**Length of term.**—*See* CHARITIES, Vol. VIII., pp. 360, 361, Nos. 1579–1598.

**Renewal.**—*See* CHARITIES, Vol. VIII., pp. 361, 362, Nos. 1599–1611.

**Rent.**—*See* CHARITIES, Vol. VIII., p. 362, Nos. 1612–1634.

**Leases to trustees.**—*See* CHARITIES, Vol. VIII., p. 362, Nos. 1635–1637.

**Leases by corporations.**—*See* CHARITIES, Vol. VIII., pp. 362, 363, Nos. 1638–1644.

**Improvements by lessees.**—*See* CHARITIES, Vol. VIII., p. 363, Nos. 1645–1657.

#### SUB-SECT. 3. COMPANIES.

Companies generally, *see* COMPANIES, Vols. IX., X. **Leases by railway companies.**—*See* RAILWAYS.

**Acquisition of property by lease.**—*See* COMPANIES, Vol. IX., pp. 664, 665, Nos. 4423–4425.

**Liability of directors.**—*See* COMPANIES, Vol. IX., p. 483, No. 3170.

#### SUB-SECT. 4.—CO-OWNERS.

##### A. In General.

**892. Right of one to bind others.**—A married woman, with the concurrence & in the presence of her husband, signed an agreement in writing to grant a lease. At the date of the agreement it was believed by all parties that she was entitled to two-thirds of the property for her separate use, & that the remaining one-third belonged to her brother in India, whose concurrence it was represented that she could procure. It was soon afterwards discovered that the wife was entitled to one-fourth only for her separate use; that to another

### PART III. SECT. 1, SUB-SECT. 4.—A.

**a. Husband & wife—Tenants by entireties.**—A lease for life to a husband & wife makes them tenants by entireties, so that the whole accrues to the survivor.—*LEITCH v. McLELLAN* (1883), 2 O. R. 587. —*CAN.*



**Sect. 1.—Capacity to grant and take leases: Subsect. 4, A., B., C. & D.]**

fourth she was entitled absolutely; that another fourth had belonged to a deceased sister of the wife; & that the remaining fourth belonged to the brother in India. The fourth which had belonged to the sister was purchased by the husband soon after the state of the title was discovered. Upon a bill for specific performance against husband & wife:—*Held*: there could be no decree against her *in personam*; & her agreement did not bind the husband as to the interests in the property which he had at the date of the agreement or which he afterwards acquired.—*AYLETT v. ASHTON* (1835), 1 My. & Cr. 105; 5 L. J. Ch. 71; 40 E. R. 316.

*Annotations*:—*Reid*. Johnson v. Gallagher (1861), 3 De G. F. & J. 494. *Mentd*. London Chartered Bank of Australia v. Lempiere (1873), L. R. 4 P. C. 572; Atwood v. Chichester (1878), 26 W. R. 320.

**B. Coparceners.**

Coparceners generally, see REAL PROPERTY.

**893. Right of one to lease own share.]**—One coparcener may let her moiety, yielding the moiety of the accustomed rent.—*MOUNTJOY'S (LORD) CASE* (1589), 5 Co. Rep. 3 b; 77 E. R. 52.

*Annotations*:—*Reid*. *Re* Aldam's S. E., [1902] 2 Ch. 46. *Mentd*. Worcester's (Dean & Chapter) case (1606), 0 Co. Rep. 37 a; Gee v. Freeland (1626), Cro. Car. 47; Orby v. Mohun (1706), Freem. Ch. 291; Scott v. A'Chez (1743), Park. 21; Taylor d. Atkyns v. Horde (1757), 1 Burr. 60; Wolferstan v. Lincoln (Bp.) (1763), 2 Wils. 174; Doe d. Bartlett v. Rendle (1814), 3 M. & S. 99; Doe d. Vaughan v. Meyler (1814), 2 M. & S. 276; Doe d. Shrowsbury v. Wilson (1822), 5 B. & Ald. 363; Doe d. Douglas v. Look (1835), 2 Ad. & El. 705; Delacherols v. Delacherols (1864), 4 New Rep. 501.

**894. Effect of lease by one of whole.]**—*REIGNOLD'S CASE* (prior to 1598), cited in 2 Cro. Eliz. at p. 615; 78 E. R. 856.

*Annotation*:—*Reid*. Doe d. Reed v. Taylor (1833), 5 B. & Ad. 576.

**895. —.]**—If one of two coparceners of a house make a lease of "all that my house, etc." the entire house passes.—*GERRY v. HOLFORD* (1598), 2 Cro. Eliz. 615; 78 E. R. 856.

*Annotation*:—*Consd*. Doe d. Reed v. Taylor (1833), 5 B. & Ad. 575.

**896. —.]**—*WEEKS v. BIRCH*, No. 220, *ante*.

**897. Effect of lease by all—Lease by each of own share.]**—*MILLINER v. ROBINSON* (1600), Moore, K. B. 682; 72 E. R. 837.

*Annotations*:—*Dbtd*. Boner v. Juner (1701), 1 Ld. Raym. 726. *Reid*. Doe d. Campbell v. Hamilton (1840), 13 Q. B. 977. *Mentd*. Luddington v. Kime (1697), 1 Ld. Raym. 203; Bamfield v. Popham (1703), Holt, K. B. 233; Doe d. Burrin v. Charlton (1840), 1 Man. & G. 429; Beauchant v. Usticke, [1880] W. N. 14; *Re* Bird & Barnard's Contract (1888), 59 L. T. 166.

**898. —.]**—*BONER v. JUNER* (1698), 1 Ld. Raym. 726; 91 E. R. 1385, N. P.

**899. Necessity for all to join.]**—*Seemle*: coparceners must all join in a demise.—*DOE d. RUSHWORTH v. WILLIAMSON* (1845), 6 L. T. O. S. 100.

**C. Joint Tenants.**

Joint tenancy generally, see REAL PROPERTY.

*See, now*, Law of Property Act, 1925 (c. 20), s. 36.

**900. Nature of demise by joint tenants.]**—When joint tenants join in a lease, each demises his own share (*LORD TENTERDEN, C.J.*).—*DOE d. ASLIN v. SUMMERSETT* (1830), 1 B. & Ad. 135; 8 L. J. O. S. K. B. 369; 109 E. R. 738.

*Annotation*:—*Expld*. *Re* Viola's Indenture of Lease, Humphrey v. Stenbury, [1909] 1 Ch. 244. *Reid*. Doe d. Kindersley v. Hughes (1840), 7 M. & W. 139; Dodd v. Aoklom (1843), 6 Man. & G. 672; Cope v. Mooney (1863), 10 L. T. 854; Belaney v. Kelly (1871), 24 L. T. 738.

**901. Right of surviving lessor.]**—*HENSTEAD'S CASE* (1594), 5 Co. Rep. 10 a; 77 E. R. 63.

*Annotation*:—*Mentd*. Manby v. Scott (1663), 1 Keb. 482.

**902. When lessees take as joint tenants.]**—A lease for years is made to two *et cuilibet eorum*, this is a joint lease & the words *cuilibet eorum* are void; . . . but a power to sell, let, etc., to two persons *et cuilibet eorum* is good, for there is no profit.—*SLINGSBY'S CASE* (1588), 5 Co. Rep. 18 b; Jenk. 262; 77 E. R. 77; *sub nom.* ANON., 2 Leon. 47; *sub nom.* BECKWITH'S CASE, 3 Leon. 160, Ex. Ch.

*Annotations*:—*Consd*. Anderson v. Martindale (1801), 1 East, 497; Hopkinson v. Lee (1845), 6 Q. B. 964. *Reid*. May v. Woodward (1677), Freem. K. B. 248; Spencer v. Durant (1688), 1 Show. 8; Johnson v. Wilson (1741), Wilses, 248; Enys v. Donnithorne (1761), 2 Burr. 1190; Scott v. Godwin (1797), 1 Bos. & P. 67; Collins v. Prosser (1823), 3 Dow. & Ry. K. B. 112; Withers v. Birchem (1824), 3 L. J. O. S. K. B. 30; Servante v. James (1829), L. & Welsb. 54; Lane v. Drinkwater (1834), 5 Tyr. 40; Bradburne v. Botfield (1845), 14 M. & W. 559; Keightley v. Watson (1849), 3 Exch. 716; White v. Tyndall (1888), 13 App. Cas. 263. *Mentd*. Crabbe v. Tooker (1626), Poph. 204; Hemming v. Brabason (1660), O. Bridg. 1; Eccleston v. Clypeam (1668), 2 Keb. 338; Vernon v. Jefferys (1740), 2 Stra. 1146; Foley v. Addenbrooke (1843), 4 Q. B. 197; Haddon v. Ayers (1858), 1 E. & E. 118.

**903. —.]**—*MELLOWS v. MAY* (1602), Cro. Eliz. 874; Moore, K. B. 636; 78 E. R. 1099.

*Annotations*:—*Mentd*. Hamerton v. Stead (1824), 3 B. & C. 478; Doe d. Biddulph v. Poole (1848), 11 Q. B. 713.

**904. Lease by one joint tenant—Binding on survivor—Lease to commence on death of lessor.]**—*SHARPNER v. HARDENHAM* (circa 1590), Moore, K. B. 395; 72 E. R. 650.

*Annotation*:—*Reid*. Harbin v. Barton (1601), Moore, K. B. 395.

**905. —.]**—A husband may make a lease of lands held in joint tenancy with his wife to commence after his death & it will be good though the wife survive.—*GRUTE v. LOCROFT* (1592), Cro. Eliz. 287; 78 E. R. 541; *sub nom.* *GROWTE v. LOWROFT*, Moore, K. B. at p. 395; *sub nom.* *GUTTER v. LOCROFTS*, Gouldsb. at p. 187.

*Annotation*:—*Reid*. Harbin v. Barton (1601), Moore, K. B. 395.

**906. —.]**—*HARBIN v. BARTON* (1601), Gouldsb. 187; Moore, K. B. 395; 3 Bulst. at p. 131; 75 E. R. 1083.

*Annotations*:—*Apprvd. & Expld*. Dantel v. Waddington (1615), 3 Bulst. 130. *Reid*. Whitlock v. Horton (1605), Cro. Jac. 91; Smalcman v. Elgiburrow (1610), 3 Bulst. 272.

**907. —.]**—If one of two joint tenants make a lease for years, to begin after his death, it will bind his companion.

The words "covenant, grant & agree" that he should have the land for so many years, are apt words to make a lease for years, & enure as a lease (*per CUR.*).—*WHITLOCK v. HORTON* (1605), Cro. Jac. 91; 79 E. R. 78; *sub nom.* *WHITLOCK v. HARTWELL*, Moore, K. B. 776.

*Annotation*:—*Mentd*. Boson v. Sandford (1690), 1 Show. 101.

**908. —.]**—A. & B. are joint tenants. A. makes a lease for years of his moiety to commence upon his death if B. shall so long live. This is a severance of the joint tenancy & the lease will bind B. if he survives.—*CLERK v. CLERK* (1694), 2 Vern. 323; 1 Eq. Cas. Abr. 293; 23 E. R. 809.

*Annotation*:—*Reid*. Gould v. Kemp (1834), 2 My. & K. 304.

**909. —.]**—ANON. (undated), Plowd. Queries 41; 75 E. R. 915.

**910. —.]**—If a bargainee before enrolment make a grant of the lands to another, & afterwards the first deed of bargain & sale is enrolled within the six months it is good. If one joint tenant bargain & sell the land, & before enrolment the other dies, his part shall survive.—*BELLINGHAM v. ALSOP* (1604), Cro. Jac. 52; 79 E. R. 44.

*Annotations*:—*Mentd*. Norris v. Isham (1628), Het. 81; Flower v. Baldwin (1631), Cro. Car. 217; Foote v. Berkley (1666), O. Bridg. 527; Perry v. Bowes (1682), 1 Vent. 360.

**911. — — —.]—A lease for years made by one joint tenant for life, this shall be good against the survivor (COKE, C.J.).—SMALEMAN v. EIG-BURROW (1616), 3 Bulst. 272; Cro. Jac. 417; J. Bridg. 42; 1 Roll. Rep. 401; 81 E. R. 229.**  
*Annotation:—Mentd. Hill v. Saunders (1824), 9 Moore, C. P. 238.*

**912. — As to own moiety.]—Joint tenant may lease his moiety.—CARTWRIGHT'S CASE (1598), cited in 1 Vent. at p. 136; 86 E. R. 93; *sub nom.* BOND v. CARTWRIGHT, 2 Roll. Abr. 453.**  
*Annotations:—Reld. Putt v. Nosworthy (1671), 1 Vent. 135; Sacheverell v. Walker (1671), Freem. K. B. 16.*

**913. One may lease to others.]—One joint tenant may make a lease to the other (POPHAM, C.J.).—JAMES v. PORTMAN (1593), Owen, 102; 74 E. R. 930.**  
*Annotation:—Consd. Cowper v. Fletcher (1865), 6 B. & S. 464.*

**914. — Subsequent lease by others.]—A., B. & C. being joint tenants for years, C. lets her part to B. & then A. & B. join in a lease for years of the entire land: *qu.*: if a declaration in ejectment can be maintained on this lease.—JURDAN v. STEERE (1605), Cro. Jac. 83; 79 E. R. 71.**  
*Annotation:—Reld. Heatherley d. Worthington v. Weston (1764), 2 Wils. 232.*

**915. — With usual incidents of reversion—& right to distrain.]—One of two joint tenants may demise his part to the other with the usual incidents of a reversion & right to distrain.**

Where one of three co-exors. to whom land was devised in trust agreed with the others to pay a rent for it & entered into possession & paid rent:—*Held*: the two might distrain for rent in arrear. *Semle*: the one was estopped from denying that he was tenant.—COWPER v. FLETCHER (1865), 6 B. & S. 464; 6 New Rep. 145; 34 L. J. Q. B. 187; 12 L. T. 420; 29 J. P. 423; 11 Jur. N. S. 780; 13 W. R. 739; 122 E. R. 1267.

*Annotations:—Reld. Re Potter, Ex p. Park (1874), De Colyar's County Court Cases, 235; Leigh v. Dickeson (1883), 12 Q. B. D. 194.*

**916. Severance of joint tenancy—What amounts to—Marriage of female joint tenant.]—A joint tenancy in freeholds & leaseholds is not severed by the marriage of a female joint tenant. A subsequent demise by the husband of such female joint tenant & the other joint tenant will not effect a severance.—PALMER v. RICH, [1897] 1 Ch. 134; 66 L. J. Ch. 69; 75 L. T. 484; 45 W. R. 205; 41 Sol. Jo. 111.**

**917. — — — — Lease to commence on death of lessor.]—CLERK v. CLERK, No. 908, *ante*.**

**918. — — — Assignment of interest by joint tenant—Assignment not by deed.]—By an indenture of lease one J. N. demised a house to T. N. for a term of seventy-nine & a half years less ten days at the yearly rent of £180; & by an indenture made in 1895 between T. N., as vendor, & S. & C., as purchasers, the vendor, in consideration of the sum of £50, assigned the house "unto the purchasers, their & each of their exors., administrators, & assigns," & the purchasers & each of them for himself, his heirs, exors., & administrators, covenanted to pay the rent reserved by the lease. S. & C. entered into possession of the house & carried on business therein in co-partnership; but in 1900, for the purpose of dissolving the partnership, they entered into an agreement whereby C. retired from the partnership & assigned to S. all his interest in the lease of the premises, & C. undertook to execute a formal agreement,**

but no formal agreement was ever executed. S. died in Feb. 1908, & at his death C. was still living. In an action by the assignees of the reversion against the executors of S. to recover two quarters' rent which had accrued due after the death of S., C. being still alive:—*Held*: (1) the deed of 1895 created in the purchasers S. & C. a joint tenancy, at all events during their joint lives & the life of the survivor, & not a tenancy in common; (2) the agreement of 1900 not having been an assignment by deed did not operate as a severance in law of the joint tenancy; upon the death of S. the whole interest at law passed by survivorship to C. & not to the exors. of S., & therefore there was no privity of estate between ptfs. as assignees of the reversion & the exors. of S. to enable ptfs. to maintain the action for rent.—GODDARD v. LEWIS (1909), 101 L. T. 528; 25 T. L. R. 813.

#### D. Tenants in Common.

Tenancy in common generally, *see* REAL PROPERTY.

*See, now, Law of Property Act, 1925 (c. 20), ss. 34–36; Settled Land Act, 1925 (c. 18), s. 36.*

**919. Whether joint lease can be created.]—An ejectment cannot be maintained on a joint lease by tenant in common. MANTLE v. WOLLINGTON (1607), Cro. Jac. 160; 79 E. R. 145.**  
*Annotations:—Reld. Heatherley d. Worthington & Tunna-dine v. Weston (1764), 2 Wils. 232; Doe d. Campbell v. Hamilton (1819), 13 Q. B. 977; Beer v. Beer (1852), 12 C. B. 60.*

**920. —.]—Tenants in common cannot make a joint lease. HEATHERLEY d. WORTHINGTON & TUNNADINE v. WESTON (1764), 2 Wils. 232; 95 E. R. 783.**

*Annotations:—Consd. Doe d. Campbell v. Hamilton (1819), 13 Q. B. 977. Reld. Beer v. Beer (1852), 12 C. B. 60; Thompson v. Hakewill (1865), 19 C. B. N. S. 713.*

**921. —.]—C. & P. leased land jointly to H., who covenanted with the two jointly; & a power of re-entry for breach of covenant was reserved to C. & P. jointly; but, in the lease, it appeared that C. & P. were tenants in common. *Qu.*: whether ejectment against H., for breach of covenant, could be maintained on the joint demise of C. & P.:—*Held*: (LORD DENMAN, C.J., ERLE, J.), it could; (COLERIDGE, J., WIGHTMAN, J.) it could not.—DOE d. CAMPBELL v. HAMILTON (1819), 13 Q. B. 977; 19 L. J. Q. B. 99; 14 Jur. 546; 116 E. R. 1536.**

*Annotation:—Reld. Beer v. Beer (1852), 10 Jur. 227.*

**922. Effect of joint lease—Operates as several lease of interest of each.]—JOULES v. — (1614), Brownl. 39; 123 E. R. 651.**

*Annotations:—Reld. Heatherley d. Worthington & Tunna-dine v. Weston (1764), 2 Wils. 232; Beer v. Beer (1852), 12 C. B. 60.*

**923. — — —.]—(RADDOCK v. JONES (1611), Brownl. 131; 123 E. R. 712.**

*Annotations:—Reld. Heatherley d. Worthington & Tunna-dine v. Weston (1764), 2 Wils. 232; Beer v. Beer (1852), 12 C. B. 60.*

**924. — — — & confirmation of others.]—When two tenants in common join in a lease, it operates as the several lease of each, & the confirmation of the other; & it cannot be pleaded as a joint demise.—GYLES v. KEMPE (1677), Freem. K. B. 235; 86 E. R. 168.**

*Annotation:—Reld. Beer v. Beer (1852), 12 C. B. 60.*

**925. — — —.]—A demise by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of**

#### PART III. SECT. 1, SUB-SECT. 4.—C.

**913 I. One may lease to others.]—The owners of certain land who were joint**

tenants let the land to deft. S. who was himself one of the owners:—*Held*: this was a valid contract.—PARKER v. SELL (1890), 16 V. L. R. 271.—AUS.

#### PART III. SECT. 1, SUB-SECT. 4.—D.

**b. Lease expired—New lease to one personally.]—When a lease held**

**Sect. 1.—Capacity to grant and take leases: Sub-sects. 6, 7, 8, 9, 10, 11, 12, 13, 14 & 15.]**

instrument under a common seal.—**SMITH v. ADKINS** (1841), 8 M. & W. 362; 1 Dowl. N. S. 129; 11 L. J. Ex. 83; 151 E. R. 1078.

**Annotations:—***Consd. Re Leeds Institute of Science, Art & Literature & Leeds City Council*, [1909] 1 Ch. 500. **Refd.** *Doe d. Lunsdell, Penbury v. Gower* (1851), 18 L. T. O. S. 135. **Mentd.** *Ghialin v. Gregory* (1848), 11 L. T. O. S. 124.

— — — — —.]—**See CORPORATIONS**, Vol. XIII., pp. 284, 285, Nos. 164–173.

**942. Effect of lease for lives to corporation.]**—**ANON.** (undated), *Plowd. Queries* 28; 75 E. R. 898.

— **Application of Mortmain Acts.]—See CORPORATIONS**, Vol. XIII., p. 371, Nos. 1025–1027.

**943. Personal liability of lessees—Where corporation not empowered to accept.]—**An agreement having been entered into between the owner of land & the churchwardens, overseers, & surveyors of the highways, for the letting to those officers of certain land for the purposes of parish gardens & allotments to labourers, which agreement purported to bind the churchwardens, overseers, & surveyors of the highways, their exors., administrators, & assigns, & successors in office, & under which the land had been used for the above purposes:—**Held:** the interest in the land was not such as the churchwardens & overseers could take, under Poor Relief Act, 1819 (c. 12), s. 17, as a quasi corp., & they became liable for rent in their personal capacity.—**UTHWATT v. ELKINS** (1845), 13 M. & W. 772; 14 L. J. Ex. 131; 4 L. T. O. S. 399; 9 J. P. 504.

**SUB-SECT. 7.—THE CROWN.**

**Crown leases generally.]—See CONSTITUTIONAL LAW**, Vol. XI., pp. 583–586, Nos. 843–852, 866–868.

**Lease of land in Duchy of Lancaster—During minority of Sovereign.]—See CONSTITUTIONAL LAW**, Vol. XI., p. 590, No. 913.

**Lease of land in Duchy of Cornwall.]—See CONSTITUTIONAL LAW**, Vol. XI., p. 591, No. 924.

**SUB-SECT. 8. ECCLESIASTICAL AUTHORITIES.**

**Ecclesiastical leases generally.]—See ECCLESIASTICAL LAW**, Vol. XIX., pp. 502–506, Nos. 3584–3645.

**Powers of diocesan chancellor to grant.]—See ECCLESIASTICAL LAW**, Vol. XIX., p. 240, No. 217.

**Demise of benefice by way of charge.]—See ECCLESIASTICAL LAW**, Vol. XIX., pp. 413, 416, Nos. 2488–2490, 2511, 2512.

**Lease of mines.]—See ECCLESIASTICAL LAW**, Vol. XIX., p. 511, No. 3716.

**Jurisdiction of ecclesiastical courts—As to validity of leases.]—See ECCLESIASTICAL LAW**, Vol. XIX., p. 321, Nos. 1214, 1215.

**Power of clergy to take.]—See ECCLESIASTICAL LAW**, Vol. XIX., p. 365, Nos. 1825, 1826.

**SUB-SECT. 9.—EXECUTORS AND ADMINISTRATORS.**

**944. Power to grant lease—Administration subsequently revoked.]—**Citation to repeal adminis-

tration, but the grant affirmed, upon which an appeal was sued, & both sentences repealed. A lease made by the first administrator in the meantime, good.—**SEMINÉ v. SEMINÉ** (1673), 2 Lev. 90; 83 E. R. 464.

**Annotations:—***Mentd.* *Allen v. Dundas* (1789), 3 Term Rep. 125; *Woolley v. Clark* (1822), 1 Dowl. & Ry. K. B. 409.

**945. — Executor of devisee.]—NORTON v. HARVEY** (1674), 1 Vent. 259; 86 E. R. 173.

**946. — — —.]—WHITFIELD v. HOW**, No. 971, *post*.

**947. — Term in excess of express power.]—**A. being possessed of premises for a term of years, bequeathed his interest therein to B. for his life, & then over; & appointed B. & two others, trustees & exors. of his will; with power to B. during his life, & to the survivors of the trustees after his decease, to lease the premises for any term not exceeding twenty-one years. At A.'s death, B. took possession of the premises, & granted a lease of them to C. for fourteen years, with a further demise for forty-two years, reserving the rent to himself, his exors., administrators, & assigns; contracting in his own name, without any mention of the other exors.; & appointed by will other trustees, in case of the death of the original trustees:—**Held:** these acts did not constitute an assent by B. to the legacy, & therefore, the lease to C., having been granted by B. in the character of exor., was valid.—**DOE d. HAYES v. STURGES** (1816), 7 Taunt. 217; 2 Marsh. 505; 129 E. R. 87.

**Annotations:—***Mentd.* *Doe d. Sturges v. Tatchell* (1832), 3 B. & Ad. 675; *Hawkins v. Williams* (1862), 10 W. R. 692.

**948. — Before probate.]—**Extrix. may demise in ejectment before probate.—**ROE d. BENDALL v. SUMMERSET** (1770), 2 Wm. Bl. 692; 5 Burr. 2608; 96 E. R. 407.

**Annotations:—***Mentd.* *Cranley v. Dixon* (1857), 23 Beav. 512; *Humphreys v. Humphreys* (1867), L. R. 4 Eq. 475.

— **Administrator.]—See EXECUTORS**, Vol. XXIII., p. 196, No. 2282.

**949. Power to grant underlease.]—**An administrator makes an underlease of intestate's term rendering rent to himself, his exor., etc., & dies; his exor. & not the administrator *de bonis non*, shall have the rent, & shall be chargeable with it as assets, in the nature of an exor. *de son tort*.—**DRUE v. BAILIE** (1675), *Freem. K. B.* 402; 1 Vent. 275; 89 E. R. 299; *sub nom.* **DREW v. BAILY**, 3 Keb. 298, 495; 2 Lev. 100.

**950. —.]—DYOT v. MORGAN** (1806), cited in 13 Ves. at p. 268; 33 E. R. 294, L. C.

**Annotation:—***Refd.* *Middleton v. Dodswell* (1806), 13 Ves. 268.

— — —.]—**See EXECUTORS**, Vol. XXIV., pp. 565 568, Nos. 6029–6031, 6062–6064.

**951. Power to take lease—Beneficial to estate—Concurred in by cestuis que trust.]—**J. H., being possessed of the moiety of an estate in Jamaica by his will appointed J. P. his exor. & trustee with power to manage, conduct, carry on & im prove his estate. In 1830 J. P. took a lease of the other moiety, & covenanted to keep it in the same cultivation, order, repair, & condition, & thenceforward managed the entirety on account of the trust estate. In 1835, in a suit by the *cestuis que trust* under the will of J. H., P. & Co were, by an order of ct., appointed managers, receivers, & both moieties were managed for the trust estate until 1842. No rent had been paid since 1835, & the estate was in a state of utter ruin. Upon petition in the cause by the owne

**PART III. SECT. 1, SUB-SECT. 9.**

**g. Power to grant lease with option to purchase.]—**An option to purchase clause in a lease made by an administrator declared to be null & void.—**ST. GERMAIN v. RENEULT** (1909), 12 W. L. R. 169.—**CAN.**

of the other moiety:—*Held*: though the taking of the lease was not authorised by the will, yet as it was concurred in by the *cestuis que trust* & sanctioned by the ct., & had proved beneficial to the trust estate, it must be considered as binding on the *cestuis que trust* & the trust estate was liable for the rent in arrear & the dilapidations.—*NEATE v. PINK* (1851), 3 Mac. & G. 476; 42 E. R. 344; *sub nom.* *NEATE v. PINK*, *Ex p. FLETCHER & YATES*, 21 L. J. Ch. 574; 16 Jur. 69; *sub nom.* *PINK v. NEATE*, 18 L. T. O. S. 57, L. C.

*Annotations*:—*Mentd.* *Brookbank v. East London Ry.* (1879), 12 Ch. D. 839; *Hand v. Blow*, [1901] 2 Ch. 721.

**952.** — *From co-executor.*—*COWPER v. FLETCHER*, No. 915, *ante*.

*Liability in respect of leases.*—*See* EXECUTORS, Vol. XXIV., pp. 637–644, Nos. 6631–6706.

#### SUB-SECT. 10.—INFANTS.

*See* Law of Property Act, 1925 (c. 20), s. 19; Settled Land Act, 1925 (c. 18), ss. 26, 27.

*Leases by infants generally.*—*See* INFANTS, Vol. XXVIII., pp. 196 *et seq.*

#### SUB-SECT. 11.—LAND SEIZED IN EXECUTION.

*Lease by sequestrator.*—*See* EXECUTION, Vol. XXI., pp. 595, 601, Nos. 1770, 1863–1865.

*Lease by owner of sequestered land.*—*See* EXECUTION, Vol. XXI., p. 603, No. 1898.

*Sequestration generally.*—*See* EXECUTION, Vol. XXI., pp. 591 *et seq.*

*Tenant by elegit.*—*See* EXECUTION, Vol. XXI., p. 572, Nos. 1479, 1480.

*Elegit generally.*—*See* EXECUTION, Vol. XXI., pp. 556 *et seq.*

#### SUB-SECT. 12.—LUNATICS.

Lunatics generally, *see* LUNATICS.

*See, now*, Law of Property Act, 1925 (c. 20), s. 171; Settled Land Act, 1925 (c. 18), s. 28.

**953.** *Power of committee to grant—Necessity for leave of court.*—The committee of a lunatic cannot make leases, or incur the estate, without the leave of the ct.—*FOSTER v. MARCHANT* (1684), 1 Vern. 262; 23 E. R. 457.

*Annotation*:—*Mentd.* *Oxenden v. Compton* (1793), 2 Ves. 69.

**954.** — *Covenant upon a lease made by the committee of a lunatic, by pltf. as the committee will not lie, for a committee cannot make such lease at law.*—*KNIFE v. PALMER* (1760), 2 Wils. 130; 95 E. R. 725.

*Annotation*:—*Refd.* *Pitman v. Woodbury* (1848), 3 Exch. 4.

**955.** — *Mining lease.*—Agreement by the committee of a lunatic that coal under the lunatic's estate should be worked by the owner of the adjoining land, established under the circumstances.—*Ex p. TABBERT* (1801), 6 Ves. 428; 31 E. R. 1127.

**956.** — *Where a lunatic was bound by covenant to grant a renewal of a lease, the expenses incurred by the lessee in applying to the ct. for a direction to the committee to execute a lease instead of the lunatic, must be borne by the lunatic's estate.*—*Ex p. BARNES* (1848), 17 L. J. Ch. 436, L. C.

*Annotation*:—*Refd.* *Wortham v. Dacre* (1856), 2 K. & J. 437.

**957.** — *Lease of easement.*—*Re* ARNOTT (1891), 35 Sol. Jo. 623, C. A.

**958.** *Agreement by committee to grant—Specific enforcement.*—*Re* WYNNE, No. 486, *ante*.

*Specific enforcement of agreements to grant.*—*See* Part II., Sect. 8, *ante*.

**959.** *Power of committee of lunatic tenant for life—Whether trustee under Settled Land Act necessary.*—Where a tenant for life is a lunatic, & his committee desires to exercise the powers of leasing given by Settled Land Act, 1882 (c. 38), & no trustees of the settlement are in existence new trustees must be appointed for the purposes of the Act.—*Re* TAYLOR (1883), 52 L. J. Ch. 728; 49 L. T. 420; 31 W. R. 596, C. A.

**960.** — *—*—The person appointed to act, under Lunacy Act, 1890 (c. 5), s. 116, as committee of the estate of a person lawfully detained as a lunatic though not so found by inquisition may by leave of a judge exercise the power of leasing vested in the lunatic as tenant for life under Settled Land Act, 1882 (c. 38).—*Re* SALT, [1896] 1 Ch. 117; 65 L. J. Ch. 152; 73 L. T. 598; 44 W. R. 146; 40 Sol. Jo. 113, C. A.

*Annotations*:—*Consd.* *Re S. S. B.*, [1906] 1 Ch. 712. *Refd.* *Re A.*, [1904] 2 Ch. 328.

**961.** *Infant entitled in remainder—Lease for life of lunatic approved.*—An application having been made under Infants Property Act, 1830 (c. 65), s. 23, for a lease of property belonging to a lunatic for life, with remainder to an infant, at rack rent, for a term of twenty-one years. The ct. refused to make such order, but directed a lease to be granted for twenty-one years determinable on the lunatic's death, & without a covenant for quiet enjoyment.—*Re* WHITE (1853), 21 L. T. O. S. 82; 1 W. R. 294, L. J.

**962.** *Guardian appointed under statute.*—*Re* VENNER'S SETTLED ESTATES (1868), L. R. 6 Eq. 249; 16 W. R. 1033.

*Annotation*:—*Refd.* *Re Clough's Estate* (1873), L. R. 15 Eq. 284.

#### SUB-SECT. 13.—MARRIED WOMEN.

*See* Married Women's Property Act, 1882 (c. 75), ss. 1, 2.

*Married women generally.*—*See* HUSBAND & WIFE, Vol. XXVII., p. 116, Nos. 934, 935.

#### SUB-SECT. 14.—MORTGAGORS AND MORTGAGEES.

*See* MORTGAGE.

#### SUB-SECT. 15.—OWNERS OF RENTCHARGE.

Rentcharge generally, *see* RENTCHARGES & ANNUITIES.

**963.** *After entry for non-payment.*—A fine levied to the grantee of a rentcharge with a power limited by way of use to enter on non-payment of the rent “& retain until he be fully satisfied” conveys to him on entry an estate in possession of which his lessor may maintain ejectment.—*HAVERGILL v. HARE* (1618), Cro. Jac. 510; 3 Bulst. 250; 79 E. R. 435; *sub nom.* *HAVERGILL & HARES CASE*, 2 Roll. Rep. 12.

*Annotations*:—*Refd.* *Jemmot v. Cooley* (1668), 1 Lev. 170. *Mentd.* *Paterson v. Danges, Salisbury's Case* (1682), 1 Keb. 287; *Tewkesbury (Balliffs) v. Diston* (1805), 2 Smith, K. B. 508.

#### PART III. SECT. 1, SUB-SECT. 12.

**954 i.** *Power of committee to grant.*—*SARABJIT SINGH v. CHAPMAN* (1886), 1 L. R. 13 Calc. 81; L. R. 13 Ind. App. 44.—*IND.*

he was summarily dismissed from employment for misconduct. In the hope of being reinstated, he threatened to bring an action for wrongful dismissal, but made no claim under Workmen's Compensation Act, 1925 (c. 81), until two days after the statutory six months had expired. The county ct. judge found that the workman never intended to claim within the necessary period of six months, & there was no reasonable cause for the delay, & he refused to award compensation: *Held*: the evidence supported the findings, & there was no misdirection.

When the workman knows that the injury he suffers from was occasioned by an accident giving him a right to compensation, & fails to make a claim within six months, if that failure was prompted by his own interests, & was not induced by any action of the employer which would lead him to believe he could get compensation without making a claim, he shows no reasonable cause (SCRUTTON, L.J.). *DREWITT v. BRITANNIC ASSURANCE CO., LTD.* (1927), 137 L. T. 511; 20 B. W. C. C. 434, C. A.

*Innovations.* *Apld.* *Brown v. Aveling & Porter* (1929), 22 B. W. C. C. 161. *Consd.* *Shotts Iron Co. Ltd. v. Fordyce*, [1930] A. C. 503. *Reid.* *Halsey v. Esch Oil Works* (1930), 23 B. W. C. C. 1.

**3033a. Unwillingness to claim compensation.** *SHOTTS IRON CO., LTD. v. FORDYCE*, No. 2999a, *ante*.

**3033b. Expectation of compensation without necessity of making claim.** In Apr. 1925, a chef severed the ligaments of his right hand in handling a dish which broke, but he continued his work at his full wages. His employers knew of the accident, but were not aware the chef could not do his full work. In July, 1926, he was dismissed, & in that month made a claim for compensation. The county ct. judge found that the workman did not refrain from making a claim because he formed the view that he would receive compensation should incapacity supervene in the future without the necessity of making a claim, & that the employers did nothing to encourage such a view, & there was no reasonable cause for not making the claim within six months of the accident: *Held*: there was evidence to support the findings, & no misdirection.

There would be reasonable cause for not making a claim within six months, if the workman could prove that there was a tacit understanding that the employers knew all about the possibility of a claim & were prepared to give him compensation, even though his claim might fall outside the six months (LORD HANWORTH, M.R.). *SOYER v. JOHNSON, MATTHEY & CO.* (1927), 96 L. J. K. B. 1011; 20 B. W. C. C. 504, C. A.

**3035. Add. Annotations:** *As to* (1) *Consd.* *Drewitt v. Britannic Assee.* (1927), 137 L. T. 511.

*Folld. Soyer v. Johnson, Matthey* (1927), 96 L. J. K. B. 1011. *Apld.* *Sharrod v. Warwickshire Coal Co.* (1929), 22 B. W. C. C. 599. *Reid.* *Brown v. Aveling & Porter* (1929), 22 B. W. C. C. 165; *Shotts Iron Co. v. Fordyce*, [1930] A. C. 503.

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**3055. Add. Annotation:**—*Apld.* *Pullen v. Enthoven* (1927), 20 B. W. C. C. 248.

**3056a.** —.] *Appct.* was in receipt of a weekly payment on account of injuries received in the course of his employment. The employers gave notice of termination of the weekly payment, on the ground of recovery as certified by their doctor. The workman replied with a counter-certificate of his doctor. The matter was submitted to the medical referee, who certified that the man was fit for most forms of work. The employers ceased making the weekly payments, & the workman appealed to the county ct. judge as to the effect of the certificate. The judge, sitting with the same medical referee as assessor, who explained his certificate as being one of complete recovery, held the man was fit for work on the date when compensation ceased, but awarded compensation from the date of cessation of the weekly payment to the date of his award: *Held*: (1) compensation was not payable after incapacity had ceased; (2) the certificate of the medical referee was sufficient & conclusive.—*PULLEN v. ENTHOVEN & SON* (1927), 20 B. W. C. C. 218, C. A.

**3056b.** —.]—In a reference to a medical referee made under Workmen's Compensation Act, 1925 (c. 81), s. 19 (2), the medical referee certified that the workman was fit to resume his ordinary occupation, but described it as being something different from what in fact it had previously been. The county ct. judge refused to treat the certificate as conclusive, & received evidence as to the nature of the respective occupations, the parties having objected to the certificate being sent back to the medical referee for explanation or correction: *Held*: the certificate being ambiguous was not conclusive, & the parties having refused the opportunity of the ambiguity being explained by the medical referee, the judge was entitled to hear the evidence tendered & act upon it.—*AUSTIN v. PARTINGTON STEEL & IRON CO., LTD.* (1928), 21 B. W. C. C. 1, C. A.

**3056c.** —.]—A stoneman in a colliery was certified by a medical referee to be suffering

#### PART XIV. SECT. 9, SUB-SECT. 1.

f. i. —.] The Workmen's Compensation Board has no jurisdiction over rights of action or proceedings in the Exchequer Ct. in Admiralty. *DAYLAND v. S.S. CANAL*, [1927] 4 D. L. R. 120; [1927] 3 W. W. R. 97, 25 B. C. P. 410. *CAN.*

*See Control of Board By court.* On construction of Workmen's Compensation Act (Accident Fund). *R. S. A.*, 1922, c. 177, s. 13: *Held*:

the jurisdiction of the ct. to interfere with acts of the board is excluded only with respect to acts within the jurisdiction of the board, & the board's jurisdiction is limited to "matters arising under this Act," & its regulations are to be for the purpose of "carrying out the provisions of this Act." Therefore where a regulation of the board goes beyond the authority which the Act confers on the board, the ct. can declare it, & an assessment based thereon, unauthorised & invalid. — *R. v. ex rel. DAVIES v. F. W. McDON-*

*GALL CONSTRUCTION CO., LTD. (AIRC.)*, [1929] 3 W. W. R. 650. *CAN.*

#### PART XIV. SECT. 9, SUB-SECT. 3.

**3044 i. Position of judge - Sits as arbitrator.**—*DELAHUNT v. MOODY*, [1928] 1 F. 208, *subsequent proceedings*, 25 B. W. C. C. 939, P. C.—*IR.*

#### PART XIV. SECT. 9, SUB-SECT. 5.

**3053 xv.** —.]—*M'CRADIE v. DOULTON & CO.*, [1928] S. C. 29.—*SCOT*

from miners' nystagmus, & unable to do work which involved stooping. The county ct. judge, after hearing evidence, interpreted that certificate as meaning that the workman was unable to do work which involved continuous stooping, such as his old employment necessitated, & made an award on the basis of partial incapacity:—*Held*: the judge had properly treated the certificate as conclusive, & interpreted it rightly, & was justified in hearing evidence as to the amount of stooping that would incapacitate the man in order to make an award for the proper compensation.—*TAYLDER v. LAMSTON, HETTON & JOICEY COLLIERIES, LTD.* (1928), 21 B. W. C. C. 115, C. A.

**3056d.** — As to possibility of recurrence.] A medical referee, to whom a dispute as to the condition of a workman who had sustained injuries by accident arising out of & in the course of his employment had been referred under Workmen's Compensation Act, 1925 (c. 84), s. 19, after giving two certificates of partial recovery, certified that in his opinion the workman had completely recovered from the accident & was fit for his ordinary work: *Held*: the medical referee must be taken to have directed his mind, not merely to the condition of the workman at the moment, but to the possibility of a recurrence of incapacity, & that his certificate was final & conclusive.

Where, therefore, upon an application by the employer to end the compensation, the workman lodged a minute informing the ct. that skiagrams taken since the last certificate of the medical referee had disclosed conditions not apparent on external examination, & that there was a reasonable probability of a recurrence of incapacity: *Held*: it was not competent to the arbitrator, or, failing him, to the appellate ct., to direct an inquiry into the facts set forth in the minute, & that the only course open to the arbitrator was to end the compensation.

*WILSONS & CLYDE COAL CO. v. BURROWS*, [1929] A. C. 651; 98 L. J. P. C. 151; 141 L. T. 591; 45 T. L. R. 615; 22 B. W. C. C. 130, H. L.

**3057a.** — What amounts to ambiguity.] *EVANS (RICHARD) & CO., LTD. v. GILBIE*, No. 3541a, *post*.

**3057b.** — ] *AUSTIN v. PARTINGTON STEEL & IRON CO., LTD.*, No. 3056b, *ante*.

**3057c.** — What amounts to.] A medical referee certified that a workman was fit for work as a stevedore, or at any other form of unskilled labour, but that occasionally in actions where a particularly strong grip was necessary he would be working at a small disadvantage as compared with his condition before the accident. The county ct. judge, contrary to his own opinion that the man was not fit for work as a stevedore, held that the certificate was conclusive against

the workman:—*Held*: the certificate was unambiguous & there was no misdirection.—*MONTGOMERY v. GENERAL STEAM NAVIGATION CO., LTD.* (1929), 22 B. W. C. C. 48, C. A.

**3059.** *Add. Annotations*: *Consd.* *Somerville v. Barclay Curle* (1925), 19 B. W. C. C. 530; *Penman v. Caprington & Auchlochan Collieries* (1926), 19 B. W. C. C. 604. *Refd.* *Lafferty v. Dargavill Coal Co.* (1926), 20 B. W. C. C. 671; *Cotton v. Ashwell & Nesbit*, [1928] Ch. 484. *Mentd.* *Akers v. L. & N. E. Ry.* (1926), 20 B. W. C. C. 195.

**3061.** *Add. Annotation*: *Refd.* *Lewis v. Tredegar Iron & Coal Co.* (1929), 22 B. W. C. C. 268.

**3061a.** — ] A miner was certified in Dec. 1925, as suffering from miner's nystagmus, & was paid compensation. In Aug. 1926, the employers stopped compensation after serving notice under Workmen's Compensation Act, 1925 (c. 84), s. 12, on the ground that the workman no longer suffered from the disease. A counter-notice having been served, the issue was referred by the registrar to the medical referee, who certified that the workman was totally incapacitated, but that such incapacity was due to other causes than nystagmus. On an application by the workman for an arbitration in Jan. 1929, evidence was tendered that nystagmus had once more become active, but the employers raised the preliminary objection that the medical referee's certificate was conclusive against the workman, & destroyed the effect of the certifying surgeon's certificate of Dec. 1925. The county ct. judge upheld the objection & made an order dismissing the application for arbitration. The workman appealed: *Held*: the certificate of a medical referee being only conclusive as to the matters therein certified, & miner's nystagmus being a recurrent disease, the certificate was not of itself a bar to the claim of the workman for compensation, & it was for the county ct. judge to decide whether there had been in fact any recrudescence of the original disease. *LEWIS v. TREDEGAR IRON & COAL CO.* (1929), 22 B. W. C. C. 268, C. A.

**3068.** *Add. Annotation*: *Distd.* *Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573.

**3074.** *Add. Annotation*: *Folld.* *Lewis v. Cammell, Laird & Co.* (1929), 22 B. W. C. C. 110.

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**3057 l.** *Ambiguous report*—*Duty of judge to clear*.—Employers, who had been paying compensation to a labourer in respect of an injury to his eye, served upon him a medical certificate to the effect that he had recovered; & no counter-certificate having been received from him, they stopped payment of compensation on Apr. 5, 1927. In a subsequent application by the workman to have a memorandum of

agreement recorded, the arbitrator, on the application of the employers, made a remit to a medical referee. On Feb. 2, 1928, the referee reported that the workman's condition was such that he was not "at present" debilitated from doing labouring work. The arbitrator granted warrant to record the memorandum, but suspended compensation as from Apr. 5, 1927, until the further orders of the Ct. —

*Held*: the arbitrator was not entitled, on the evidence before him, to suspend compensation as from Apr. 5, 1927, & in view of the circumstances disclosed, the capacity of the workman as between Apr. 5, 1927, & Feb. 2, 1928, should be inquired into by the arbitrator rather than by a further remit to the medical referee. *MCLELLAN v. THORNBURN & SONS*, (1929) S. C. (Ct. of Sess.) 31. *SCOT*.



he was summarily dismissed from employment for misconduct. In the hope of being reinstated, he threatened to bring an action for wrongful dismissal, but made no claim under Workmen's Compensation Act, 1925 (c. 84), until two days after the statutory six months had expired. The county ct. judge found that the workman never intended to claim within the necessary period of six months, & there was no reasonable cause for the delay, & he refused to award compensation: *Held*: the evidence supported the findings, & there was no misdirection.

When the workman knows that the injury he suffers from was occasioned by an accident giving him a right to compensation, & fails to make a claim within six months, if that failure was prompted by his own interests, & was not induced by any action of the employer which would lead him to believe he could get compensation without making a claim, he shows no reasonable cause (*SCRUTTON, L.J.*). *DREWITT v. BRITANNIC ASSURANCE CO., LTD.* (1927), 137 L. T. 511; 20 B. W. C. C. 431, C. A.

*Annotation.* *Appl.* *Brown v. Aveling & Porter* (1929), 22 B. W. C. C. 164. *Consd.* *Shotts Iron Co. Ltd. v. Fordyce*, [1930] A. C. 503. *Refd.* *Halsey v. Esch Oil Works* (1930), 23 B. W. C. C. 1.

**3033a. Unwillingness to claim compensation.]**  
*SHOTT'S IRON CO., LTD. v. FORDYCE, No. 2999a, ante.*

**3033b. Expectation of compensation without necessity of making claim.]** In Apr. 1925, a chef severed the ligaments of his right hand in handling a dish which broke, but he continued his work at his full wages. His employers knew of the accident, but were not aware the chef could not do his full work. In July, 1926, he was dismissed, & in that month made a claim for compensation. The county ct. judge found that the workman did not refrain from making a claim because he formed the view that he would receive compensation should incapacity supervene in the future without the necessity of making a claim, & that the employers did nothing to encourage such a view, & there was no reasonable cause for not making the claim within six months of the accident: *Held*: there was evidence to support the findings, & no misdirection.

There would be reasonable cause for not making a claim within six months, if the workman could prove that there was a tacit understanding that the employers knew all about the possibility of a claim & were prepared to give him compensation, even though his claim might fall outside the six months (*LORD HANWORTH, M.R.*): *SOYER v. JOHNSON, MATTHEY & CO.* (1927), 96 L. J. K. B. 1011; 20 B. W. C. C. 501, C. A.

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**3056a.** —. ]- *Appet.* was in receipt of a weekly payment on account of injuries received in the course of his employment. The employers gave notice of termination of the weekly payment, on the ground of recovery as certified by their doctor. The workman replied with a counter-certificate of his doctor. The matter was submitted to the medical referee, who certified that the man was fit for most forms of work. The employers ceased making the weekly payments, & the workman appealed to the county ct. judge as to the effect of the certificate. The judge, sitting with the same medical referee as assessor, who explained his certificate as being one of complete recovery, held the man was fit for work on the date when compensation ceased, but awarded compensation from the date of cessation of the weekly payment to the date of his award:—*Held*: (1) compensation was not payable after incapacity had ceased; (2) the certificate of the medical referee was sufficient & conclusive.—*PULLEN v. ENTHOVEN & SON* (1927), 20 B. W. C. C. 218, C. A.

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the jurisdiction of the ct. to interfere with acts of the board is excluded only with respect to acts within the jurisdiction of the board, & the board's jurisdiction is limited to "matters arising under this Act," & its regulations are to be for the purpose of "carrying out the provisions of this Act." Therefore where a regulation of the board goes beyond the authority which the Act confers on the board, the ct. can declare it, & an assessment based thereon, unauthorised & invalid. — *R. v. ex rel. DAVIES v. F. W. McDON-*

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#### PART XIV. SECT. 9, SUB-SECT. 5

**3053 xv.** —. ]- *M'CREADIE v. DOUGLTON & CO.*, [1928] S. C. 29.—*SCOT*

from miners' nystagmus, & unable to do work which involved stooping. The county ct. judge, after hearing evidence, interpreted that certificate as meaning that the workman was unable to do work which involved continuous stooping, such as his old employment necessitated, & made an award on the basis of partial incapacity:—*Held*: the judge had properly treated the certificate as conclusive, & interpreted it rightly, & was justified in hearing evidence as to the amount of stooping that would incapacitate the man in order to make an award for the proper compensation.—*TAYLDER v. LAMBTON, HETTON & JOICEY COLLIERIES, LTD.* (1928), 21 B. W. C. C. 115, C. A.

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**3057a.** — *What amounts to ambiguity.* *J. EVANS (RICHARD) & CO., LTD. v. GILBIE*, No. 3541a, *post*.

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*Held*: the arbitrator was not entitled, on the evidence before him, to suspend compensation as from Apr. 5, 1927, & in view of the circumstances disclosed, the capacity of the workman as between Apr. 5, 1927, & Feb. 2, 1928, should be inquired into by the arbitrator rather than by a further remit to the medical referee.—*M'LELLAN v. THORNBURN & SON*, [1929] S. C. (Ct. of Sess.) 31. **SCOT.**

**Sect. 2.—Creation of lease: Sub-sect. 4. Sect. 3: Sub-sects. 1, 2 & 3.]**

**tenant.**—*JINKS v. EDWARDS* (1856), 11 Exch. 775; 26 L. T. O. S. 276; 20 J. P. 184; 4 W. R. 303; 156 E. R. 1045.

**Annotations:**—*Reid*. *Stranks v. St. John* (1867), 16 L. T. 283; *Wallis v. Hands*, [1893] 2 Ch. 75. **Mentd.** *Smart v. Jones* (1864), 15 C. B. N. S. 717.

**1006.** ———.]—*COOKE v. JACKSON*, No. 1027, *post*.

**1007.** ———.]—*Re KING'S LEASEHOLD ESTATES, &c p. EAST OF LONDON RY. CO.*, No. 28, *ante*.

**1008.** ———.]—*JONES v. REYNOLDS*, No. 312, *ante*.

**1009. Possession taken.**—Covenant & entry amount to a lease.—*COPLEY v. HEPPWORTH* (1690), 3 Salk. 108; 12 Mod. Rep. 1; 91 E. R. 721.

**1010.** ———.]—*POOLE v. BENTLEY*, No. 1000, *ante*.

**1011.** ———.]—If by the terms of this agreement it had been provided that there should be no entry until a lease was executed, I should have had considerable doubts. But as the case stands, it does appear to me that the instrument must be considered as a present lease from Apr. 5, 1798. From that period it has the operation of a demise, not depending upon the contingency of the party's granting a future lease, which was a stipulation only for the better security of the lessee (*LORD ELLENBOROUGH, C.J.*).—*DOE d. WALKER v. GROVES* (1812), 15 East, 214; 104 E. R. 837. **Annotation:**—*Reid*. *Warman v. Faithfull* (1834), 5 B. & Ad. 1042.

**1012.** ———.]—Part of the agreement was, that upon payment of a stipulated sum, a lease by indenture should be granted; & if that had been the whole, it would have been difficult to say that the relation of landlord & tenant subsisted; but N. was to be put into immediate possession; he was to pay rent on certain specified days; & it is difficult to say that the mere stipulation for a future lease shall defeat the relation which arises upon such a stipulation for payment of rent (*TINDAL, C.J.*).—*HANCOCK v. CAFFEYN* (1832), 8 Bing. 358; 1 Moo. & S. 521; 1 L. J. C. P. 104; 131 E. R. 432.

**Annotations:**—*Reid*. *Chapman v. Bluck* (1838), 4 Bing. N. C. 187. **Mentd.** *Beckham v. Drake* (1841), 8 M. & W. 846; *Beckham v. Drake* (1849), 2 H. L. Cas. 579; *Re Daines, &c p. Assignees* (1867), 16 L. T. 127.

**1013.** ———.]—*DOE d. PEARSON v. RIES*, No. 1002, *ante*.

**1014.** ———.]—By a written instrument, stamped with a lease stamp, & dated Feb. 25, 1782, S., being seized in fee of a house & premises, agreed to demise & let them to a committee for the parish of H., & the committee agreed to accept & take them, for the purpose of converting them into a poorhouse for the use of the parish of H.; to hold to the committee, in trust as aforesaid, from Mar. 25, then next coming for the term of ninety-nine years, at the clear yearly rent of £27, payable half-yearly; & the committee agreed to pay the rent, & to keep the premises in good & sufficient

repair during the term. It was also agreed that a lease & counterpart of the premises should be prepared & executed on or before Jan. 1, then next, with covenants & agreements pursuant to that contract, & such other general clauses as are usually contained in leases; & there was a proviso, that in case the committee or their successors should think it a more eligible plan to purchase the premises in fee at the price of £420, that then he, the lessor, should convey them accordingly. No lease was ever executed, but the premises, from the date of the instrument, were used as a poorhouse for the parish of H., & the churchwardens & overseers for the time being of that parish paid the rent to E. S. & his representatives. In an action of *assumpsit* against the parish officers for the time being of the parish of H., for non-repair of the premises:—*Held*: the agreement operated as a demise for the term of ninety-nine years, & not as a mere agreement for a lease.—*ALDERMAN v. NEATE* (1839), 4 M. & W. 701; 1 Horn & H. 165; 8 L. J. Ex. 89; 3 Jur. 171; 150 E. R. 1604.

**Annotations:**—**Mentd.** *Doe d. Robinson v. Hird* (1843), 1 L. T. O. S. 58; *Gouldsworth v. Knights* (1843), 11 M. & W. 337; *Uthwatt v. Elkins* (1845), 14 L. J. Ex. 131; *Rumball v. Munt* (1846), 8 Q. B. 382; *Deptford Churchwardens v. Skotchley* (1847), 8 Q. B. 394.

**1015.** ———.]—*JONES v. REYNOLDS*, No. 342, *ante*.

**1016.** ———.]—*CARR v. CURITT* (1844), 2 L. T. O. S. 401.

**1017.** ———.]—*DOE d. MORGAN v. POWELL*, No. 301, *ante*.

**1018. Essential terms fixed.**—*J. B.*, being wrongfully dispossessed of certain premises, executed the following deed: "Be it remembered that J. B. hath let, & by these presents doth demise to R. F., the premises, as now held by W. F., for the full space or term of twenty-one years, to commence May 1, or of Nov. 1, whichever first happens after J. B. recovers the lands from the heirs, etc.; R. F. covenanting & agreeing, on the foregoing conditions, to pay to J. B., the sum of, etc. Leases, with power of distress, & clauses of re-entry, & all other clauses usual between landlord & tenant, to be drawn & signed at the request of either party as soon as J. B. recovers the lands," etc.:—*Held*: this instrument operated as a present demise.—*BARRY v. NUGENT* (1782), 3 Doug. K. B. 179; 99 E. R. 601.

**Annotations:**—**Appld.** *Pinero v. Judson* (1829), 6 Bing. 206. **Reid.** *Doe d. Jackson v. Ashburner* (1793), 5 Term Rep. 163; *Morgan d. Dowling v. Bissell* (1810), 3 Taunt. 65; *Doe d. Walker v. Groves* (1812), 15 East, 244; *Warman v. Faithfull* (1834), 3 Nev. & M. K. B. 137; *Chapman v. Bluck* (1838), 4 Bing. N. C. 187.

**1019.** ———.]—Memorandum of agreement, in which everything intended to be provided for in a lease, was provided for in the agreement; the lessee to pay all expenses of preparing a lease for either of the terms before mentioned:—*Held*: to amount to a demise.—*WARMAN v. FAITHFULL* (1834), 5 B. & Ad. 1042; 3 Nev. & M. K. B. 137; 3 L. J. K. B. 114; 110 E. R. 1078.

**1020.** ———.]—*Ptfr.* by letter offered to take a

**PART III. SECT. 2, SUB-SECT. 4.**

**1009 i. Possession taken.**—*Ptfr.* being in possession of land belonging to deft., & negotiating for a lease, signed a memorandum, which, after describing the property, stated as follows:—"Twenty-five years, \$50 a year, commencing from Sept. 1, 1880." *Ptfr.* remained in possession more than a year after this:—*Held*: the agreement amounted to an actual demise at a fixed rent.—*BUCKLEY v. RUSSELL* (1884), 24 N. B. R. 205.—**CAN.**

**1009 ii.** ———.]—Where a person enters

into possession of land under an agreement for a lease he is regarded as being in the same position as if the lease had been actually granted to him.—*YOUNG v. RICHARDS, ROBINSON & NEW BRUNSWICK PROVINCE (MINISTER OF LANDS & MINES)* (1923), 50 N. B. R. 476.—**CAN.**

**1009 iii.** ———.]—*JACKSON v. SMITH*, [1925] 3 D. L. R. 50; 1 W. W. R. 1074; 19 Sask. L. R. 353.—**CAN.**

**1009 iv.** ———.]—*MORRIS, MONTAGUE* (1883), 2 N. Z. L. R. 418.—**N.Z.**

**1018 i. Essential terms fixed.**—

*BECHER v. WOODS* (1865), 16 C. P. 29.—**CAN.**

**p. Receipt for rent—For definite term.**—An informal document which acknowledges the receipt of rent of premises for a future definite term, & under which possession is taken by the person paying the rent, is a contract of letting & hiring, & not merely an agreement for a lease.—*WOLFE v. MCGUIRE* (1896), 23 O. R. 45.—**CAN.**

**q. Contract to farm land—Crop-payment plan.**—*M. engaged K. to do all the necessary work in farming a*

farm of deft. from Michaelmas 1833, at £110 a year, payable quarterly, upon a lease for twenty-one years; a valuation to be made of the crops; a lease to be prepared at pltf.'s expense; & the whole to be subject to a certificate of pltf.'s solvency to be given by M. Deft. having received the certificate, by letter accepted of pltf. as tenant, on the terms proposed: the valuation was deferred from time to time; but pltf., on paying £100 towards the amount, was let into possession:—*Held*: the letters of pltf. & deft., at all events, as explained by the above circumstances, & some admissions made by pltf. after a distress, constituted an actual demise on which deft. was authorised to distrain for rent arrear, & not a mere agreement for a lease.—*CHAPMAN v. BLUCK* (1838), 4 Bing. N. C. 187; 1 Arn. 27; 5 Scott, 515; 7 L. J. C. P. 100; 2 Jur. 206; 132 E. R. 700.

*Annotations*:—*Refd.* Jones v. Reynolds (1841), 1 Q. R. 506; Doe d. Wood v. Clarke (1845), 5 L. T. O. S. 91. *Mentd.* Watcham v. East Africa Protectorate, [1919] A. C. 533.

**1021.** —[—]—A., by deed, "in consideration of the rents, covenants, & agreements hereinafter reserved & contained," on the part of B., covenants to grant to B., at his request, a lease of a house: *habendum* for twenty-one years from a day past, "but determinable as hereinafter mentioned." B. covenants to lay out a certain sum on the premises; & it is agreed that the lease shall contain a covenant for the payment of rent & other usual covenants; " & also a covenant, as it is also hereby agreed, on the part of A. for the quiet enjoyment, etc.; & it is also agreed that it shall be lawful for, & in the event of a lease being executed, there shall be contained in the lease a proviso empowering, B. to determine the tenancy or the lease," etc.:—*Held*: a present demise.—*CURLING v. MILLS* (1843), 6 Man. & G. 173; 7 Scott, N. R. 709; 12 L. J. C. P. 316; 1 L. T. O. S. 257; 7 J. P. 384; 131 E. R. 853.

**1022. Covenants immediately operative—Rent.** —The following instrument amounts to a lease: P. T. agrees to pay F. W. the sum of £110 per annum, in quarterly payments, for the house, etc. at etc., for the term of seven, fourteen or twenty-one years, at his option at the end of every seven years. The rent to commence on Jan. 1, 1827.

If in the instrument relied on, there is that which in point of law will satisfy the word "lease," then it will operate as a lease, unless it was the intention of the parties that another instrument should be executed (*BEST, C.J.*).—*WRIGHT v. TREVEZANT* (1828), 3 C. & P. 441; Mood. & M. 231, N. P.

*Annotation*:—*Refd.* Doe d. Marlow v. Wiggins (1843), 4 Q. B. 367.

**1023.** —[—]—[—]*HANCOCK v. CAFFYN*, No. 1012, *ante*.

**1024.** —[—]—Where an agreement for a lease contained covenants on the part of the lessee to repair the premises, to pay all taxes, etc., & to paint once in three years; & also a covenant that, until the lease was executed, the lessees were "to pay rent, & to hold the premises, subject to the covenants above mentioned":—*Held*: this was an absolute demise, & not a mere agreement for a future lease.

We think this instrument must be taken to operate as a lease. It is true the parties con-

template a formal lease in future, & if that were the only stipulation there might be some difficulty. . . . But when we come to the latter words of the agreement, that until the lease is executed the parties are to stand in the same relation as if it had been executed, there is no longer any room for doubt. The defts. are to hold according to covenants, some of which are inconsistent with a tenancy from year to year (*TINDAL, C.J.*).—*PINERO v. JUDSON* (1820), 6 Bing. 206; 3 Moo. & P. 497; 8 L. J. O. S. C. P. 19; 130 E. R. 1259.

*Annotations*:—*Fold.* Warman v. Faithful (1831), 3 Nev. & M. K. B. 137. *Refd.* Doe d. Pearson v. Rios (1832), 8 Bing. 175; Woolley v. Watling (1837), 7 C. & P. 610; Jones v. Reynolds (1841), 1 Q. B. 506; Doe d. Bailey v. Foster (1846), 3 C. B. 215; Anderson v. Mid. Ry. (1861), 3 K. & E. 614. *Mentd.* Izon v. Gorton (1839), 7 Scott, 537; Atkins v. Humphrey (1846), 2 C. B. 654.

**1025.** —[—]—An agreement, by which A. agrees to "let" premises to B., "on lease" for a certain term, at a certain rent, "subject to the stipulations & covenants in the original lease, under which he holds," & "to keep the stipulations in every respect until the lease shall be granted," which lease, when required by B., is to be prepared by A.'s solr., but at B.'s expense, is a lease, & not only an agreement for one.—*WILSON v. CHISHOLM* (1831), 1 C. & P. 474.

**1026. Agreement while in possession on sufferance.**—*POUSLEY v. BLACKMAN* (1621), Bent. 103; Palm. 201; 73 E. R. 973.

*Annotations*:—*Refd.* Taylor v. Horde (1757), 1 Burr. 60; Jerrett v. Weare (1817), 3 Price, 575.

### SECT. 3. - CONTENTS OF LEASE.

#### SUB-SECT. 1. PARTIES.

*See, generally*, DEEDS, Vol. XVII., p. 198, Nos. 82-87.

**1027. Signature—Whether as party or witness—Surrounding circumstances.**—A document which is informally prepared, & states that "whereas J. C. doth agree to let," etc., & has no other operative words, may nevertheless amount to an actual demise. Although the name of one of the parties is on the face of the instrument in connection with the word "witness," it may be shown by other circumstances that that person did not sign as a witness, but as party to the demise. Where one person signs on behalf of another, the authority for his doing so need not be in writing, unless the instrument is one within Stat. Frauds.—*COOKE v. JACKSON* (1850), 15 L. T. O. S. 523.

**Capacity to grant & take leases.**—*See* Sect. 1, *ante*.

#### SUB-SECT. 2. DATE.

*See, generally*, DEEDS, Vol. XVII., p. 199, Nos. 98-101.

**Construction of.**—*See* DEEDS, Vol. XVII., pp. 358, 359, Nos. 1679-1701.

#### SUB-SECT. 3. OPERATIVE WORDS OF DEMISE.

**Agreements for future lease.**—*See* Part II., Sect. 2, sub-sect. 3, *ante*.

certain quarter section owned by M. K. was to furnish the horses & equipment. All the crop was to belong to M., but K. was to receive as compensation a share of the crop.—*Held*: the agreement between M. & K. should be construed as a lease.—*MCLEAN v. DINNING & SASKATCHEWAN CO-OPERATIVE ELK VATOR CO., LTD.*, [1922] 1

W. W. R. 401.—CAN.

### PART III. SECT. 3, SUB-SECT. 1.

*v. Person named in lease.*—The lessee can only be the person named in the lease.—*IRAGOONATHIDAR GOPALDAS v. MORARJI JUTHA* (1892), 1 L. R. 16 Bom 568.—IND.

### PART III. SECT. 3, SUB-SECT. 3.

*t. "Lease & to farm let."*—*Qu.*: whether the words "lease & to farm let" imply a covenant to give possession on the day when the term is to commence.—*HARVEY v. FERGUSON* (1852), 9 U. C. R. 431.—CAN.

Sect. 3.—*Contents of lease: Sub-sects. 3, 4, 5, 6 & 7.*

**Agreements for lease amounting to lease.**—See Sect. 2, sub-sect. 4, *ante*.

**1028. General rule—No technical words necessary—Provided clear intention to demise shown.**—WRIGHT v. TREVEZANT, No. 1022, *ante*.

**1029.** ————]—The instrument falls within the principle laid down in *Bacon's Abridgment, Leases, K.* (which head is supposed to be the production of Chief Baron GILBERT) "that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, & the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient & will, in construction of law, amount to a lease for years as effectually as if the most proper & pertinent words had been made use of for that purpose" (TINDAL, C.J.).—WILKINSON v. HALL (1837), 3 Bing. N. C. 508; 3 Hlodg. 56; 4 Scott, 301; 6 L. J. C. P. 82; 132 E. R. 506.

*Annotations:—*Consd. Doe d. Parsley v. Day (1842), 2 Q. B. 147. *Apprvd.* Duxbury v. Sandford (1898), 80 L. T. 552. *Refd.* Alderman v. Neate (1839), 8 L. J. Ex. 89; Doe d. Roylance v. Lightfoot (1841), 8 M. & W. 553. *Mentd.* Doe d. Lytster v. Goldwin (1841), 2 Q. B. 143; Gibson v. Kirk (1841), 1 Q. B. 850; Chapman v. Beecham (1842), 3 Gal. & Dav. 71; Foley v. Addenbrooke (1843), 4 Q. B. 197; Manders v. Williams (1849), 4 Exch. 339.

**1030.** ————]—By an instrument dated Dec. 13, 1834, A., in consideration of the rents, covenants, & agreements thereafter mentioned, agreed to grant a lease to B., his exors., etc., of certain premises, to hold the same for the term of two years & three-quarters, wanting seven days from Dec. 25, instant, yielding & paying a certain rent, payable quarterly, the first payment to be made on Mar. 25 then next; which indenture should contain covenants on the part of B. to pay the rent, etc., & all such other covenants as were contained in a lease therein referred to; & B. agreed that he would, if & when requested so to do by A., accept such lease; & that until such lease should have been granted as aforesaid, it should be lawful for A., his exors., etc., to distrain for all or any part of the rent which might become due from B., for or in respect of the premises thereby agreed to be demised, at any time after the execution of that agreement:—*Held*: the instrument operated as an agreement only, & not as an actual demise; & consequently, an agreement stamp was sufficient for it.

The principle of law is undoubted, that no technical words are necessary to create a lease: any words amounting to a grant of land, coupled with any facts or covenants, evidencing the intention of the parties that the lessee was to occupy the land immediately or at some future specified time, will be sufficient for this purpose (PARKE, B.).—BICKNELL v. HOOD (1839), 5 M. & W. 104; 2 Horn & H. 86; 8 L. J. Ex. 193; 3 Jur. 774; 151 E. R. 45.

**1031.** ————]—The corp'n. of a city granted a lease of the tolls payable for passage over a swing bridge, erected in lieu of a ferry, & of a tollhouse situate on or adjoining the bridge, to a lessee for a term of years. The lease reserved to the corp'n. right to open the bridge at certain times for the passage of ships & certain rights of passage toll free over the bridge. It contained a covenant by the lessee not to place or permit to be placed any gate or bars across the bridge, & not to permit the exhibition of bills or placards upon it, & reserved a right of entry to the corp'n. on the bridge for the purpose of removing anything placed on the bridge in contravention of

this covenant:—*Held*: looking at the lease as a whole, though it did not, as a matter of conveyancing, amount to a demise of the bridge, yet it showed that the intention of the parties was that the lessee should be in *de facto* occupation of the bridge, & his rights over the bridge should be paramount & those of the corp'n. subordinate & the lessee was the ratable occupier of the bridge.—PERCY v. HALL (1903), 88 L. T. 830; 67 J. P. 293; 19 T. L. R. 503; 47 Sol. Jo. 549; 1 L. G. R. 613; Ryde & K. Rat. App. 319, D. C.

**1032. "I have made a lease."**—ANON. (1561), Dal. 34; 123 E. R. 251.

**1033. "Covenanteth, demiseth & letteth."**—BALDWIN v. MARTON (1589), 1 And. 223; 123 E. R. 442; *sub nom.* BALDWIN'S CASE, 2 Co. Rep. 23 a.

*Annotations:—*Refd. Ph. — v. Piat (1672), 2 Keb. 865. *Mentd.* Loddington v. Kime (1695), 3 Lev. 431.

**1034. "Covenanted & agreed that A. doth let."**—Articles by which "it is covenanted & agreed that A. doth let the said lands, etc." amount to an immediate lease.—HARRINGTON v. WISE (1596), Cro. Eliz. 486; Noy, 57; 78 E. R. 737.

*Annotations:—*Fold. Drake v. Munday (1631), W. Jo. 231. *Appld.* Copley v. Hepworth (1690), 12 Mod. Rep. 1; Warman v. Faithfull (1834), 5 B. & Ad. 1042. *Refd.* Tisdall v. Essex (1616), 1 Roll. Rep. 397; Doe d. Jackson v. Ashburner (1793), 5 Term Rep. 163; Doe d. Henniker v. Watt (1828), 8 B. & C. 308.

**1035. "Covenant, grant & agree."**—WHITLOCK v. HORTON, No. 907, *ante*.

**1036.** ————]—If a person covenants, grants, & agrees, that another shall have & enjoy such a house for a certain time, & the other agrees to pay a sum annually, it amounts to a lease with a reservation of rent.—DRAKE v. MUNDAY (1631), Cro. Car. 207; W. Jo. 231; 79 E. R. 781.

*Annotations:—*Consd. Doe d. Jackson v. Ashburner (1793), 5 Term Rep. 163. *Refd.* Pinner v. Judson (1829), 3 Moo. & P. 497. *Mentd.* Delacherols v. Delacherols (1861), 11 H. L. Cas. 62.

**1037. "To have & to hold for years."**—A grant to have & hold land for years is a good lease; but that he shall enjoy the lands, is only a covenant.—EVANS v. THOMAS (1607), Cro. Jac. 172; 79 E. R. 150.

*Annotation:—*Refd. Doe d. Parsley v. Day (1842), 2 Q. B. 147.

**1038. "Hold & enjoy."**—A. covenanted in a deed that B. should occupy & enjoy certain land for seven years:—*Held*: there was a good lease for seven years.—TISDALE v. ESSEX (1616), Moore, K. B. 861; 3 Bulst. 201; 1 Brownl. 23; Hob. 34; 1 Roll. Rep. 397; 72 E. R. 956.

*Annotations:—*Refd. Hayes v. Bickerstaff (1669), Vaugh. 118; Gregory v. Mayo (1676), 3 Keb. 714. *Mentd.* Lucy v. Leviston (1673), Freem. K. B. 103; Norman v. Foster (1673), 1 Mod. Rep. 101; Coggs v. Bernard (1703), 2 Ld. Raym. 909; Ross v. Hill (1846), 2 C. B. 877.

**1039.** ————]—If a copyholder, to secure a person who has become bound for him, covenant, that such person shall hold & enjoy the copyhold estate for seven years, & so from seven years to seven years, for & during the term of forty-nine years, if the copyholder should so long live, it is a forfeiture of the estate, although there is a clause that the deed should be void on the bond being paid; for this deed, though intended only as a collateral security, amounts to a present lease.—RICHARDS v. SELY (1676), 2 Mod. Rep. 79; 3 Keb. 638; 86 E. R. 952.

**1040.** ————]—Without restraining words.—Words in an agreement "that A. shall hold & enjoy, etc." if not accompanied by restraining words, operate as words of present demise. *Secus* if they be followed by others which show that the parties intended that there shall be a lease in future. The whole must depend on the intention of the

parties.—**DOE d. JACKSON v. ASHBURNER** (1793), 5 Term Rep. 163; 101 E. R. 93.

*Annotations*:—**Distd.** Doe d. Walker v. Groves (1812), 15 East, 244; **Pinero v. Judson** (1829), 6 Bing. 208. **Appld.** Doe d. Pearson v. Rios (1832), 8 Bing. 178. **Consd.** Doe d. Morgan v. Powell (1844), 7 Man. & G. 980. **Refd.** Doe d. Bromfield v. Smith (1805), 6 East, 530; **Warman v. Faithful** (1834), 3 Nov. & M. K. B. 137; **Doe d. Rogers v. Pullen** (1836), 2 Bing. N. C. 749; **Chapman v. Bluck** (1838), 5 Scott, 515. **Mentd.** **Newberry v. Colvin** (1830), 1 Tyr. 55.

**1041. Covenant "to stand seised."**—A covenant "to stand seised" entered into by the owner, is a lease (*per cur.*).—**RIGHT d. BASSET v. THOMAS** (1703), 3 Burr. 1441; 1 Wm. Bl. 446; 97 E. R. 916.

**1042. "Set & let."**—Agreement to grant a lease, whereby the lessor did let & set for twenty-one years from a future day, shall be a lease *in presenti*, if the circumstances show the party's intent so to be.—**BAXTER d. ABRAHAM v. BROWNE** (1775), 2 Wm. Bl. 972; 96 E. R. 573.

*Annotations*:—**Consd.** **Pinero v. Judson** (1829), 3 Moo. & P. 197. **Refd.** **Chapman v. Bluck** (1838), 4 Bing. N. C. 187.

**1043. "Doth demise."**—**BARRY v. NUGENT**, No. 1018, *ante*.

**1044. Agreement for quiet possession.**—The owners of a house & shop, in Sept. 1890, wrote a letter to the person who was then in occupation, in the following terms: "We hereby agree to let you keep peaceable possession of your present house & shop in Strand Lane for a term of ten years, on condition that you commit no nuisance, & pay us the sum of 9s. 3d. per week for rent thereof. You to pay local board rates & we to pay poor rates & water rates as hitherto":—**Held**: there was a demise of the premises for a term of ten years.—**DUXBURY v. SANDIFORD** (1898), 80 L. T. 552, C. A.

"Agree to let."—See Nos. 999–1008, *ante*.

#### SUB-SECT. 4.—RECITALS.

See, generally, **DEEDS**, Vol. XVII., p. 198, Nos. 88, 89.

**Construction of.**—See **DEEDS**, Vol. XVII., pp. 302–309, Nos. 1737–1806.

#### SUB-SECT. 5.—THE PROPERTY CONVEYED.

See, generally, **DEEDS**, Vol. XVII., pp. 374–385, Nos. 1833–1930; & Part VII., *post*.

#### SUB-SECT. 6.—HABENDUM.

See, generally, **DEEDS**, Vol. XVII., pp. 385–389, Nos. 1931–1982.

**1045. Purpose of habendum—To control premises.**—The *habendum* . . . restrains the generality of the premises which is its proper office (**TINDAL, C.J.**).—**BURTON v. BARCLAY** (1831), 7 Bing. 745; 5 Moo. & P. 785; 9 L. J. O. S. C. P. 231; 131 E. R. 288.

**1046.** ————]—**DOE d. TIMMIS v. STEELE**, No. 1167, *post*.

— See, further, **DEEDS**, Vol. XVII., p. 386, Nos. 1932–1943.

**1047.** ————] **To determine period of letting.**—**STRICKLAND v. MAXWELL**, No. 1163, *post*.

— See, further, **DEEDS**, Vol. XVII., p. 386, No. 1944.

**Habendum from past date.**—See Sect. 8, sub-sect. 2, B., *post*.

**Variance between habendum & reddendum.**—See **DEEDS**, Vol. XVII., p. 389, Nos. 1981, 1982.

**Construction of.**—See Sect. 6, *post*.

#### SUB-SECT. 7.—CONSIDERATION.

See, generally, **CONTRACT**, Vol. XII., pp. 172 *et seq.*; **DEEDS**, Vol. XVII., pp. 190, 191, Nos. 9–23.

**1048. Consideration—Good consideration—Promise to make lease generally.**—A promise to make a lease generally, is not a sufficient consideration to ground an action upon.—**FERBY v. LURKYN** (1597), Cro. Eliz. 566; 78 E. R. 810; *sub nom.* **FERBY v. LORKINGS**, Noy, 65.

**1049.** ————] **Past consideration—Promise to pay on same day as lease granted.**—**JONES v. CLARKE** (1613), 2 Bulst. 73; 80 E. R. 969.

— See, generally, **CONTRACT**, Vol. XII., pp. 213–219, Nos. 1719–1789.

**1050.** ————] **Not truly stated—Lease not void.**—Declarations, in consideration that *pltf.* would procure A. B. to grant a lease to *deft.*; the latter promised to pay *pltf.* £170. The proof was, that A. B. having agreed to grant a lease to *pltf.*, the latter undertook, originally, to assign it to *deft.*, for the consideration mentioned; but that afterwards, a lease, to which *pltf.* was a party & assented, was granted immediately by A. B. to the *deft.* The consideration to be paid by *deft.* to *pltf.* was not mentioned in that lease:—**Held**: (1) the lease was not void on account of this omission, the *ad valorem* duty imposed by Stamp Act, 1815 (c. 184), applying only to considerations passing between lessor & lessee; (2) the evidence proved the substitution of a new contract to procure a lease from A. B. to *deft.*, in lieu of the original contract, & there was not any variance.—**BOONE v. MITCHELL** (1822), 1 B. & C. 18; 1 L. J. O. S. K. B. 25; 107 E. R. 8.

*Annotation*:—As to (1) **Dbtd.** A.-G. v. Brown (1849), 3 Exch. 662.

**1051.** ————]—A deed of conveyance, which omits truly to set out the whole consideration directly or indirectly paid, or agreed to be paid for the estate conveyed, is not void by Probate & Legacy Duties Act, 1808 (c. 149), s. 22; therefore in ejectment for a forfeiture, where a lease was supposed to have omitted part of the consideration:—**Held**: this was no answer to the action.—**DOE d. HIGGINBOTHAM v. HOBSON** (1823), 3 Dow. & Ry. K. B. 186; 1 L. J. O. S. K. B. 224.

*Annotation*—**Refd.** **Reed v. Whitnot** (1831), 7 Bing. 577.

**1052.** ————]—**DOE d. KITTLE v. LEWIS**, No. 1082, *post*.

**1053.** ————] **Defence to executing lease.**—The declaration stated, that it was agreed between *pltf.* & *deft.*, that *pltf.* should purchase of *deft.* certain house & shop fixtures, specified in a certain inventory, for £150; that £125 should be paid on taking possession, & the remainder of the purchase-money by three bills of exchange; that *deft.* should grant, & *pltf.* should take, a lease of the messuage for twenty-one years, at the rent of £60. The declaration then averred, that *pltf.* tendered to *deft.* for execution an instrument in the form of a lease, which, after it should have been executed by *deft.*, would have become such a lease as was so agreed to be granted by *deft.* to

#### PART III. SECT. 3, SUB-SECT. 7.

a. *Consideration—Good consideration.*—**MCINTYRE v. CITY OF KINGSTON** (1847), 4 U. C. R. 471.—CAN.

b. ————]—**MERRICK v. L'ESPERANCE** (1860), 10 C. P. 259.—CAN.



*Sect. 3.—Contents of lease: Sub-sects. 7, 8 & 9.*  
*Sect. 4: Sub-sects. 1 & 2, A., B. & C.]*

**pltf.** Deft. traversed this averment. The indenture tendered by pltf. stated, that, as well in consideration of the sum of £150 paid by pltf. to deft., as of the yearly rent, covenants, etc., deft. had demised & leased all that messuage, etc.:—*Held*: the consideration was not truly stated, & therefore the instrument was not such a lease as was agreed to be granted by deft. to pltf.—*VON-HOLLEN v. KNOWLES* (1844), 12 M. & W. 602; 13 L. J. Ex. 140; 2 L. T. O. S. 370; 152 E. R. 1339.  
*Annotation*:—*Refd.* *Manning v. Bailey* (1848), 2 Exch. 45.

**1054. — Premium—Not expressed in lease—Recovery.**—Pltf. granted a lease to deft., in consideration of a premium of £40, & being indebted to deft. in that amount for work done, a settlement of accounts took place between them, when deft. was allowed the £40 in account, but no moneys in fact passed. Pltf. having afterwards sued deft. for £37 4s. for rent, & goods sold, deft. claimed to set off the £40 as money received for his use, on the ground that it was not expressed in the lease, & therefore he was entitled under Probate & Legacy Duties Act, 1808 (c. 149), s. 24, & Stamp Act, 1815 (c. 184), to recover it:—*Held*: (1) the effect of those statutes is to put leases for a premium on the same footing as conveyances upon a sale, so that in all cases where the consideration is not expressed in the lease the amount paid may be recovered back; (2) as deft. might recover back the premiums as money received for his use, he was entitled to set it off as a debt.—*GINGELL v. PURKINS* (1850), 4 Exch. 720; 19 L. J. Ex. 129; 14 L. T. O. S. 354; 154 E. R. 1405.

**1055. — Right of lien for unpaid premium.**—Testatrix, long before her death, had granted a lease of a house for thirty-one years at a low rent, with a premium of £600, which had not been paid:—*Held*: the unpaid premium being in the nature of purchase-money, for which there was a lien upon the land, could not be bequeathed to a charity.—*SHEPHEARD v. BEETHAM* (1877), 6 Ch. D. 597; 46 L. J. Ch. 763; 36 L. T. 909; 25 W. R. 761.  
*Annotation*: *Mentd.* *Re Pullen, Parker v. Pullen*, [1910] 1 Ch. 564.

— **Rent.**—*See* Part XV., *post*.

**Receipt clause—Operating as estoppel.**—*See* *ESTOPPEL*, Vol. XXI., pp. 265, 266, Nos. 848–855.

— *See, further*, *DEEDS*, Vol. XVII., pp. 370–373, Nos. 1807–1832.

#### SUB-SECT. 8.—COVENANTS.

*See* Part XI., *post*.

#### SUB-SECT. 9.—OPTIONS.

*See* Sect. 12, *post*.

#### PART III. SECT. 4, SUB-SECT. 1.

**a. Effect of non-execution by some parties—Non-execution by lessor.**—*HUNGERFORD v. BECKER* (1855), 5 L. Ch. R. 417.—*IR*.

**d. — Lease to husband & wife—Non-execution by wife.**—*Held*: the non-execution by the wife of a lease to her & her husband, containing covenants to be performed by her, did not render her incapable of taking thereunder.—*BRITTON v. KNIGHT* (1879), 20 C. P. 567.—*CAN*.

— **Non-execution by lessee.**—*PIPER v. SIMPSON* (1881), 6 A. R.

#### 175.—CAN.

**f. Necessity for actual entry.**—The estate of a lessee for years is not complete without actual entry.—*DOE d. HATHEWAY v. MURRO* (1848), 6 N. B. R. (1 All.) 92.—*CAN*.

**g. —**—A lease, to have its full effect, must be followed by possession.—*HUTCHINSON v. FERRIER* (1852), 1 Macq. 196; 24 Sc. Jur. 404; 1 Stuart. 677; *affy.* 13 Duml. (Ct. of Sess.) 837; 23 Sc. Jur. 379.—*SCOT*.

**h. Execution by attorney.**—So long as a valid power of attorney enabling the attorney to execute a lease of

#### SECT. 4.—EXECUTION AND COMPLETION.

##### SUB-SECT. 1.—IN GENERAL.

*See, now*, Law of Property Act, 1925 (c. 20), s. 73.  
**1056. Binding on party executing.**—If one party executes an indenture it shall be his deed though the other party does not execute it.—*FOSTER v. MAPES* (1590), Cro. Eliz. 212; 1 Leon. 324; Owen, 100; 78 E. R. 468.

*Annotations*:—*Mentd.* *Tisdale v. Essex* (1613), Hob. 34; *Hayes v. Bickerstaff* (1669), Vaugh. 118; *Fowle v. Welch* (1822), 2 Dow. & Ry. K. B. 133.

**1057. Effect of non-execution by some parties—Non-execution by lessor—Lessee not estopped.**—A declaration in covenant stated that one J. was seised in fee, & being so seised, by a certain indenture, with the consent & approval of J. then given, made between J. of the one part, & deft. of the other part (*profert* sealed with the seal of deft.), it was witnessed, that, for the considerations therein mentioned, he, J., did demise to deft., his exors. & administrators, certain premises therein mentioned; to hold to him, his exors., etc., for the term of eleven years. By virtue of which indenture, & by permission of J., deft. afterwards entered into the premises, & was possessed thereof. That J. afterwards made his will, by which he devised the estate to his widow E. for life, remainder to pltf. for life. It then averred the death of J., & afterwards to E., his wife, whereupon pltf. became & was seised of the reversion of & in the premises in his demesne as of freehold for the term of his natural life, under & by virtue of the will. Deft. pleaded in effect that, although the deed was his deed, yet, that it was not signed by J., nor by any agent of J., thereunto lawfully authorised by writing, nor was any lease for the term of eleven years put into writing & signed by J., or any agent, etc.:—*Held*: the action was not maintainable by pltf. against deft. for breaches of the covenants in the indenture.—*CARDWELL v. LUCAS* (1836), 2 M. & W. 111; 2 Gale, 203; 6 L. J. Ex. 52; 150 E. R. 691.

*Annotations*:—*Apld.* *Coch v. Goodman* (1812), 2 Q. B. 580.

*Refd.* *Pittman v. Woodbury* (1848), 3 Exch. 4.

— *See* *DEEDS*, Vol. XVII., pp. 221 *et seq.*  
**Formalities of execution.**—*See* *DEEDS*, Vol. XVII., pp. 199 *et seq.*

**Delivery as escrow.**—*See* *DEEDS*, Vol. XVII., pp. 208 *et seq.*

**Additions & alterations before & after execution.**—*See* *DEEDS*, Vol. XVII., p. 226, Nos. 400–405.

**From what time deed effective.**—*See* *DEEDS*, Vol. XVII., p. 228, Nos. 425–436.

#### SUB-SECT. 2.—COUNTERPART.

##### A. Execution.

**1058. Execution under power requiring counterpart—Contemporaneous execution unnecessary.**—*Semble*: when a leasing power requires that the lessee shall execute a counterpart, it is not necessary

the premises exists a lessee without power to assign his interest cannot insist on the lease being executed personally by the landlord.—*GRAHAM v. MANDERS* (1918), 53 L. T. 5.—*IR*.

**k. Execution by one lessee for himself & others.**—A written lease granted to G. & his four sisters was signed by G. alone, the testing clause, however, bearing that he had subscribed "for himself & his sisters":—*Held*: G. was not entitled to be enrolled as sole tenant.—*DONALDSON v. COLQUHOUN* (1865), 38 Sc. Jur. 79.—*SCOT*.

1. *Availability of counterpart.*] — *PERNETTE v. CLINCH* (1894), 26 N. S. R. 410. — **CAN.**

*Sect. 4.—Execution and completion: Sub-sect. 3, A., B., C. (a) & (b), & D.]*

**SUB-SECT. 3.—STAMPS.**

**A. Necessity for.**

See Stamp Act, 1891 (c. 39), ss. 11, 75 (2).

**1071. Lease in writing—For term capable of creation by parol.]—PROSSOR v. PHILLIPS** (1765), Bull. N. P. 5th ed. 269, N. P.

*Annotation:—***Refd.** *Goodtitle v. Way* (1787), 1 Term Rep. 735.

**1072. — Not under seal.]—GOODTITLE d. ESTWICK v. WAY**, No. 303, *ante*.

**1073. — Contained in correspondence.]—**(1) A bill of exceptions, tendered to a judge's ruling, that certain documents could not be received for want of a stamp, did not set forth the documents, but after the seal of the judge were these words: "The following are the letters referred to in the bill of exceptions." They were then set forth, but not authenticated by the judge's seal:—**Held:** they did not form part of the record, & could not be looked at by the House.

In trespass *quare clausum fregit* under a special traverse of pltf.'s title, pltf.'s witness said certain letters had passed annually between pltf. & his lessor as to the demise:—**Held:** (2) the demise sufficiently appeared to be by writing, & pltf. was bound to produce the letters, whatever they were; (3) the judge having on exception rejected the letters for want of a stamp, it not appearing in the bill of exceptions for what purpose they had been tendered, it must be presumed that they were tendered to prove a lease, & therefore were properly rejected.—**HUTCHINSON v. FERRIER** (1852), 19 L. T. O. S. 116, 11 L.

**1074. Alteration of agreement—Necessity for further stamp—Alteration immaterial.]—**The alteration of an agreement, stipulating to give up the holding & occupation of a farm, by the addition of the words "house & premises," after that agreement has been completed, is not such an alteration as will render the affixing of a new stamp necessary; house & premises being included within the meaning of the term farm.—**DOE d. WATERS v. HOUGHTON** (1827), 1 Man. & Ry. K. B. 208; 6 L. J. O. S. K. B. 86.

**1075. As evidence of terms of parol agreement for new lease.]—**Where a parol agreement was made between A. & B., that the former should let, & the latter take, certain premises, upon the terms & conditions contained in a lease of the same premises granted by A. to C.:—**Held:** in an account by A. against B. for rent & non-repair, the lease could not be read in evidence, unless duly stamped.—**TURNER v. POWER** (1828), 7 B. & C. 625; 108 E. R. 856; *sub nom.* **TURNER v. FORD**, 6 L. J. O. S. K. B. 122.

*Annotation:—***Refd.** *Larry v. Deere* (1836), 2 Har. & W. 395.

**1076. —.]—**Declaration, in *assumpsit*, that deft. had held lands under a lease from E., on certain terms, which were set forth on the record; that the reversion came to pltf.; & that deft., in consideration of an alteration of the rent, promised to hold of pltf. on the same terms in all other respects; but that deft. broke the terms. Plea, *non assumpsit*. Pltf. not having proved an express contract to hold of deft. on the old terms:

—**Held:** he could not rely upon an implied contract, arising from the old lease, without put it in evidence; & the old lease could not be as such evidence, unless properly stamped.—

—**WALLISS v. BROADBENT** (1836), 4 Ad. & El. 877; 2 Har. & W. 40; 6 L. J. K. B. 269; 111 E. R. 1014.

**1077. Agreement allowing occupation as remuneration for services.]—**A. being owner of a farm, let it for 7 years to B., & by a written agreement of same date it was agreed, that A. should manage the farm for B., B. allowing A. 12s. a week, " & allowing him & his family to reside & have the use of the dwelling-house & furniture therein, free of rent," & this agreement was to be put an end to by three months' notice or three months' wages:—**Held:** (1) this agreement did not require a lease stamp, as it did not contain a demise, of the house, the occupation of it being a mere remuneration for service; (2) no notice to quit was necessary, if the service was put an end to.—**DOE d. HUGHES v. DERRY** (1840), 9 C. & P. 494.

*Annotation:—***Generally, Mntd.** *Curling v. Mills* (1843), 7 Scott, N. R. 709.

**1078. Acknowledgment of existing tenancy.]—**An agreement in the following terms: "I, W., do hereby acknowledge that I am indebted to B., as agent of S., my landlord, in the sum of £22 for arrears of rent, for the cottage in my occupation; & I do now pay B. the sum of 5s. on account & in part of such rent, & do hereby undertake to pay B. the sum of £8 *per annum*, by quarterly payments from Michaelmas last":—**Held:** not to require a lease stamp.—**EAGLETON v. GUTTERIDGE** (1843), 11 M. & W. 465; 2 Dowl. N. S. 1053; 12 L. J. Ex. 359; 152 E. R. 888.

—**Mntd.** *Bannister v. Hyde* (1860), 2 E. & E.

627.

**1079. —.]—**A memorandum, by which, in consideration that A. will withdraw a distress for a sum exceeding £20, which B. admits to be due from him as tenant to A., until a future day, B. declares that in case of default it shall be lawful for A. to enter & distrain, & to pursue all remedies for the recovery of the land, as if no distress had been taken, is admissible in evidence to prove the tenancy without an agreement stamp.—**HILL v. RAMM** (1843), 5 Man. & G. 789; 6 Scott, N. R. 571; 1 L. T. O. S. 109; 134 E. R. 779; *sub nom.* **HILL v. RANDOM**, 12 L. J. C. P. 275.

**1080. Void lease.]—**A lease in writing, not by deed, void under Real Property Act, 1845 (c. 106):—**Held:** not to require a stamp.—**MOTT v. TURNAGE** (1856), 1 F. & F. 6, N. P.

*Annotation:—***Refd.** *Golden v. Taylor* (1860), 2 F. & F. 110.

**Lease from Crown.]—**See CONSTITUTIONAL LAW, Vol. XI., p. 581, No. 829.

**B. Scale Applicable.**

See, now, Stamp Act, 1891 (c. 39), sched.; Finance (1909–10) Act, 1910 (c. 8), s. 75; Revenue Act, 1911 (c. 2), s. 15; Finance Act, 1924 (c. 21), s. 35.

**1081. Scale at time of fixing stamp.]—**Where an instrument, which was in reality a lease, but which bore an agreement stamp for 15s. was executed in 1805, at which period the amount of

**PART III. SECT. 4, SUB-SECT. 3.—A.**

*m. Joint agreement.]—***COOPER v. FLYNN** (1841), 3 L. R. 472.—**IR.**

*n. Proposal by tenant—Signed by both parties.]—*A proposal purporting to come entirely from the tenant, without any words of acceptance or contract on the part of the landlord,

but containing all the terms necessary to constitute a lease, & signed by both parties:—**Held:** to be a lease, & to require a lease stamp.—**FITZPATRICK v. KING** (1854), 6 Ir. Jur. 314.—**IR.**

*o. Agreements to demise.]—*Agreements to demise are leases, & require to be stamped as such.—**HUTCHINSON**

(1852), 1 Macq. 196; 24 Sc. Jur. 404; 1 Stuart, 677; *affd.*, 13 Dowl. (Ct. of Sess.) 837; 23 Sc. Jur. 379.—**SCOT.**

**PART III. SECT. 4, SUB-SECT. 3.—B.**

**1081 i. Scale at time of fixing stamp.]—**A lease executed in 1849 must, in order to be admissible in evidence, be

the stamp on a lease, according to the Act then in force, was £1 10s. 0d. but was stamped in 1834, under 37 Geo. 3, c. 136, s. 2, with a stamp of £1 being the amount of the stamp then in force:—*Held*: the proper duty had been paid.—*BUCKWORTH v. SIMPSON* (1835), 1 Cr. M. & R. 834; 1 Gale, 38; 5 Tyr. 344; 4 L. J. Ex. 104; 149 E. R. 1317.

*Annotations*.—*Appld.* *Deakin v. Pennall* (1848), 2 Exch. 320. *Mentd.* *Brydges v. Lewis* (1842), 3 Q. B. 603; *Standen v. Christmas* (1847), 10 Q. B. 135; *Arden v. Sullivan* (1850), 14 Q. B. 832; *Humphreys v. Franks* (1856), 18 C. B. 323; *Maples v. Pepper* (1856), 18 C. B. 177; *Cumden v. Batterbury* (1860), 7 C. B. N. S. 864; *Walker v. Gode* (1861), 6 H. & N. 594; *Elliott v. Johnson* (1866), L. R. 2 Q. B. 120; *Cornish v. Stubbs* (1870), L. R. 5 C. P. 334; *Smith v. Egginton* (1874), L. R. 9 C. P. 145; *Williams v. Heales* (1874), L. R. 9 C. P. 177; *Phillips v. Miller* (1875), L. R. 10 C. P. 420; *Ramage v. Womack*, [1900] 1 Q. B. 116; *Manchester Brewery Co. v. Combs*, [1901] 2 Ch. 608; *Wedd v. Porter* (1915), 113 L. T. 819.

*See, now*, Stamp Act, 1891 (c. 39), s. 14 (4).

### C. Consideration.

#### (a) Lump Sum.

*See* Stamp Act, 1891 (c. 39), sched.; Finance (1909–10) Act, 1910 (c. 8), s. 75; Revenue Act, 1911 (c. 2), s. 15.

**1082. Consideration not truly expressed—Duty payable on sum expressed.**—A conveyance liable to *ad valorem* duty, by Stamp Act, 1815 (c. 184), sched., Part I., title “Conveyance,” is not void, because the true consideration money is not expressed on the face of the deed. The duty is payable merely on the sum expressed; though, under Probate & Legacy Duties Act, 1808 (c. 149), the parties may be liable to punishment for not truly expressing the consideration.—*DORR v. KETTLE* (1830), 10 B. & C. 673; 8 L. J. O. S. K. B. 300; 109 E. R. 600.

**1083. — Lump sum payable to third party.**—H. being seised in fee of certain land, contracted with B. to execute to him a lease of the land, & a house to be built thereon by B., for 99 years, at a rent of £9 5s. 0d. The house having been built, B. contracted with O. to sell him his (B.’s) interest in the land & house for £550, which was accordingly paid. In order to effect this contract, B. procured an indenture to be made between himself, H. & O. whereby H. demised to O. the house & land for ninety-nine years, at the same rent. No mention was made in this instrument of the purchase-money:—*Held*: the lease was a conveyance within the Stamp Act, 1815 (c. 184), & B. was liable to the penalties imposed by Probate & Legacy Duties Act, 1808 (c. 149), s. 2, for omitting to set forth the purchase-money.—*A.-G. v. BROWN* (1840), 3 Exch. 662; 18 L. J. Ex. 336; 13 L. T. O. S. 121; 154 E. R. 1011.

**1084. — Payment of premium—Right of lessee to recover premium.**—*GINGELL v. PURKINS*, No. 1054, ante.

*See, now*, Stamp Act, 1891 (c. 39), s. 5.

#### (b) Rent and Addition thereto.

**1085. Reservation of sum equal to premium for insurance—In addition to fixed rent.**—An instrument, which operated as a lease, reserved a rent of £50 but contained a stipulation that the landlord should insure the premises for £1,000 & that the premiums of insurance should be added to the rent of £50, & become due & payable in like manner as the rent:—*Held*: this was not a “deed not otherwise charged” within Stamp Act, 1815

(c. 184), title “Deed,” but was properly stamped with an *ad valorem* lease stamp of £1 10s., as on a rent exceeding £20 & not exceeding £100; & if the premiums of insurance, added to the rent, exceeded £100, it lay upon the party seeking to impeach the instrument to show that they did so.—*WILSON v. SMITH* (1844), 12 M. & W. 401; 1 Dow. & L. 633; 13 L. J. Ex. 113; 2 L. T. O. S. 285; 8 J. P. 522; 152 E. R. 1253.

#### 1086. Reservation of royalty in addition to rent.]

—A lease of a coal mine for a term of ninety-nine years reserved a certain rent of £75 a year payable quarterly, & also a galeage or tonnage rent of 0d. for every ton of coal raised. The lease contained more than two thousand, one hundred & sixty words, & was stamped with an *ad valorem* duty of £1 10s., & a progressive duty of £1. *Qu.*: whether the royalty or tonnage rent rendered a £1 15s. stamp necessary in lieu or in addition to the *ad valorem* duty.—*ROBERTS v. SECAR* (1850), 16 L. T. O. S. 66.

#### 1087. Payment of sum in lieu of repairs.]

By a lease of tramways to a traction co. by a municipal corp., made pursuant to the Tramways Act, 1870 (c. 78), the co. were to pay rent at a fixed rate per cent. on the cost of the original purchase. They were also to pay to the lessors a given sum per mile of road along which the tramways were laid, in lieu of repairing any portion of such road & maintaining the tramways, except the rails & electric bonds laid thereon. The minimum amount payable under this clause was £900 *per annum* & a power of distress was reserved in respect of it. They were also bound to purchase from the vendors all electrical energy required for the purpose of the tramways & to pay for same at a given rate, the minimum sum payable in any one year being £1,000. On a case stated:—*Held*: the £900 payable in respect of the repair of the road was rent, & *ad valorem* duty was payable upon it under Stamp Act, 1891 (c. 39), s. 4. —*BRITISH ELECTRIC TRACTION CO. v. INLAND REVENUE COMRS.*, [1902] 1 K. B. 411; 71 L. J. K. B. 92; 85 L. T. 663; 60 J. P. 83; 50 W. R. 280; 18 T. L. R. 105, C. A.

**1088. “Lease exceeding thirty-five years” —Peppercorn rent.**—A lease for a term of forty-five years at a substantial rent for the first twenty-three years & at a peppercorn during the remaining twenty-two is not a lease “exceeding thirty-five years at a yearly rent” within Stamp Act, 1851 (c. 83), sched. title “Lease,” & is not liable to the duty imposed by that statute. *PEARSON v. INLAND REVENUE COMRS.* (1868), L. R. 3 Exch. 242; 37 L. J. Ex. 171; 18 L. T. 570; *sub nom.* *FLORENCE v. INLAND REVENUE COMRS.*, 16 W. R. 981.

**1089. — Lease for ninety-nine years determinable on lives.**—A lease for a term of ninety-nine years if A., B., & C. should so long live is a lease for a term which “exceeds thirty-five years,” & not a lease for an “indefinite” term, within Stamp Act, 1891 (c. 39), sched. I. —*MOUNT EDGUMBE (EARL) v. INLAND REVENUE COMRS.*, [1911] 2 K. B. 24; 80 L. J. K. B. 503; 105 L. T. 62; 27 T. L. R. 298.

#### D. Documents of Double Character.

*See* Stamp Act, 1891 (c. 39), s. 4 (a).

**1090. Whether two stamps required—Lease & bond.**—An instrument which was both a bond & a lease or demise, not required to be stamped

stamped with the duty imposed by 5 & 6 Vict. c. 83; & it is not sufficient that when produced it bears a stamp sufficient to cover the duty now in force.—*MOORE v. LONG* (1865), 13 L. T. 149.—*IR.*

*Sect. 4.—Execution and completion: Sub-sect. 3, D. & E.; sub-sects. 4 & 5, A.]*

doubly.—*JONES d. RAYNER v. SANDYS* (1753), Barnes, 463; 94 E. R. 1005.

*Annotation:—Refd. Baker v. Jardine* (1784), 13 East, 235, n.

**1091. — Demise to different tenants of different estates—Stamp relating to particular tenancy.]**

Where an instrument contains a written contract of demise in its general terms with a several operation in respect to the different tenants who sign it for different estates at the different rents set against their signatures, & one stamp only appears upon the paper, it is matter of evidence to which contract such stamp applies; & the circumstances of juxtaposition of the stamp to deft.'s signature, which stood untouched, while all the other names appeared scored through with pencil lines as if by way of cancellation; & the date of the stamp office receipt for the stamp & penalty, which showed that it had been affixed after the action bought, & recently before the trial; & there being no evidence of a dispute with any other tenant which could make the stamp necessary for another purpose; are evidence that it was intended to be & was applied to the contract with deft.; in which case the paper was evidence for this purpose.—*DOE d. COPLEY v. DAY* (1811), 13 East, 241; 104 E. R. 363.

*Annotations:—Refd. Doe d. Croft v. Tidbury* (1854), 14 C. B. 304. *Mentd. Solari v. Yorston* (1839), 8 L. J. Q. B. 234.

**1092. — Demise of several premises to one tenant at separate rents.]**—Demise to A. of a slate pit at B., & stone quarries at C., to hold to A. the slate pit at B. from Mar. 25, 1815, for the term of fourteen years, & the stone quarries at C. from Sept. 29, 1817, for the term of fourteen years, paying for the slate pit the yearly rent of £70, & for the stone quarries the yearly rent of £130. The *ad valorem* stamp on the first skin of the lease was £3, with a progressive duty of £1 on the other skins. It appeared that possession could not be given of the stone quarries at the same time with the slate pit, nor till the time mentioned in the lease. The ct. being of opinion that no fraud was intended:—*Held*: this lease was properly stamped under Stamp Act, 1815 (c. 184).—*BOASE v. JACKSON* (1822), 3 Brod. & Bing. 185; 6 Moore, C. P. 480; 129 E. R. 1254.

*Annotations:—Consd. Clayton v. Burtenshaw* (1826), 7 Dow. & Ry. K. B. 800. *Expld. & Distd. Coster v. Cowling* (1831), 7 Bing. 456. *Folld. Blount v. Pearman* (1834), 1 Bing. N. C. 408.

**1093. — — —.]**—A lease contained a demise of two separate farms, with two *habendums* differing from each other; a reservation of a separate rent in respect of each farm, & separate covenants, some applying to one farm, some to the other. The lessee entered on the whole at one time:—*Held*: one *ad valorem* stamp for the amount of both rents was sufficient.—*BLOUNT v. PEARMAN* (1834), 1 Bing. N. C. 408; 1 Scott, 55; 4 L. J. C. P. 119; 131 E. R. 1175.

**1094. — — —.]**—By the same agreement close A. was demised at a rent of £200 a year, & close B. at the same rent which was paid by the tenant then in possession, not otherwise describing the amount. The agreement was produced in evidence, with an *ad valorem* stamp on the annual sum made up of £200, & of the rent paid by the above-mentioned tenant, the amount of which was proved by witnesses:—*Held*: the document was rightly stamped, & properly admitted in evidence.—*PARRY v. DEERE* (1836), 5 Ad. & El. 551; 2 Har. & W. 395; 1 Nev. & P. K. B. 47; 6 L. J. K. B. 47; 111 E. R. 1274.

**1095. — Demise with contract for sale of goods.]**—If a lease in writing, contain a contract for the purchase of goods, it cannot be given in evidence to prove the sale of the goods, unless it has a lease stamp, although it has an agreement stamp.—*CORDER v. DRAKEFORD* (1811), 3 Taunt. 382; 128 E. R. 151.

*Annotations:—Refd. Stone v. Rogers* (1837), Murp. & H. 146; *Wharton v. Walton* (1845), 7 Q. B. 474; *Lovelock v. Franklyn* (1847), 2 New Pract. Cas. 78; *Walker v. Giles* (1848), 6 C. B. 662.

**1096. — — — Fixtures.]**—*CLAYTON v. BURTENSHAW*, No. 326, ante.

**1097. — — —.]**—On a sale of fixtures by an outgoing to an incoming tenant, the following memorandum given by the broker employed by the former: "Received of Mr. H. £3 for letting a house to him for a term of seven years; Mr. H. to take the fixtures at a valuation, if he be accepted as tenant; & in the event of his not being accepted as tenant, then the £3 to be returned." In an action for the price of the fixtures:—*Held*: fixtures are not "goods, wares or merchandise" within the exception of the Stamp Act, 1815 (c. 184); & therefore, the above memorandum, being part of the contract between the parties, could not be received in evidence without a stamp.—*WICK v. HODGSON* (1827), 12 Moore, C. P. 213; 5 L. J. O. S. C. P. 55.

**1098. — Demise with reservation of rent for furniture.]**—A £3 stamp is not sufficient on a lease reserving £370 for house & land; & by a distinct reservation, £50 for furniture & fixtures.—*COSTER v. COWLING* (1831), 7 Bing. 456; 5 Moo. & P. 399; 131 E. R. 176.

**1099. — Demise with option to purchase property other than that demised.]**—By an instrument in writing, not under seal reciting that T. had purchased a piece of ground with four messuages built thereon, in one of which pltf. resided, it was agreed that pltf. should continue to reside therein during the residue of T.'s interest therein, provided pltf. should so long live at the annual rent of 1s., & in the event of his dying during the continuance of the term his widow should reside therein on the same terms; & T. further agreed to assign all his interest in the premises so purchased to pltf., on payment, within seven years, of £140, together with all expenses:—*Held*: the instrument required an agreement stamp as well as a lease stamp.—*LOVELOCK v. FRANKLYN* (1847), 8 Q. B. 371; 2 New Pract. Cas. 78; 16 L. J. Q. B. 182; 8 L. T. O. S. 444; 11 Jur. 1035; 115 E. R. 916.

*Annotations:—Mentd. Hochster v. De Latour* (1853), 22 L. J. Q. B. 455; *Frost v. Knight* (1872), L. R. 7 Exch. 111; *Soc. Générale de Paris v. Milders* (1883), 49 L. T. 55.

**1100. — Demise with option to purchase demised property.]**—By a memorandum of agreement, containing words of present demise, A. agreed to let certain premises to B. for two years, at a certain rent, & that B. should have the right of purchasing the premises at the end of, or at any time during, the term, for a given sum, "it being understood that A. was possessed of the same premises for his own life & the life of Mrs. M., & of the survivor of them":—*Held*: (1) by this agreement, A. bound himself to make title to the premises for the lives of himself & M. & the life of the survivor; (2) a single lease stamp, 30s. under Stamp Act, 1815 (c. 184), was sufficient.—*WORTHINGTON v. WARRINGTON* (1848), 5 C. B. 635; 3 New Pract. Cas. 42; 17 L. J. C. P. 117; 10 L. T. O. S. 415; 136 E. R. 1027; *subsequent proceedings* (1849), 8 C. B. 134.

*Annotation:—As to (2) Refd. Doe d. Croft v. Tidbury* (1854), 14 C. B. 304.



**1101. — Demise with guarantee by third party for payment of rent.**—By indenture, in the form, & containing the usual covenants, of a lease, A. demised premises to B., & B. & C. covenanted to pay the rent; but C. was not otherwise referred to in the instrument. In an action against C., on the covenant to pay rent:—*Held*: the indenture was available against him, though stamped as a lease only, & a deed stamp was unnecessary.—*PRICE v. THOMAS* (1831), 2 B. & Ad. 218; 109 E. R. 1125; *previous proceedings, sub nom. PRATT v. THOMAS*, 4 C. & P. 554, N. P.

*Annotations*:—*Distd.* Wharton v. Walton (1845), 7 Q. B. 474. *Refd.* Lovelock v. Franklyn (1847), 8 L. T. O. S. 444.

**1102. — Demise with guarantee by third party for payment of penalties.**—A., by written contract, agreed to take a public-house of S. at a certain rent, & to buy of S. all the beer which should be sold & consumed on the premises, under a penalty of £30 for every barrel bought of any other person; & to quit on six months' notice, under a penalty of £30 per month for holding over. At the end of this instrument was written: "It is further agreed by O., who was not previously made party to the contract, that he will hold himself responsible for any amount of money which may become due from A. to S. that is to say, to the amount of £36." The names of S., O. & A. were subscribed:—*Held*: in an action by S. against O. on the guarantee, a lease stamp was not sufficient, but an agreement stamp was necessary in respect of O.'s guarantee, for the payment of penalties.—*WHARTON v. WALTON* (1845), 7 Q. B. 474; 14 L. J. Q. B. 321; 5 L. T. O. S. 171; 9 Jur. 638; 115 E. R. 567.

*Annotations*:—*Folld.* Lovelock v. Franklyn (1847), 8 Q. B. 371. *Refd.* Mayfield v. Robinson (1845), 7 Q. B. 486; Worthington v. Warrington (1848), 5 C. B. 635; Doe d. Croft v. Tidbury (1854), 2 C. L. R. 347.

**1103. — Demise of land & incorporeal hereditament.**—If, in proof of a settlement by renting a tenement, under 6 Geo. 4, c. 57, a writing not under seal be produced, demising land, & also professing to demise incorporeal hereditaments, at an entire rent, evidence may be given to show how much of such rent the land was worth. If the amount is £10 a year, & the land has been occupied, & rent paid, according to the statute, the settlement is good. The instrument above described reserved a rent of £75 & had a stamp of £1 10s.:—*Held*: sufficient; & the writing did not require to be stamped as a lease not otherwise charged, under Stamp Act, 1815 (c. 184), sched. Part I.—*R. v. HOCKWORTHY (INHABITANTS)* (1837), 7 Ad. & El. 492; 2 Nev. & P. K. B. 383; Nev. & P. M. C. 372; Will. Woll. & Dav. 707; 7 L. J. M. C. 25; 1 J. P. 249; 112 E. R. 555.

**1104. — Demise with covenant to build.**—Where a piece of land was demised for ninety-nine years, at an annual rent of £8, & the lease contained a covenant that the lessee should, within a year from the granting of the lease, build a dwelling-house on the land, & expend the sum of £150 at the least upon it:—*Held*: a stamp of £1 was sufficient.—*NICHOLLS v. CROSS* (1845), 14 M. & W. 42; 14 L. J. Ex. 244; 9 J. P. 807; 153 E. R. 381.

**1105. —**—A lease made in consideration of a rent & also of a covenant to complete houses, is a lease made "for a further or other valuable consideration" besides the rent, within Stamp Act, 1854 (c. 83), s. 10, & is chargeable with

a deed stamp beyond the *ad valorem* duty.—*Re BOLTON'S LEASE* (1870), L. R. 5 Exch. 82; *sub nom. BOULTON v. INLAND REVENUE COMRS.*, 39 L. J. Ex. 51; 21 L. T. 720; 18 W. R. 351.

*Annotation*:—*Consd.* British Electric Traction Co. v. I. R. Comrs., [1902] 1 K. B. 441.

*See, now*, Stamp Act, 1891 (c. 39), s. 77 (2).

#### E. Counterpart or Duplicate.

*See* Stamp Act, 1891 (c. 39), ss. 11, 72, sched. I.

**1106. Duplicate—Power of court to order production for stamping.**—In an action on an agreement for a lease, where two parts have been executed, & pltf. has lost the part delivered to him, the ct. or a judge on summons will order deft. or his attorney to produce the part in his possession at the Stamp Office to be stamped.—*NEALE v. SWIND* (1832), 2 Cr. & J. 278; 1 Dowl. 314; 2 Tyr. 318; 149 E. R. 120; *sub nom.* NEALE v. SWEENEY, 1 L. J. Ex. 118.

*Annotation*:—*Refd.* Hall v. Balnbridge (1845), 3 Dow. & L. 92.

**1107. — In action by purchaser from landlord.**—If two parts of an agreement be interchangeably executed between landlord & tenant, in an action upon the agreement by a purchaser of the premises, the ct. will not compel the tenant to produce his part to be stamped, unless such purchaser has applied to the vendor, or used every endeavour, without success, to find him.—*TRAVIS v. COLLINS* (1832), 2 Cr. & J. 625; 2 Tyr. 726; 1 L. J. Ex. 244; 149 E. R. 203.

*Annotation*:—*Refd.* Rankin v. Hamilton (1850), 15 Q. B. 187.

**1108. Counterpart—Tendered as proof of assignment.**—Pltf., a leaseholder, in consideration of £100, & a yearly sum of £75 payable quarterly, by indenture under-demised & leased to deft. certain premises for a longer term than pltf. had in them himself:—*Held*: a counterpart of this indenture, executed by deft. only, & bearing only a 30s. stamp, was not admissible in evidence to support an allegation of assignment, on which deft. had taken issue.—*BAKER v. GOSTLING* (1834), 1 Bing. N. C. 246; 1 Scott, 58; 4 L. J. C. P. 31; 131 E. R. 1111.

**1109. — Document signed by both parties—Admission as counterpart before action.**—*DOE d. WRIGHT v. SMITH*, No. 60, *ante*.

#### SUB-SECT. 4.—REGISTRATION.

*See* REAL PROPERTY.

#### SUB-SECT. 5. COSTS OF LEASE.

##### A. Costs of Preparing Lease.

**1110. General rule—Lease prepared by lessor & paid for by lessee.**—*GRISSELL v. ROBINSON*, No. 1111, *post*.

**1111. Right of lessor to recover from lessee—Costs paid to lessor's solicitor.**—P. orally agreed to grant deft. a lease for sixty years: deft. paid part of the consideration, but P. died before the contract was carried into effect. Pltfs., P.'s exors., then granted the lease, which recited that P.'s agreement had been treated as void by the Ct. of Ch., & that the lease was granted pursuant to a proposal of pltfs. thereafter mentioned.

#### PART III. SECT. 4, SUB-SECT. 5.—A.

**1111 L. Right of lessor to recover from lessee—Costs paid to lessor's solicitor.**—The liability of the lessee for the costs

of the lessor's solr. in the preparation of a lease depends upon agreement or custom & is by way of indemnity only, & the lessor cannot recover the costs

unless they themselves are liable to the solr. for them.—*METCALFE v. VENABLES*, [1921] N. Z. L. R. 576.—N.Z.



**Sect. 4.—Execution and completion: Sub-sect. 5, A. & B.]**

Ptfs. having paid their own attorney his charges for drawing this lease:—*Held*: they were entitled to sue deft. for money paid, & in their own right.

The evidence shows that it is the custom for the landlord's attorney to draw the lease & that it is paid for by the lessee (TINDAL, C.J.).—GRISSELL v. ROBINSON (1836), 3 Bing. N. C. 10; 2 Hodg. 138; 3 Scott, 329; 5 L. J. C. P. 313; 132 E. R. 312.

*Annotations*:—*Distd.* Webb v. Rhodes (1837), 4 Scott, 497. *Refd.* Wilkinson v. Grant (1856), 18 C. B. 319; Helps v. Clayton (1864), 17 C. B. N. S. 553; *Re* Gray, [1901] 1 Ch. 239; *Re* Fletcher & Dyson, [1903] 2 Ch. 688. *Mentd.* Brittain v. Lloyd (1845), 14 M. & W. 762; Gratton v. Lloyd (1847), 8 L. T. O. S. 474.

**1112.** ———.]—If the attorney of a lessor, who is not attorney for the lessee, prepare the lease, the lessor is the person liable to pay the attorney for it, & the lessor can recover over against the lessee; & this is so whether the lessee takes up the lease or refuses to do so.

A. applied to his attorney, who was not attorney of B., to prepare an assignment of a lease to B. The attorney recommended an underlease, to which A. objected, as being more expensive. The attorney said, "you won't have to pay it, for the lessee always pays for the lease." A. gave instructions for an underlease, & his attorney prepared it, but B. would not take it up or pay for it:—*Held*: A. was liable to his attorney for the expenses of preparing the underlease.—BAKER v. MERYWEATHER (1849), 2 Car. & Kir. 737; 15 L. T. O. S. 97.

**1113.** ———.]—*Re* GRAY, No. 1132, *post*.

**1114. Right of solicitor to lessor to recover from lessee.—Express agreement by lessee.]**—Lessor & lessee, in the presence of lessor's attorney, signed an agreement that a lease should be prepared by lessor's attorney, & paid for by lessee. The lease was prepared accordingly, but lessor, who had only a life estate, dying, the lease was never executed:—*Held*: lessor's attorney was entitled to recover of lessee the charge for drawing the lease.—WEBB v. RHODES (1837), 3 Bing. N. C. 732; 3 Hodg. 138; 4 Scott, 497; 6 L. J. C. P. 212; 132 E. R. 593.

**1115.** ———.]—A. agreed to take a lease & to pay the expenses. The lease was prepared by the lessor's solrs., who delivered his bill, made out as against the lessee. The lessee obtained an order to tax the bill, on an allegation that he, the lessee, had employed the solrs., which being contrary to the fact, the order was discharged, but without costs, the matter in difference being very small.—*Re* GABRIEL (1846), 10 Beav. 45; 50 E. R. 499.

**1116.** ———.]—Although ordinarily, notwithstanding that it is understood that the attorney of the lessor or mtgee., who prepares the lease or mtgee., is to be paid by the lessee or the mtgor., the latter will not be liable directly to the attorney, slight evidence will suffice to render them so; as, if he receives his instructions directly from the proposed lessee or mtgor.; & this applies, even although the agreement has proved abortive through defect in the title of the lessor, & although in a written agreement for the lease, the name of another party is introduced as the proposed lessee, at the desire of the real principal; & any evidence that tends to show who is the real principal, & has really employed the attorney in the particular matter, although the general attorney of the lessor or mtgee., is admissible.—SMITH v. CLEGG (1858), 27 L. J. Ex. 300.

**1117.** ———.]—The solr. of a lessor who has prepared a draft lease cannot recover for his services from the intended lessee, unless there is a privity of contract between them. It is not sufficient for the lessee to have instructed his own solr., & that solr. to have handed over the work to the lessor's solr.—*Re* IPSTONE PARK COLLIERY CO., BROUGH'S CLAIM (1870), 18 W. R. 285.

**1118. Agreement by lessee to pay fixed sum.—Right of lessor to recover without proof of payment.]**—Where a deft. agreed to pay pltf. the sum of £25 in full for his share of the costs of a lease to deft., to be procured for him by pltf., & to be prepared by his solr., & of an agreement for so procuring it:—*Held*: the declaration was sustainable without any allegation that costs had been incurred, or of their amount, or that notice had been given thereof to deft.—TOWNSEND v. BURNS (1832), 1 Cr. & M. 177; 3 Tyr. 104; 2 L. J. Ex. 30; 149 E. R. 363.

**1119. Lease to be "prepared at expense of lessor"—Right of lessor to prepare.]**—PRICE v. WILLIAMS, No. 827, *ante*.

**1120. Right of lessee to tax costs.]**—*Re* GABRIEL, No. 1115, *ante*.

**1121.** ———.]—W., on May 31, 1865, agreed in writing to take a lease from G. & T., & to pay their costs of the agreement & of the lease & counterpart, & incidental thereto. W. paid the bill of G. & T.'s solrs., & afterwards applied for taxation against the solrs. An order was made to tax the bill "upon the terms of the agreement dated May 31, 1865":—*Held*: this reference to the agreement was erroneous, for that the order must be to tax the bill which W. had paid, without anything to limit the bill to that which would be the proper bill as between G. & T. & W.—*Re* NEWMAN (1867), 2 Ch. App. 707; 36 L. J. Ch. 843; 15 W. R. 1189, 1 L. J.

*Annotations*:—*Mentd.* *Re* Lacey & Sons (1883), 53 L. J. Ch. 287; *Re* Boycott (1885), 29 Ch. D. 571.

**1122.** ———.]—Appts. were lessees of property belonging to a hospital, & the lease contained a clause that all assignments & underleases should be prepared by the clerk to the hospital. Appts. having arranged to underlet their premises, the underleases were prepared by the clerk to the hospital, a member of resp. firm of solrs., whose charges appts. now sought to obtain an order to tax:—*Held*: as there was no liability on the part of appts. under the lease to pay the charges, or any direct employment by appts. of resps. as their solrs., the ct. had no jurisdiction to order the bill to be taxed.—*Re* COOKSON, WAINWRIGHT & PENNINGTON (1886), 2 T. L. R. 363.

**Taxation of costs generally.]—See SOLICITORS.**

**1123. Apportionment of costs.—Between lessee & estate of lunatic lessor.]**—Apportionment of the costs of granting a lease of a lunatic's estate, between the estate & the lessee.—*Re* NORFOLK (DUCHESS), *Ex p.* PRICKETT (1818), 3 Swan. 130; 36 E. R. 801, 1 L. C.

**1124.** ———.]—**Between tenant for life & remainderman.]**—A rule, that the obligation of the tenant for life of property subject to fines for renewal, is satisfied by keeping down the interest only of the amount necessary to be paid for the renewal, would be unjust if the tenant for life survived the first *cestui que vie*, & a second renewal was necessary in his lifetime, for then the tenant for life would have had the whole benefit of the first renewal; & the rule therefore is, that the tenant for life is bound, not only to bear the interest of the sum paid for the renewal, but to contribute towards the payment of such sum.

A rule, which attributed one-third of the expense

of renewal to the tenant for life, & two-thirds to the parties in remainder, would not remove the injustice; & therefore the ct. holds that the amount of contributions of the tenant for life & remainderman are to be determined by the amount of the benefit which they respectively derive from the renewal.—*HUDLESTON v. WHELPDALE* (1852), 9 Hare, 775; 68 E. R. 729.

#### B. For What Costs Lessee Liable.

**1125. Cost of counterpart.]**—In a written agreement for a lease, it was stipulated that if the tenant shall be desirous, to take a lease of the premises, "he, the landlord, will at the request & costs of the tenant grant & execute to him a lease thereof":—*Held*: upon this agreement the tenant was not bound to pay for the counterpart of the lease, although the lease was to contain covenants to be performed by the tenant; & if the landlord required a counterpart, he must be at the expense of it himself.—*JENNINGS v. MAJOR* (1837), 8 C. & P. 61, N. P.

*Annotations*:—*Reid*. *Re Gray*, [1901] 1 Ch. 239. *Mentd.* Thornton v. Jenyns (1810), 1 Man. & G. 166.

**1126. —.]**—In estimating the costs properly payable by the lessee to the lessor's solr., the cost of the counterpart or duplicate agreement must be deducted from the scale fee when ascertained.—*Re NEGUS*, [1895] 1 Ch. 73; 64 L. J. Ch. 79; 71 L. T. 716; 43 W. R. 68; 39 Sol. Jo. 29; 13 R. 85.

*Annotations*:—*Consd.* *Re Gray*, [1901] 1 Ch. 239. *Mentd.* *Re McGarel* (1897), 45 W. R. 321; *Re Longbotham*, [1901] 2 Ch. 152; *Re Cohen & Cohen*, [1905] 2 Ch. 137.

**1127. Costs of concurring party.]**—A lease was about to be granted to pltf., to which it was necessary that C. should be a concurring party. The attorney of the proposed lessors applied to him for that purpose, & deft., as C.'s attorney, answered the application, requiring certain documents to be furnished, etc.: for which business deft. had a claim on C. It was ultimately agreed that C. should concur in the lease, on the terms, as deft. contended, that all the past costs, as well as those to be occasioned by his joining in the lease, should be paid by the trustees; as pltf. contended, that the latter costs only should be paid. The lease, having been engrossed & executed by the lessors, was sent to deft. to procure C.'s execution; deft. sent an account of his costs against C. to the attorney of the lessors, who complained of the amount; on which deft. said, that C. should not execute unless that amount was paid him; & when C. had executed, refused to deliver up the lease until the whole amount was paid. The attorney of the lessors, after tendering a smaller sum to deft., paid him the larger sum under protest, for pltf., to obtain possession of the lease:—*Held*: an action to recover back the overplus was rightly brought by pltf. against deft., although the latter merely acted as C.'s attorney; & such action was maintainable.—*SMITH v. SLEAP* (1844), 12 M. & W. 585; 162 E. R. 1332.

*Annotation*:—*Mentd.* *Wakefield v. Newbon* (1844), 4 Q. B. 276.

**1128. —.]**—On taking a lease from a lessor & concurring parties represented by separate solrs., the lessee, in the absence of agreement express or implied, is only liable for one set of costs. If the lessor's solr. includes the costs of the concurring parties' solrs. in his own bill, & more than one-sixth is taxed off the total amount, he must pay the costs of taxation, although less than one-sixth is taxed off his own costs.—*Re FLETCHER & DYSON*, [1903] 2 Ch. 688; 72 L. J. Ch. 791; 89

L. T. 473; 52 W. R. 27; 19 T. L. R. 682; 47 Sol. Jo. 769.

**1129. Costs of inventory of fixtures.]**—Lessee of a house & fixtures agreed to pay the expense of preparing the agreement:—*Held*: he was liable to pay the costs of preparing, & of copies of an inventory of the fixtures referred to by the agreement.—*Re THOMAS* (1844), 8 Beav. 145; 4 L. T. O. S. 130A.; 50 E. R. 58.

**1130. Surveyors' fees.]**—(1) Counsel's & (2) surveyors' fees for advising on title etc., not allowed as part of the costs of a lease.—*LOCK v. FURZE* (1865), 19 C. B. N. S. 96; 6 New Rep. 340; 34 L. J. C. P. 201; 12 L. T. 731; 11 Jur. N. S. 726; 13 W. R. 971; 144 E. R. 722; *on appeal* (1866), L. R. 1 C. P. 441, Ex. Ch.

*Annotations*:—*As to* (1) *Dbtd.* *Re Gray*, [1901] 1 Ch. 239. *Generally, Mentd.* *Wall v. City of London Real Property Co.* (1871), 30 L. T. 53; *Wissell v. School for Indigent Blind* (1882), 8 Q. B. D. 357; *Wallis v. Hands*, [1893] 2 Ch. 75; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

**1131. Fees of conveyancing counsel.]**—*LOCK v. FURZE*, No. 1130, *ante*.

**1132. — Where reasonably employed.]**—

(1) Lessees having obtained the usual third party order to tax the lessor's solr.'s bill of costs in the preparation of a mining lease, took objection to the allowance by the taxing master of certain items for charges for negotiations leading up to the lease, & in particular for fees paid to a mining engineer who had been consulted on behalf of the lessor, & for various correspondence with him. On a summons to review this taxation: *Held*: the third party order to tax obtained by the lessees did not alter the nature or enlarge the scope of their liability, upon the existence of which the order to tax was based; but even on a third party taxation the ct. was bound to look at the nature of the items, & to consider whether, apart from the order, appert. was under any liability to pay them; & the bill must therefore be referred back to the taxing master to revise his taxation.

(2) In a case where the aid of a skilful conveyancer is reasonably required in settling the draft lease, I think the lessee ought to be liable to pay his fees (*COZENS-HARDY, J.*).

(3) On principle the lessee must be held to have impliedly contracted to indemnify the lessor against expenses properly incurred in preparing the lease (*COZENS-HARDY, J.*). *Re GRAY*, [1901] 1 Ch. 239; 70 L. J. Ch. 133; 84 L. T. 24; 40 W. R. 298; 45 Sol. Jo. 139.

*Annotations*:—*As to* (3) *Consd.* *Re Fletcher & Dyson*, [1903] 2 Ch. 688. *Reid*. *Re Mostyn & Fitzsimmons* (1903), 19 T. L. R. 191. *Generally, Mentd.* *Re Lewis* (1904), 49 Sol. Jo. 54; *Re Longbotham*, [1904] 2 Ch. 152; *Re Cohen & Cohen*, [1905] 2 Ch. 137.

**1133. Reports by mining engineer.]**—*Re GRAY*, No. 1132, *ante*.

**1134. Costs occasioned by state of lessor's title.]**—Where a person bound by a covenant to renew a lease if required, "at the costs & charges in all things" of the lessee, subsequently devised the land in strict settlement & died pending the arrangements for a renewal, leaving the first person entitled to an estate of inheritance under his will an infant, so that it was necessary to institute a suit in Chancery to obtain a renewal of the lease:—*Held*: the costs of the suit must be paid out of the estate of the covenantor, because it had been rendered necessary by his own act done subsequently to entering into the covenant.—*WORTHAM v. DACRE (LORD)* (1856), 2 K. & J. 437; 27 L. T. O. S. 63; 4 W. R. 451; 69 E. R. 853.

*Annotations*:—*Distd.* *Mostyn v. Fitzsimmons*, [1903] 1 K. B. 349. *Reid*. *Cresswell v. Haines* (1861), 8 Jur. N. S. 208; *Murdin v. Patey* (1863), 1 New Rep. 566.

*Sect. 4.—Execution and completion: Sub-sect. 5, B. & C. Sect. 5: Sub-sect. 1, 2 & 3. Sect. 6.]*

**1135. Costs of investigating title of applicant for renewal.]**—A perpetually renewable lease granted by the City Corp'n. contained a covenant that the lessors would make the renewals "at the request costs & charges of the lessee." The lessors, incurred certain costs in investigating the title of appcts. for a renewal & those were disallowed on a taxation:—*Held*: (1) the words of the covenant meant that the lessors were to be at no cost & therefore the lessors were entitled to the costs in question which were reasonably & necessarily incurred in such investigation of title; (2) such costs were not covered by the scale fee charge "for preparing settling & completing lease & counterpart" under the general order made under Solicitors' Remuneration Act, 1881 (c. 44).—*Re BAYLIS*, [1907] 2 Ch. 54; 70 L. J. Ch. 358; 96 L. T. 812.

**1136. Costs of unreasonable objections by lessor.]**—A lease contained a covenant by the lessor to grant a further lease, & a stipulation that the lease should be prepared by the lessor's solr. The lessor's solr. raised various untenable objections, & put the lessee to considerable expense. The lessee required the lessor to pay the costs occasioned thereby, & threatened to file a bill for specific performance of the covenant. The lessor then wrote, withdrawing all his objections, but refused to pay the costs occasioned by them. Pltf. filed his bill the day after:—*Held*: deft.'s solr. was bound to prepare a proper lease, & deft. was ordered to pay the costs of the suit, & of the dispute occasioned by deft.—*MAPPIN v. SAVORY* (1869), 20 L. T. 777.

#### *C. Solicitors' Remuneration.*

See SOLICITORS.

### SECT. 5.—CUSTODY OF LEASE AND COUNTERPART.

#### SUB-SECT. 1.—DURING TENANCY.

**1137. Lease belongs to lessee—Counterpart to lessor.]**—*HALL v. BALL*, No. 1139, *post*.

#### SUB-SECT. 2.—ON DETERMINATION OF TENANCY.

**1138. Right of lessee to custody.]**—*R. v. NORTH BEDBURN (INHABITANTS)* (1784), Cald. Mag. Cas. 452.

*Annotations*:—*Consd.* *Hall v. Ball* (1841), 3 Scott, N. R. 577. *Mentd.* *R. v. Minworth* (1802), 2 East, 199.

**1139. — Covenants unperformed by lessor.]**—In trover for an expired lease, by lessor, the lease, or counterpart executed by the lessor, not being produced by deft., upon notice:—*Held*: after the expiration of a lease, containing covenants by the lessor, the lessor is not entitled to the possession of the indenture as against the lessee.

The instrument for which this action is brought, was executed by pltf. for the use & security of the lessee, & was delivered to him absolutely; the lessee at the same time executing & delivering, in like manner, a counterpart to pltf. The *prima facie* inference to be drawn from this state of facts is that the property in the indenture of lease belongs to the lessee, & in the counterpart, to the lessor. . . . The right of the lessee to hold the

indenture of lease, does not cease immediately on the expiration of the term, as he may still have occasion to use it in an action of covenant against his lessor (*TINDAL, C.J.*).—*HALL v. BALL* (1841), 3 Man. & G. 242; 3 Scott, N. R. 577; 10 L. J. C. P. 285; 133 E. R. 1133.

*Annotations*:—*Fold.* *Elworthy v. Sandford* (1864), 3 H. & C. 330. *Refd.* *Knight v. Williams*, [1901] 1 Ch. 256. *Mentd.* *R. v. Hinckley Overseers* (1863), 3 B. & S. 885.

**1140. — Void lease.]**—A bill for the delivery up of a void lease may not be demurrable, although it may appear from the statements in the bill that the lease is void on the face of it.—*MOLESWORTH v. HOWARD* (1845), 2 Coll. 145; 9 Jur. 837; 63 E. R. 674.

**1141. — Forfeiture of lease.]**—To detain, by an administrator, for a title-deed whereby deft. demised land & premises to the intestate for an unexpired term of fourteen years, deft. pleaded that the deed was a farming lease, at a yearly rent, with various farming covenants, & that after the death of the intestate, & upon grant of administration, deft., pursuant to the terms of the lease, re-entered, for breach of covenants, & thereupon the title-deed became the deft.'s title-deed, & the lessee ceased to have any interest in it:—*Held*: the plea was no answer to the action, & pltf. was entitled to the deed.

It is a common application at chambers on the part of lessors for a copy of the lease in the possession of the lessee & the order is frequently made on the ground that the lessee is a trustee for the lessor (*MARTIN, B.*).—*ELWORTHY v. SANDFORD* (1864), 3 H. & C. 330; 34 L. J. Ex. 42; 10 L. T. 654; 12 W. R. 1008; 150 E. R. 558; *sub nom.* *ELWORTHY v. HEWETT*, 4 New Rep. 371.

*Annotation*: *Refd.* *Knight v. Williams*, [1901] 1 Ch. 256.

**1142. — Surrender of term & grant of new term.]**—On the surrender of a term & the grant of a longer term to the same lessee, the lessee is entitled to retain the original lease.—*KNIGHT v. WILLIAMS*, [1901] 1 Ch. 256; 70 L. J. Ch. 92; 83 L. T. 730; 49 W. R. 427; 45 Sol. Jo. 164.

**1143. Right of lessor to custody.]**—The muniment chest of the lessor & his assigns is the proper custody of an expired term.—*PLAXTON v. DARE* (1829), 10 B. & C. 17; 5 Man. & Ry. K. B. 1; 8 L. J. O. S. K. B. 98; 109 E. R. 357.

*Annotations*:—*Expld.* *Hall v. Ball* (1841), 3 Man. & G. 242. *Consd.* *Doe d. Shrewsbury v. Keeling* (1848), 11 Q. B. 884. *Mentd.* *Morser v. Donne* (1905), 74 L. J. Ch. 723.

**1144. —.]**—T. occupied land under one W., who was lessee for lives, & paid the rent reserved by the lease. The day after the lease expired, T. went & obtained the lease from W. & J., who claimed no interest in it, & delivered it up to the lessor, from whom he took a fresh demise of the land. The lease was produced from the custody of the lessor at the trial:—*Held*: it came from the proper custody.—*REES v. WALTERS* (1838), 3 M. & W. 527; 150 E. R. 1254; *sub nom.* *REECE v. WALTERS*, 1 Horn & H. 110; 7 L. J. Ex. 138; 2 Jur. 378.

*Annotation*:—*Refd.* *Doe d. Shrewsbury v. Keeling* (1848), 11 Q. B. 884.

#### SUB-SECT. 3.—PRODUCTION AND COPIES.

Production & inspection of documents, generally, see DISCOVERY, Vol. XVIII., pp. 95 *et seq.*

**1145. Whether production ordered.]**—The ct. will compel a deft. in covenant on a deed which he holds, to produce it to pltf. for the purpose of

### PART III. SECT. 5, SUB-SECT. 3.

**1145 I. Whether production ordered.]**—*FYNN v. MULLIN* (1854), 6 Ir. Jur. 295.—*IR.*

the cause. It differs not that plff. seeks for inspection for the purpose of discovering some defect in the deed.—**KING v. KING** (1812), 4 Taunt. 666; 128 E. R. 492.

*Annotations*.—**Reid**. Street v. Brown (1815), 1 Marsh. 610. Ratcliffe v. Bleasby (1825), 10 Moore, C. P. 523; Birmingham, Bristol & Thames Junction Ry. v. White (1841), 1 Q. B. 282.

].—Estates were demised to trustees for a term of ninety-nine years, in trust, to permit the wife of the lessor, or such persons as she should by will appoint, to receive the rents thereof during the term. The fee simple was afterwards purchased, subject to the term, & deff. took an assignment of it from the wife & the trustees. The wife, as was alleged, by her will bequeathed the estate to plff.; but the will & the title of plff. under the will were not admitted by deff.; who, however, acknowledged that he had in his possession the original demise, & also the indenture of assignment, the abstract of which latter deed he set forth in his answer.—**Held**: under the circumstances, plff. was not entitled to the production of any of the deeds.—**GLOVER v. HALL** (1848), 2 Ph. 481; 17 L. J. Ch. 219; 10 L. T. O. S. 517; 41 E. R. 1030, L. C.

*Annotation*.—**Reid**. A-G v. Thompson (1819), 8 Harc. 106

**1147. Whether inspection & copy ordered—No counterpart available.**—Upon an affidavit, that no copy or counterpart of a lease on which plff. had sued was in the possession or power of plff., & that the attorney who drew the lease & counterpart had absconded, the ct. refused to order deff., who was in possession of the lease, to permit a copy of it to be taken.—**PORTMORE (LORD) v. GORING** (1827), 4 Bing. 152; 12 Moore, C. P. 363; 5 L. J. O. S. C. P. 132; 130 E. R. 726.

**1148.** ———.].—Where two parts of a lease were interchangeably executed, & the part in the possession of plff. was lost, the ct. would not interfere to compel deff. to permit plff. to inspect & take a copy of that part which was in his possession.—**WOODCOCK v. WORTHINGTON** (1827), 2 Y. & J. 4; 148 E. R. 807.

**1149.** ———.].—Where a lease is in the hands of a tenant, & it appears that no counterpart can be found, the ct. will permit the landlord to inspect & take a copy of the lease.—**DOE d. - - - v. SLIGHT** (1832), 1 Dowl. 163.

*Annotation*.—**Apld.** Per p. Brett (1835), 1 Har. & W. 212

**1150.** ———.].—A party who holds an agreement of which there is only one part, is bound to give a copy to the other side, without imposing any terms. An application for a copy of an agreement ought to be made to a judge at chambers, & not to the full ct.—**REID v. COLEMAN** (1834), 2 Cr. & M. 456; 4 Tyr. 274; 3 L. J. Ex. 138; 149 E. R. 839; *sub nom.* **READ v. COLEMAN**, 2 Dowl. 354.

**1151.** ———.].—Where an agreement for a lease was in the hands of an attorney & it was

doubtful whether he acted as attorney for both the parties to the agreement in drawing it up the ct. allowed one of the parties to inspect & take a copy of it.—**Ex p. BRETT** (1835), 1 Har. & W. 212.

**1152.** ———. **Application by tenant in possession.]**

—Ejectment for a house. The tenant in possession took out a summons to inspect two leases. No affidavits were used before the judge; but it was stated, for the tenant, that he was in possession as a lawful occupant of the house, & that the lessors of plff., who were owners of the reversions expectant on two leases, comprising a considerable district of which the premises were part, sought to recover on the ground that they had a right of entry for breaches of covenants alleged to be contained in the leases which the tenant sought to inspect. The attorney for the lessors of plff., without either denying or in terms admitting the statement, argued that the judge had no authority to make an order to inspect. The judge made the order, on the assumption that the statement, not being disputed, was admitted to be true in fact. On a motion for a rule to set aside this order:—**Held**: the order was properly made in exercise of the common law powers of the ct.; the tenant appearing, by the tacit admissions before the judge, to have an interest in the deeds which he sought to inspect. **DOE d. CHILD v. ROE** (1852), 1 E. & B. 279; 22 L. J. Q. B. 102; 20 L. T. O. S. 126; 17 Jur. 136; 1 W. R. 53; 118 E. R. 412.

**1153.** ———. **ELWORTHY v. SANDFORD**, No. 1141, *ante*.

## SECT. 6.—CONSTRUCTION OF LEASE.

*See, generally*, **DEEDS**, Vol. XVII., pp. 212 *et seq.*

**1154. Additions to deed—Whether construed as part thereof—Indorsement.]** **GRIFFIN v. STANHOPE**, No. 1291.

**1155.** ———.].—An indorsement on a deed after it has been signed by the parties, but written at the same time as the sealing & delivery, is part of the deed. **LYBURN v. WASHINGTON** (1816), 1 Stark. 162, N. P.

*Annotation*.—**Reid**. Potter v. I. R. Comrs (1851), 10 Exch. 117

**1156.** ———. **Memorandum.]** A lease was made, reciting, that one of the lessors was an original lessee for the term of his natural life, & the other a person to whom he had granted a lease for a term of years certain, seven of which would remain unexpired on Sept. 29 following the date of the lease; & they thereby demised to the lessee the premises, *habendum* from Sept. 29, for & during the two several terms thereinbefore mentioned, the rent to be paid to both the lessors & their

**1153 i. Whether inspection & copy ordered.]**—**GORDON v. MURPHY** (1853), 5 Ir. Jur. 231.—**IR.**

## PART III. SECT. 6.

**1154 i. Additions to deed—Whether construed as part thereof—Indorsement.]**—**MEHR v. McNAB** (1894), 24 O. R. 653.—**CAN.**

**1156 i. ———. Memorandum.]**—**KATZ v. WHITE** (1868), 19 C. P. 36.—**CAN.**

**p. According to intention of parties.]**—**LAWTON v. REED** (1873), 1 Pug. 329.—**CAN.**

**q. ———.]**—**FORRESTER v. SOVEREIGN** (1887), 14 A. R. 482.—**CAN.**

**r. ———.]**—**ACORN v. HILL** (1901), 31

N. S. R. 508.—**CAN.**

**t. ———.]**—**SE. CATHRINES HYDRAULIC CO., LTD. v. R.** (1910), 13 Exch. C. R. 76.—**CAN.**

**u. ———.]**—**WOOD v. SAUNDERS** (1912), 21 W. L. R. 195, 3 D. L. R. 342.—**CAN.**

**v. ———.]**—**MANUFACTURERS LIFE INSURANCE CO. v. SWINNEY**, [1925] 2 D. L. R. 503.—**CAN.**

**w. ———.]**—**PORT v. LANGELL**, [1925] 4 D. L. R. 90.—**CAN.**

**x. Meaning of words—"Repairs"]**—**LAZAR v. WILLIAMSON** (1886), 7 N. S. W. L. R. (L.) 98; 2 N. S. W. W. N. 61.—**AUS.**

**y. ———. "Forthwith"]**—**MEASURES**

**v. MCFADYEN** (1910), 11 C. L. R. 723.—**AUS.**

**z. ———. "Lease"]**—The word "lease," differing from "grant" or "demise," implies no contract for entry & quiet possession.—**KORR v. MANNINGBERG** (1862), 12 C. P. 62.—**CAN.**

**aa. ———. "Demised premises"]**—**Held**: the words "demised premises" referred only to the building let itself, & not to the interest in the lane which passed by the lease.—**JAMES v. O'KEEFE** (1895), 26 O. R. 489.—**CAN.**

**bb. ———. "Buildings & erections"]**—A covenant in a lease to pay "for & erections" on the demised covers & includes fixtures &

Sect. 6.—Construction of lease.]

respective exors., if the lessee should so long live, & the term & estate of the original lessee should so long continue. Under the lease there was subscribed a memorandum, providing that the rent reserved should be paid during the first seven years to the intermediate lessee, & afterwards to the original lessee, during the term of thirty years, if his interest should so long continue; & that the new lessee, his exors., administrators, & assigns, should & might have liberty to quit a part of the premises demised at any time during the term, upon giving twelve months' notice:—*Held*: the lease & the memorandum must be taken together, & construed as one entire instrument, & the intention of the parties expressed in the latter so controlled the former part of it, as to extend the *habendum* beyond the term of the life of the lessee, giving him a lease for thirty-seven years, determinable on the death of the lessor.—*WEAK D. TAYLOR v. ESCOTT* (1821), 9 Price, 595; 147 E. R. 193.

1157. ————.]—A farming lease contained an agreement to refer to arbitration all matters in dispute "touching these presents, or any clause, matter, or thing herein contained, or the construction hereof, or anything to be done under the covenants or agreements herein contained, or any matter in any way connected with these presents, or the operation hereof, or the rights, duties, liabilities of either party in connection with the premises. By a supplemental deed of even date, which contained no arbitration clause, the lessor released the lessee from the observance of certain of the restrictive covenants in the lease. The assignees of the lessor having brought ejectment for alleged breaches of covenant, *deft.* moved for a stay of proceedings & that the matter might be referred:—*Held*: the lease & supplemental deed must be read & construed as one instrument, & therefore, although the alleged breaches arose under the supplemental deed, the matters in dispute came within the arbitration clause, & would be left to the decision of the arbitrator.—*WADE-GERY v. MORRISON* (1877), 37 L. T. 270.

*Annotation* :—*Reid*. Turnock v Sartoris (1889), 43 Ch. D. 150.

———.]—*See, also*, DEEDS, Vol. XVII., p. 220, Nos. 402–405.

1158. According to intention of parties—Ascertainment of intention—Words obliterated in lease.]—*STRICKLAND v. MAXWELL*, No. 1163, *post*.

1159. ————.]—Circumstances at particular dates.]—*Deft.* B. had granted to G. separate leases of four plots of land fronting on H. road & four houses which had been erected thereon by G. under a building agreement. The plan on each lease, which was made part of the description, showed a row of twelve plots with houses thereon fronting on H. road, including the house demised which alone was coloured, & a strip of land coloured brown running past the back of all the plots to E. road. The position of this strip on the plan suggested that it was intended to give access to

back of the plots, but there was no words on the plan expressing such an intention. This strip of land was included in the building agreement but not in the leases. The leases were executed in May, 1903, & then bore no date except the year 1903, but the dates July 27, 28, 29, 30, 1904, respectively, were afterwards inserted by agreement between the parties. At the latter dates the houses had been completely erected & surrounded with a fence in which gates or openings had been made in the back fences giving access to & from the brown strip. This strip, which belonged to B., had never been fenced or marked off from the rest of B.'s land. *Pltf.* was a mtgee. of G. who had entered into possession & claimed a right of way over the brown strip:—*Held*: the alteration of the leases did not make them void, but B. was estopped from denying that all the leases were executed at the dates inserted in them with his consent; the circumstances existing at those dates could be looked at in construing the lease & plan; & an implied right of way over the brown strip was granted by the leases to the lessee & those claiming under him.—*RUDD v. BOWLES*, [1912] 2 Ch. 60; 81 L. J. Ch. 277; 105 L. T. 864.

*Annotations* :—*Consd.* Hanford v Jago, [1921] 1 Ch. 322. *Reid*. Cory v. Davies, [1923] 2 Ch. 95.

———.]—*See, also*, DEEDS, Vol. XVII., pp. 255–259, Nos. 683–712.

———.]—*See, generally*, DEEDS, Vol. XVII., pp. 249–259, Nos. 632–712.

1160. Meaning of words—Construed according to ordinary meaning—Contrary interpretation by parties.]—By deed in 1854 H. agreed to grant to a railway co. a way-leave & right to make railways through his land for the term of 1,000 years, the co. paying H. a specified rent on coal carried over "any part of the railways comprehended in" a bill which afterwards became the co.'s special Act of 1854 & which should be shipped at Port B. The railways were constructed & for more than forty years rent was paid by the co. for coal carried over the railways, & shipped at Port B., when the coal passed over H.'s land, no rent being paid or claimed for coal carried over the railways & shipped at Port B. but not passing over H.'s land. In an action brought by H.'s successor against the co.:—*Held*: the words in the deed were plain & unambiguous; the fact that the parties had interpreted the words in a sense different from that which the words themselves plainly bore could not affect the construction; the co. were liable to pay the rent upon coal conveyed over any part of the railways comprehended in the special Act & shipped at Port B., although it did not pass over H.'s land, & *pltf.* was entitled to an account for the six years prior to the issue of the writ.—*NORTH EASTERN RY. CO. v. HASTINGS (LORD)*, [1900] A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325, H. L.; *affg.* S. C. *sub nom.* HASTINGS (LORD) v. NORTH EASTERN RY. CO., [1899] 1 Ch. 656, C. A.

*Annotations* :—*Reid*. Brown v. Peto, [1900] 2 Q. B. 653; A.-G. v. Tamworth R. D. C. (1901), 85 L. T. 190; Van Diemen's Land Co. v. Table Cape Marine Board, [1906] A. C. 92; Eekersley v. Wigan Coal & Iron Co. (1910),

machinery which would have been fixtures but for 58 Vict. c. 26, s. 2.—*Re BRANTFORD ELECTRIC & POWER CO. & DRAPER* (1896), 28 O. R. 40; *affd.* (1897), 24 A. R. 301.—*CAN.*

k. ————.]—*GORDON v. ST. JOHN CORPN.*, *QUINLAN & GORDON v. ST. JOHN CORPN.* (1911), 10 E. L. R. 437; 40 N. B. R. 541.—*CAN.*

l. ————.]—"Crown lands."—*BUCKNALL v. BRITISH CANADIAN POWER CO.* (1912),

23 O. W. R. 155; 4 O. W. N. 164; 5 D. L. R. 574; 3 O. W. N. 1138.—*CAN.*

m. ————.]—"Improvements, alterations & fixtures."—*Held*: the words "improvements, alterations & fixtures" referred to alterations to the building as provided for in the lease.—*BURNS (P.) & CO., LTD. v. GODSON*, [1917] 3 W. W. R. 966.—*CAN.*

n. ————.]—"Expiration of tenancy."—

In a lease the words "expiration of the tenancy" mean the termination of the tenancy, whether upon the effluxion of time, upon default, or upon forfeiture.—*BENNETT & TATHAM v. KOOVARJEE & KASAW* (1906), 27 N. L. R. 110.—*S. AF.*

o. Notice of intention to continue.]—*SHIPMAN v. GRANT* (1862), 12 C. P. 395.—*CAN.*

p. Covenant for payment of taxes.]



102 L. T. 281; Hong Kong & China Gas Co. v. Glea (1914).  
 120 M. A. 500; WATSON v. PROCTOR, [1919] A. C. 533.

—[**Indicative of time.**—]—See TIME.

—[**See, generally,** DEEDS, Vol. XVII., pp. 264-271, Nos. 773-873.

**Description of property—Falsa demonstratio non nocet.**—[**See, generally,** DEEDS, Vol. XVII., pp. 277-282, Nos. 917-950; & Part VII., Sect. 1, *post*.

**Verba fortius accipiuntur contra proferentem.**—[**See** DEEDS, Vol. XVII., pp. 290-295, Nos. 1010-1087.

**1161. Evidence of custom & usage to control lease—Usage of brick trade.**—A. agreed to let, & B. agreed to hire, a piece of land containing about fifteen acres, at an annual surface rent, B. to use the land for the purpose of making bricks, & to pay to A., his exors. etc. 3s. per thousand on the quantity made, the quantity made to be not less than four million annually; the ground not to be excavated beyond the depth of eight feet, without the special permission of A. in writing. A portion of the land being required by a railway co. B.'s claim for compensation in respect of his estate & interest in the land so required, & for deterioration to the residue, was referred to arbitration, under Lands (Clauses Consolidation Act, 1845 (c. 18). The umpire, by his award, found that the interest of B. under the above agreement was that of merely a tenant from year to year; & he assessed the compensation upon that basis:—**Held:** the construction put by the umpire upon the agreement was correct; & evidence tending to show that by the custom of the brickmaking trade, brick land is never hired from year to year, was properly rejected. *Qu.*: as to the power of the ct. to interfere, even if the decision of the umpire had been wrong.—*Re* STROUD & EAST & WEST INDIA DOCK & BIRMINGHAM JUNCTION RY. CO. (1849), 8 C. B. 502; 19 L. J. C. P. 117; 137 E. R. 604; *sub nom.* STROUD v. EAST & WEST INDIA DOCK & BIRMINGHAM JUNCTION RY. CO., 14 L. T. O. S. 291.

—[**See, generally,** CUSTOM & USAGES, Vol. XVII., pp. 3 *et seq.*

**1162. Admissibility of extrinsic evidence.**—[**VILLIERS v. SKELTON** (1905), 49 Sol. Jo. 204, D. C.

—[**See, further,** DEEDS, Vol. XVII., pp. 302-348, Nos. 1144-1588.

**1163. Correction of errors by intrinsic evidence—Rejection, supply & transposition of words & clauses—Rejection.**—An instrument of demise was produced in evidence, by which the plaintiff agreed to let, etc. for the term of one year, fully to be complete & ended. Most of the subsequent stipulations in the lease were wholly inapplicable to a tenancy for a year, & many of them appeared applicable only to a tenancy determinable by a notice to quit. The document appeared on the face of it to have originally contained words creating a tenancy from year to year, which were struck out, & the above words as to the term for one year only remained:—**Held:** the words struck out might be looked at to show what the intention of the parties was; the tenancy was for

a single year only; such a tenancy must be considered as expunged, or as only applicable in case the tenancy should continue.

The *habendum* is the proper place to look to for the purpose of ascertaining what periods the parties had in their contemplation in making a lease, because it is generally the office of that part of the deed to fix the time during which the lessor grants that the lessee shall enjoy the demised premises. I agree that you may look at other parts of the instrument, & that, if you can see clearly that it must have been the intention of the parties that the lease should endure for a longer period of time than the *habendum* specifies, the other parts of the lease may control the *habendum*; but then it must be clear from those other parts of the lease, that it could not have been the intention of the parties that the *habendum* should operate according to the words (BAYLEY, B.). *STRICKLAND v. MAXWELL* (1834), 2 Cr. & M. 539; 1 Tyr. 316; 3 L. J. Ex. 161; 140 E. R. 875.

**1164.**—[**Supply.**—] Where a material word appears to have been left out of a lease by mistake, & other words cannot have their proper effect unless it be introduced, the lease may be construed as if it had been inserted, though the particular passage where it ought to stand conveys a sufficiently distinct meaning without it.—*WIGHT v. DICKSONS* (1813), 1 Dow, 141; 3 E. R. 651, H. L.

*Annotations:* **Reid.** *Strickland v. Maxwell* (1834), 2 Cr. & M. 539. **Mentd.** *Hall v. Ross* (1813), 1 Dow, 201.

—[**See, also,** DEEDS, Vol. XVII., pp. 349-356, Nos. 1602-1667.

**Rectals.**—[**See** DEEDS, Vol. XVII., pp. 302-369, Nos. 1737-1806.

**Date.**—[**See** DEEDS, Vol. XVII., pp. 358, 359, Nos. 1679-1704.

**1165. Habendum—Variance between habendum & reddendum—Habendum prevails.**—[**BURCH v. CLARK**, No. 1060, *ante*.

—[**See, also,** DEEDS, Vol. XVII., p. 389, Nos. 1081, 1082.

**1166.**—[**Whether controlled by other parts of lease—Intention of parties.**—[**STRICKLAND v. MAXWELL**, No. 1163, *ante*.

**1167.**—[**Demise to "H. T., her heirs & assigns, to hold to the said H. T. & her assigns for & during the natural life of G. T.":** **Held:** (1) the *habendum* could not be rejected altogether, as the effect would be to give to H. T. an estate in fee contrary to the intention, & the office of the *habendum* being to qualify & explain the premises, provided it be not contradictory, the words of the *habendum* "for & during the natural life of G. T." must be let in to qualify the meaning of the word "heirs" in the premises, so as to make the person designated take as special occupant, & not as heir by descent; (2) but, as under the words "heirs & assigns" in the premises there would be a special occupant, whereas under the words "assigns" in the *habendum* there would not, this part of the *habendum* was contradictory to the premises, & must be rejected.

The proper office of the *habendum* being to limit,

—*MACNAUGHTON v. WIGG* (1874), 35 U. C. R. 111.—**CAN.**

**c. Covenant to build & rebuild.**—[**EMMETT v. QUINN** (1882), 7 A. R. 306.—**CAN.**

**f. Leasing of court against one-sided agreement.**—[**Held:** a certain lease should be so construed as to give the lessee, as well as the lessor, a right

of renewal.—*MACDONELL v. DAVIES* (1913), 23 O. W. R. 778; 4 O. W. N. 620; 9 D. L. R. 24.—**CAN.**

**t. Lease of part of building—Access to bath-room.**—[**ALLEN v. JOHNSTON** (1913), 25 W. L. R. 325; 6 W. W. R. 85; 13 D. L. R. 160.—**CAN.**

**a. Admissibility of parol evidence.**—[**Parol evidence is not admissible to**

prove that the real intention of the parties was to permit a mining lease to remain outstanding.—*GRIGIO v. FRANCO-CANADIAN MORTGAGE CO.* (1916), 34 W. L. R. 1102.—**CAN.**

**b.**—[**TAMBLYN (G.), LTD. v. AUSTIN** (1920), 48 O. L. R. 97; 54 D. L. R. 663; 18 O. W. N. 357.—**CAN.**

**c. Insensible words.**—[**FETHERSTON**



**Sect. 6.—Construction of lease. Sect. 7: Sub-sect. 1, A. & B.; sub-sect. 2, A.]**

explain or qualify the words in the premises, provided it be not contradictory or repugnant to them (LORD DENMAN, C.J.).—DOE d. TIMMIS v. STEELE (1843), 4 Q. B. 663; 3 Gal. & Dav. 622; 12 L. J. Q. B. 272; 7 Jur. 555; 114 E. R. 1048.

*Annotation*.—**Reid**. Phillips v. Ball (1859), 6 C. B. N. S. 811.

—**See, generally**, DEEDS, Vol. XVII., pp. 385–389, Nos. 1931–1982.

**Covenants.**—**See** Part XI., *post*.

**Option to purchase.**—**See** Sect. 12, sub-sect. 1, *post*.

**Option to renew.**—**See** Part IX., Sect. 2, *post*.

**Option to determine.**—**See** Part XXIV., Sect. 5, *post*.

**SECT. 7.—CONCURRENT AND FUTURE LEASES.**

**SUB-SECT. 1.—CONCURRENT LEASES.**

**A. By Deed.**

**See, now**, Law of Property Act, 1925 (c. 20), s. 149 (1), (2).

**1168. Lease valid.**—A lease made to one before the expiration of a former lease, though great question among judges, yet determined to be a good lease.—BARTON v. MAWD (1583), Toth. 127; 21 E. R. 144.

**1169. Effect of grant.—Whether reversion passes.**—RAWLYN'S CASE (1587), 4 Co. Rep. 52 a; Gouldsb. 89, 93; Jenk. 254; 4 Leon. 116; 70 E. R. 1007.

*Annotations*.—**Consd.** Doe d. Christmas v. Oliver (1829), 10 B. & C. 181; Edwards v. Wickwar (1866), L. R. 1 Eq. 403. **Reid**. Lampet's Case (1812), 10 Co. Rep. 46 b; Lyn v. Wyn (1665), O. Bridg. 122; Sturgeon v. Wingfield (1840), 15 M. & W. 224. **Mentd.** Blackmore's Case (1610), 8 Co. Rep. 156, a; Simpson v. Jackson (1622), Palm. 295; Foot v. Berklay (1670), 2 Keb. 654; Hodgkins v. Thornbury (1875), Froem. R. B. 417; Symonds v. Cadmore (1692), 12 Mod. Rep. 32; R. v. Hornby, Bankers' Case (1692), 5 Mod. Rep. 29; Palmer v. Ekins (1728), 2 Ld. Raym. 1550; Magrath v. Hardy (1838), 6 Scott, 627; Rowbotham v. Wilson (1857), 27 L. J. Q. B. 61.

**1170.** ———. **See** A. lets a manor for thirty years; & the next day lets it to another for forty years to commence at Michaelmas next after the date. This passes a reversionary interest.—PALMER v. THORPE (1589), Cro. Eliz. 152; 78 F. R. 410.

**1171.** ———. **See** The lessor made a lease to R. for twenty years, & about a year afterwards he made another lease to W. for twenty years; now if there was an attornment to this second lease, then it amounts to a grant of the reversion of the lessor; but if no attornment, then it is a lease by estoppel; so where a man makes a lease to B. for twenty years, & about a year afterwards makes another lease to C. for twenty years, this is a lease by estoppel, & the rent is payable for the whole term; but if he enter upon the first lessee, & then make a lease to C., who is turned out by B., it is no lease by estoppel, but only a future interest for the last year.—HOLMAN v. HORE (1692), 3 Salk. 153; 91 E. R. 747; *sub nom.* GILMAN v. HOARE, 1 Salk. 275. *Annotation*.—**Consd.** Langford v. Selmes (1857), 3 K. & J. 220.

———. **See** A lessee of one hundred acres of land accepted the lease & entered upon

the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, & that person kept possession of the eight acres, until half a year's rent became due, & excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. It appeared from the dates of & averments in the pleadings, that the prior lease was for a term extending beyond the duration of the latter lease:—**Held**: the latter demise was wholly void as to the eight acres; & the rent was not apportionable, & the lessor was not entitled to distrain for the whole rent or any part of it.

It is expressly laid down in *Bacon's Abr., leases* (N.), which is to be considered as the language of Lord Chief Baron GILBERT as follows: "If one make a lease to A. for ten years & the same day make a parol lease to B. for ten years of the same lands, this second lease is absolutely void & can never take effect either as a future *interesse termini*, or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition & the condition broken within ten years; neither shall the lessor have the rent reserved upon such second lease, but, such second lease is absolutely void, as if none such had been made." . . . So *Sheppard's Touchstone*, 275 b: "If the second lease be for the same or a less time, as, if the first lease be for twenty years, & the second lease be for twenty or for ten years, to begin at the same time, these second leases are for the most part void; but if the second lease be by fine, deed indented, or poll, it may pass the reversion with attornment when attornment is necessary, & without if not necessary. But, if the second lease be by word of mouth it is otherwise:—" & if the second lease be by fine, or deed indented, then it may work by way of estoppel both against the lessor & the lessee; so that, if the first lease happen by any means, as, by surrender or otherwise, to determine before it be run out, then the second lessee shall have it" (DENMAN, C.J.).—NEALE v. MACKENZIE (1836), 1 M. & W. 747; 2 Gale, 174; 6 L. J. Ex. 263; 150 E. R. 635, Ex. Ch.; *subsequent proceedings* (1837), 1 Keen, 474.

*Annotations*.—**Consd.** Watson v. Wand (1853), 3 Exch. 335. **Reid**. Slack v. Sharp (1838), 7 L. J. Q. B. 225; Harris v. Morrice (1842), 10 M. & W. 260; *Re Moore & Hulme's Contract* (1911), 106 L. T. 330. **Mentd.** Matthey v. Curling, [1922] 2 A. C. 180.

**1173.** ———. **See** The grantee of part of the grantor's reversionary interest in the whole of the property in which a particular estate, as a term of years, has been created, is an assignee of the reversion within the 32 Hen. 8, c. 34; but the grantee of the whole reversionary interest in part of the property is not such an assignee.

A. in Feb. 1840, demised to B. for twenty-one years as from Christmas then last; B. in Jan. 1841, demised to D. for three years, & in Apr. 1842, demised to E. for the whole of B.'s term, less one day:—**Held**: E. was an assignee of the reversion of the premises demised, within the statute.—WRIGHT v. BURROUGHS (1846), 3 C. B. 685; 4 Dow. & L. 438; 16 L. J. C. P. 6; 10 Jur. 968; 136 E. R. 274.

*Annotations*.—**Reid**. Talte v. Gosling (1879), 11 Ch. D. 275; Horn v. Beard, [1912] 3 A. D. 101.

**1174.** ———. **See** A let a house to B. as tenant

R. BICE, [1917] 1 W. W. R. 224.—CAN.

d. *Provision for crop-share rental & for seed.*—**Re** ARBITRATION ACT, *Re* DONALD ESTATE, [1924] 1 W. W. R. 252; 18 Sask. L. R. 169.—CAN.

**PART III. SECT. 7, SUB-SECT. 1.—A.**

**1169 l. Effect of grant.—Whether reversion passes.**—Where a lessor executes two concurrent leases of the same property, the second lessee is to be

taken as the assignee of the lessor's interest during the concurrent portion of the terms.—RAM ANANT SINGH v. SHANKAR SINGH (1908), 1 L. R. 30 All. 369.—IND.

from year to year, & afterwards granted a lease by deed to C. of the house & other property for twenty-one years:—*Held*: this transferred the reversion of the house to C., & A. could not recover against B. for rent due after the lease.—*HARMER v. BEAN* (1853), 3 Car. & Kir. 307.

*Annotations*.—*Consd.* Wordsley Brewery Co. v. Halford (1903), 90 L. T. 89. *Refd.* Horn v. Beard, [1912] 3 K. B. 181; Dale v. Hatfield Chase Corp., [1922] 2 K. B. 282.

1175. —[.]—A landlord who, during the currency of a yearly tenancy, grants a lease of the premises to a third person, cannot, during the term granted by such lease, give the yearly tenant notice to quit.—*WORDSLEY BREWERY CO. v. HALFORD* (1903), 90 L. T. 89, D. C.

1176. —[.]—*Whether attornment necessary*.—A., in 1861, granted an underlease to B. for twenty-one years from Michaelmas, 1861, at the yearly rent of £50. In 1864 he granted an underlease of the same premises to C. for twenty-one years from Michaelmas, 1863, at the same rent:—B. never attorned to C.:—*Held*: inasmuch as there was no attornment, the demise to C. did not pass the reversion to him, but only an *interesse termini*; & in order to establish C.'s underlease, a surrender by B. to A., & not to C., was the effectual & proper course.—*EDWARDS v. WICKWAR* (1866), L. R. 1 Eq. 403; 35 L. J. Ch. 309; 12 Jur. N. S. 158; 14 W. R. 363.

*Annotations*.—*Expd.* Horn v. Beard, [1912] 3 K. B. 181. *Refd.* Re Scott & Alvarez's Contract, Scott v. Alvarez (1895), 12 R. 474.

1177. —[.]—*4 & 5 Anne, c. 3, s. 19*.—By 4 & 5 Ann. c. 3 (commonly known as c. 16), s. 9, all grants or conveyances by fine or otherwise of any manors or rents or of the reversion or remainder of any messuages or lands shall be good & effectual to all intents & purposes without any attornment of the tenants of any such manors or of the land out of which such rent shall be issuing or of the particular tenants upon whose particular estates any such reversions or remainders shall & may be expectant or depending as if their attornment had been had & made. By s. 10 it is provided that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the conusor or grantee.

Certain owners of land made a lease to deft. for three years. They then assigned their reversion. The assignees of the reversion made a lease to pltf. to take effect *in presenti* for twenty-one years. A quarter's rent being unpaid by deft.:—*Held*: by virtue of the above enactment pltf. could sue deft. before attornment for the quarter's rent.—*HORN v. BEARD*, [1912] 3 K. B. 181; 81 L. J. K. B. 935; 107 L. T. 87, D. C.

*Annotation*.—*Refd.* Cole v. Kelly, [1920] 2 K. B. 106.

1178. —[.]—*Part of property let on prior lease—Rent not apportionable*.—*NEALE v. MACKENZIE*, No. 1172, *ante*.

*Concurrent leases by ecclesiastical corporations*.—*See ECCLESIASTICAL LAW*, Vol. XIX., p. 505, Nos. 3628, 3629.

#### B. By Parol.

*See, now*, Law of Property Act, 1925 (c. 20), s. 149 (1), (2).

1179. *Second lease effective from determination of first*.—A. leases land for forty years, if lessee lives so long, & afterwards leases the same to another without deed for seventy years, this is a good lease for as many of the years as shall remain after the first term ended, either by effluxion of time or

by the death of the first lessee, & shall then commence notwithstanding it is made without deed, but till the first term ended it is but executory, & not executed.—*BRACEBRIDGE v. CLOWSE* (1576), 2 Plowd. 420; 75 E. R. 633.

*Annotations*.—*Fold.* Doe d. Thomas v. Jenkins (1832), 1 L. J. K. B. 190. *Refd.* Miller v. Manwaring (1635), Cro. Car. 397. Neale v. Mackenzie (1837), 6 L. J. Ex. 263. *Mentd.* Meredith v. Webber (1660), O. Bridg. 360; Hannam v. Woodford (1691), 4 Mod. Rep. 48.

1180. —[.]—If a lease be made for two years & after the lessor let the land by parol to another for four years, this is but a lease for two years, although the first lessee surrender, for he had no power to contract for the first two years at the beginning, but otherwise it is when the estate is determinable upon an uncertainty (*GAWDYS, J.*).—*DOVE v. WILLIOT* (1580), Cro. Eliz. 160; 78 E. R. 418.

*Annotation*.—*Consd.* Neale v. Mackenzie (1837), 6 L. J. Ex. 263.

1181. —[.]—*Tenant in fee demises to A. for twenty-one years; during the time he demises, not by deed, to B. for ninety-nine years. The second lease, though not by deed, shall take effect at the expiration of the first, for as many years as remain of the ninety-nine.* *DOE d. THOMAS v. JENKINS* (1832), 1 L. J. K. B. 190.

1182. —[.]—*NEALE v. MACKENZIE*, No. 1172, *ante*.

1183. *Second lease void for term of first—Unless first determinable on an uncertainty*.—*DOVE v. WILLIOT*, No. 1180, *ante*.

1184. —[.]—*NEALE v. MACKENZIE*, No. 1172, *ante*.

#### SUB-SECT. 2.—FUTURE LEASES.

##### A. In General.

*See, now*, Law of Property Act, 1925 (c. 20), s. 149.

1185. *Interesse termini Nature of the right*.—*SANDERS v. STANFORD* (1579), Cro. Jac. at p. 60; 79 E. R. 51; *sub nom.* *SANDERS v. STARKY*, 2 Leon. at p. 157; *sub nom.* *SAUNDER'S CASE*, 5 Co. Rep. at p. 123 b; *sub nom.* *STAMFORD'S CASE*, Gouldsb. at p. 171.

*Annotations*.—*Consd.* Cootes v. Atkinson (1601), Gouldsb. 171; Murray v. East India Co. (1821), 5 B. & Ald. 204. *Refd.* Sagar & Bainton's Case (1579), 2 Leon. 157. Sallard & Everat's Case (1587), 1 Leon. 97; Kaffyn's Case (1606), 5 Co. Rep. 123 b; Corbet v. Stone (1653), T. Raym. 140; Thomas v. Mackworth (1666), Carl. 75.

1186. —[.]—The respective situations of the bkpt. & his assignees, will be similar to those of a lessor & his lessee for years before entry. The assignees in the one case, like the lessee in the other, may have an interest in the term, or *interesse termini*, as it has been called, an expression applied also to denote the interest of a lessee in a term that is to commence in future. But this, although it may be a thing capable of being granted over, is no part of the estate, as appears by the doctrine of Littleton, sect. 459, that a release by lessor to his lessee for years before entry by the latter, will not operate to enlarge the estate, & also by what is said in 5 Co. Rep. 124 b & in the conclusion of the sixth resolution in *Incham v. Morrice*, No. 261, *ante*, that if the lessor grant the reversion by that name before entry of the lessee, nothing passes thereby. In such case therefore the whole estate remains in the lessor; for if the lessee had any estate before entry, the release of the lessor might operate to enlarge it; there would be a reversion in the lessor, which

*Sect. 7.—(Concurrent and future leases: Sub-sect. 2, A. & B.)*

might be granted by that name (LORD ELLENBOROUGH, C.J.).—*COPELAND v. STEPHENS* (1818), 1 B. & Ald. 593; 106 E. R. 218.

*Annotations:—*Expld. *Williams v. Bosanquet* (1819), 1 Brod. & Bing. 238. *Reid. Doe d. Palmer v. Andrews* (1827), 4 Bing. 348; *Tuck v. Fyson* (1829), 6 Bing. 321; *Siggers v. Evans* (1855), 5 E. & B. 367; *Cartwright v. Glover* (1861), 2 Giff. 620. *Mentd. Graham v. Van Dieman's Land Co.* (1855), 24 L. J. Ex. 213; *Mackley v. Pattenden* (1861), 30 L. J. Q. B. 225; *Wilson v. Wallan* (1880), 5 Ex. D. 155; *Titterton v. Cooper* (1882), 46 L. T. 870.

1187. ———.]—(1) It is an interest which the law recognises in a future term, coupled with a right to complete that interest by possession (BOWEN, L.J.).

(2) It seems to me that this right is a right *in rem*, a right which is alienable at common law, which not only passes to the exor., but can be granted away (BOWEN, L.J.).—*GILLARD v. CHESHIRE LINES COMMITTEE* (1884), 32 W. R. 943, C. A.

*Annotations:—*As to (1) *Consd. Mann, Crossman & Paulin v. Land Registry (Registrar)*, [1918] 1 Ch. 202. As to (2) *Distd. Wallis v. Hands*, [1893] 2 Ch. 75. *Consd. Mann, Crossman & Paulin v. Land Registry (Registrar)*, [1918] 1 Ch. 202.

1188. ———.]—The *interesse termini* which a reversionary lease, for a term to commence more than twenty-one years after its date, confers on the lessee is not an executory but an immediate vested interest, a right *in rem* capable of alienation & which passes to the exor. It is not an estate in the land, but an absolute proprietary right to take possession of the land when the stipulated time for the commencement of the term arrives. Such a reversionary lease, therefore, does not offend the rule against perpetuities, & the lessee is entitled, where the Land Registry Acts apply, to be registered as the proprietor of the lease with a good leasehold title.—*MANN, CROSSMAN & PAULIN, LTD. v. LAND REGISTRY (REGISTRAR)*, [1918] 1 Ch. 202; 87 L. J. Ch. 81; 117 L. T. 705; 62 Sol. Jo. 54; *sub nom. MANN, CROSSMAN & PAULIN, LTD. v. HIND*, 34 T. L. R. 39.

1189. ———.]—*Assignable.*—*SANDERS v. STANFORD* (1879), Cro. Jac. at p. 60; 79 E. R. 51; *sub nom. SANDERS v. STARKY*, 2 Leon. at p. 157; *sub nom. SAUNDER'S CASE*, 5 Co. Rep. at p. 123 b; *sub nom. STAMFORD'S CASE*, Gouldsb. at p. 171.

*Annotations:—*Consd. *Murray v. East India Co.* (1821), 5 B. & Ald. 204. *Reid. Sagar & Balinton's Case* (1879), 2 Leon. 156; *Sallard & Evorat's Case* (1887), 1 Leon. 97; *Coates v. Atkinson* (1801), Gouldsb. 171; *Saffyn's Case* (1606), 5 Co. Rep. 123 b; *Corbet v. Stone* (1653), T. Raym. 140; *Thomasin v. Mackworth* (1666), Cart. 75.

1190. ———.]—*HEMMING v. BRABASON*, No. 1200, *post*.

1191. ———.]—*COPELAND v. STEPHENS*, No. 1186, *ante*.

1192. ———.]—*Passes to executor.*—*GILLARD v. CHESHIRE LINES COMMITTEE*, No. 1187, *ante*.

1193. ———.]—*MANN, CROSSMAN & PAULIN v. LAND REGISTRY (REGISTRAR)*, No. 1188, *ante*.

1194. *Validity of lease.*—A man leases for ten years, and the next day leases the same land to another for twenty years: this is a good lease for the last ten years of the second lease.—*ANON.* (1534), Bro. N. C. 121; 73 E. R. 900.

1195. ———.]—If a man leases for life to S. & the next day leases to D. for twenty years, the second lease is void, if it be not a grant of a reversion with attornment: for in law the freehold is more worthy & perdurable than a lease for years. Yet

if the lessee for life dies within the term, the lease for years is good for the rest of the years to come.—*ANON.* (1545), Bro. N. C. 123; 73 E. R. 900.

1196. ———.]—A lease for years may commence *in futuro*.—*BARWICK'S CASE* (1598), 5 Co. Rep. 93 b; 77 E. R. 199; *sub nom. BERWICK'S CASE*, Moore, K. B. 393.

*Annotations:—*Consd. *Hemming v. Brabason* (1660), O. Bridg. 1. *Reid. Cornish v. Cawsey* (1648), Ayleyn. 75; *R. v. Kemp* (1694), Holt, K. B. 419; *Savill v. Bethell*, [1902] 2 Ch. 523. *Mentd. Fox v. Whitecooke* (1614), 2 Bulst. 290; *St. Saviour's Southwark Churchwardens' Case* (1614), 10 Co. Rep. 66 b; *Holland v. Fisher* (1662), O. Bridg. 181; *Phillips v. Bury* (1694), Skin. 447; *R. v. Chester (Bp.)* (1698), 1 Ld. Raym. 292; *Pugh v. Leeds* (1777), 2 Cowp. 714.

1197. ———.]—By indenture between J. S. of the one part, & A., B., C., & D. of the other part. J. S. demised lands to A. for eighty years, if A. should so long live, & not alien the premises; & if A. died or aliened within the term, then that his estate should cease; & then the lessor granted the premises to B. for so many years of the said term as should be then to come, if he should so long live, & not alien; & in like manner to C.; & if C. died or aliened, then the lessor granted it to D., his exors. & assigns, for so many years as should be then to come:—*Held*: (1) this was a good lease to A., for so many years as he should live of the eighty years, but the leases to B. & C. after, were void: for the term ended by the death of A., *secus* if the words of the second demise had been, to have & to hold during the residue of the eighty years, & not during the residue of the term; (2) it was a good possibility in D. to have term for years, but B. & C. dying in the life of A., the possibility to D. could not take effect, because the contingency was to D. upon the cesser of estates of B. & C., who never had any estate, on account of their dying in the life of A.

(3) Where an interest, or estate, is to be reduced to certainty upon a contingency precedent, if either party dies before the contingency happens, the lease, or grant, is void. But on a covenant, or agreement, which is perfect & certain, though to take effect upon a future matter precedent, the interest or estate is bound immediately.—*CHEDINGTON'S (RECTOR) CASE, LLOYD v. WILKINSON* (1598), 1 Co. Rep. 148 b; Moore, K. B. 478; 76 E. R. 337.

*Annotations:—*As to (1) *Consd. Petty v. Goddard* (1662), O. Bridg. 35. *Reid. Green v. Edwards* (1591), Cro. Eliz. 216; *Lampet's Case* (1612), 10 Co. Rep. 46 b; *Roberts v. Roberts* (1613), 2 Bulst. 23; *Blamford v. Blamford* (1615), 3 Bulst. 98; *Foot v. Berkley* (1670), 2 Keb. 654; *Pybus v. Mitford* (1674), Froem. K. B. 369; *Thompson v. Leach* (1690), 2 Vent. 198. As to (2) & (3) *Reid. Price v. Almore* (1612), Moore, K. B. 831; *London Corp. v. Alford* (1639), Cro. Car. 576; *Blunket v. Holmes* (1661), 1 Keb. 119; *Howard v. Norfolk* (1682), 2 Rep. Ch. 229; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Re Ashforth's Trusts, Ashforth v. Sibley* (1905), 21 T. L. R. 329. *Generally, Mentd. Davenport's Case* (1611), 8 Co. Rep. 144 b; *Goring v. Bickerstaffe* (1633), Froem. Ch. 163; *Manby v. Scott* (1662), O. Bridg. 229; *Brewster v. Kidgill* (1697), 5 Mod. Rep. 369; *Bridgwater v. Bolton* (1703), 1 Salik. 236.

1198. ———.]—*Not by deed.*—*BRACEBRIDGE v. CLOWSE*, No. 1179, *ante*.

1199. ———.]—*DOE d. THOMAS v. JENKINS*, No. 1181, *ante*.

1200. ———.]—*Consecutive leases in futuro—Entry before commencement of lease.*—A. and B. are lessees of land for eighty-one years, if C. so long live, the term to commence *in futuro*, & from & after the day of the death of C., for thirty-one years, from thenceforth. A. & B. enter before the commencement of the term of eighty-one years

**PART III. SECT. 7, SUB-SECT. 2.—A**

1194 i. *Validity of lease.*—*PITCHA-KUTTI CHETTI v. KAMALA NAYAKKAN*

(1862), 1 Mad. 153.—IND.

1194 ii. ———.]—*JONES v. INMAN* (1795), Ridd. L. & S. 433.—IR.

e. *Right of underlessees—To obtain reversionary lease.*—*MAUNSELL v. O'BRIEN* (1835), 1 Jo. Ex. Ir. 176.—IR.

which is a disseisin, & suspends the right of assigning the *interesse termini*: but being put out of possession by their lessor before the thirty-one years had begun, their disseisin is purged, & that future interest is not disturbed, so that their assignment of it by indenture is good.—**HEMMING v. BRABASON** (1660), O. Bridg. 1; 124 E. R. 435; *sub nom.* **HENNING v. BRABERSON**, 1 Keb. 154; 1 Lev. 45.

**Annotations**.—**Reid**. **Roe v. Fludd** (1729), Fortes Rep. 184; **Doe d. Rawlings v. Walker** (1826), 7 Dow. & Ry. K. B. 487. **Mentl**. **Gulliver v. Wickett** (1745), 1 Wils. 105; **Stagrove v. Kirby** (1795), 6 Term Rep. 483.

**1201. — Interest of lessor only leasehold.**—A grant by one possessed of a lease for one hundred years of the land to hold for forty years to commence after the death of the lessor is good. So also if possessed of a term for twenty years grants the tenements for nineteen years to commence after his death, this will be good for so much of the twenty years as shall be unexpired at the time of his death.

A lease for a year, & so from year to year, *quoadm*, etc., is a lease for two years, & afterwards at will. A landlord cannot distrain for rent due under a lease after the determination of that lease, though the tenant continues in possession.—**STANFILL v. HICKES** (1697), 1 Ld. Raym. 280; 91 E. R. 1084; *sub nom.* **STOMFILL v. HICKS**, Holt, K. B. 414; 2 Salk. 413; *sub nom.* **ANON.**, 1 Ld. Raym. 717.

**Annotation**.—**Reid**. **Combes v. Cole** (1736), Leo temp. Hard. 305.

**1202. — Interest after determination of estate tail.**—**KIRSLEY v. DUCK**, No. 1256, *post*.

**1203. — Interest after grantor's death without issue.**—**KIRSLEY v. DUCK**, No. 1256, *post*.

**1204. — Lease to two persons.—One already in possession as tenant.**—(1) A close, held by copyhold tenure, contained an unopened coal mine. B. was tenant, from year to year, of the close to the copyholder in fee: B. in fact occupied the surface; & it did not appear that in the demise to B. there had been any exception or reservation of the mine. While B. was such tenant, in 1821, the copyholder in fee granted the mine, for valuable consideration, to B. & P. In 1832 B.'s tenancy from year to year ceased:—**Held**: before & at the time of the grant of 1821, B. was in possession of the mine by virtue of his tenancy from year to year, though without the right to work the mine; he therefore, by the grant, became possessed of the mine for the term without actual entry; & his possession enured to the benefit both of himself & P.; & therefore B. & P. were both possessed of the mine from the time of the grant, & had not a bare *interesse termini*.

(2) In 1847 the assignee of B. & P.'s term entered upon & worked the mine: upon which the copyholder in fee brought trespass:—**Held**: the assignee was entitled to a verdict upon an issue on a plea that the close was not *pltf.*'s.

(3) The assignee also pleaded the grant specially, & justified entering under it. *Pltf.* replied that the right of entry had not accrued within twenty years, under Real Property Limitation Act, 1833 (c. 27); which deft. traversed:—**Held**: upon this issue also, deft. was entitled to the verdict.—**KEYSE v. POWELL** (1853), 2 E. & B. 132; 1 C. L. R. 598; 22 L. J. Q. B. 305; 21 L. T. O. S. 126; 17 Jur. 1052; 118 E. R. 718.

**Annotations**.—As to (1) **Reid**. **Eardley v. Granville** (1876), 3 Ch. D. 326; **Lewis v. Baker**, [1905] 1 Ch. 46. As to (2) **Reid**. **Bowyer v. Maclean** (1860), 2 De G. F. & J. 415. As to (3) **Reid**. **Randall v. Stevens** (1853), 2 E. & B. 641.

**1205. — Commencement dependent on contingency.**—A lease in reversion of several parcels

of land, made to commence on the happening of several contingencies, shall take effect & commence respectively as those contingencies happen.—**VEAL v. ROBERTS** (1589), Cro. Eliz. 199; 78 E. R. 455.

**1206. — —.**—A. conveyed land to his own use for life & after to his son & the heirs male of his body with remainders over & if he died without a male heir of his body then his daughters should have the land for one hundred years, provided that, if his male heir should pay £1,500 to each daughter within two years after A.'s death, then this limitation for years should be void. The money was not paid wherefore the daughters entered after the death without issue male:—**Held**: it was a good lease by way of a future interest & it commenced after the death without heir male of the body of the father.—**GOODIAR v. CLARKE** (1663), 1 Sid. 102; 1 Keb. 402; 82 E. R. 996.

**Annotations**.—**Reid**. **Benson v. Hudson** (1674), Freem. K. B. 362; **Andrews v. Stroud** (1706), Holt, K. B. 623.

**1207. — Death of party before contingency happens.**—**HEDINGTON'S (RECTOR) CASE**, **LLOYD v. WILKINSON**, No. 1197, *ante*.

—By parsons.—See ECCLESIASTICAL LAW, Vol. XIX., p. 505, Nos. 3630, 3631.

*B. Taking Effect on Expiration of Previous Term.*

**1208. Lease expressed to be lease of reversion.**—An abbot leases land for life, & afterwards leases the reversion thereof, *habendum* the land from Michaelmas next after the first lease ended for twenty-one years, this is a good lease of the land for so long, & the *habendum* & the premises stand well together, & therefore although the tenant for life dies before attainment, yet the grant is good, the *habendum* showing that it was intended as a lease of the land, & not as a grant of the reversion.—**THROCKMORTON v. TRACY** (1555), 1 Plowd. 145; 75 E. R. 222; *sub nom.* **THROCKMORTON v. TRACEY**, 2 Dyer, 124 a.

**Annotations**.—**Consd.** **Wrottesley v. Adams** (1560), 1 Plowd. 187. **Reid**. **Lofield's Case** (1612), 10 Co. Rep. 106 a; **Miller v. Manwaring** (1635), Cro. Car. 307; **Berry v. White** (1662), O. Bridg. 82; **Lyn v. Wyn** (1665), O. Bridg. 122; **Footo v. Berkley** (1668), O. Bridg. 527; **Doe d. Thimms v. Steele** (1843), 4 Q. B. 693; **Burchell v. Clark** (1876), 2 C. P. D. 88. **Mentl**. **Anon.** (1551), Dal. 9; **Bellamy's Case** (1606), 6 Co. Rep. 38 a; **Leybold's Case** (1611), 10 Co. Rep. 88 a; **Berry v. Perry** (1615), 3 Bulst. 62; **Coumden v. Clarke** (1619), Hob. 29; **Farrington's Case** (1625), Cro. Car. 10; **Petty v. Goddard** (1662), O. Bridg. 35; **R. v. Trinity House** (1662), 1 Keb. 331; **Graves v. Ashenhurst** (1673), Freem. K. B. 77; **Lawrence v. Dodwell** (1699), 1 Ld. Raym. 438; **Fisher v. Wigg** (1790), 1 P. Wms. 14; **Freshwater v. Eaton** (1717), 1 Stra. 49; **Scott v. A'Chez** (1743), Park. 21; **Hunt v. Gunn** (1862), 13 C. B. N. S. 226; **Kennedy v. Brown** (1863), 13 C. B. N. S. 677; **Malcomson v. O'Dea** (1863), 10 H. L. Cas. 593; **Hanbury v. Jenkins**, [1901] 2 Ch. 401.

**1209. Surrender of first term.—Second lessee entitled to enter.**—A lease by a prior is made to a woman for years who marries & dies, the lessor grants the reversion to *pltf.* for years, "to commence from the end of the expiring of the first term of years." The husband marries again, devises his term to his wife, & dies in possession; she also marries again, & with her husband accepts a lease for lives from the patentee in fee simple of the King to whom the prior had granted the reversion. By this acceptance the first term is surrendered & merged, & *pltf.* may by virtue of his lease enter immediately, as well as if the years had been gone by the effluxion of time.—**WROTTESELEY v. ADAMS** (1559), 2 Dyer, 177 b; 1 Plowd. 187; 73 E. R. 391.

**Annotations**.—**Consd.** **Footo v. Berkley** (1668), O. Bridg. 527. **Reid**. **Veal v. Roberts** (1590), Cro. Eliz. 199; **Bath's (Bp.) Case** (1606), 6 Co. Rep. 34b. **Mentl**. **Doddington's Case**, **Hall d. Doddington v. Peart** (1594), 2 Co. Rep. 32 b; **Oshev v. Hicks** (1610), Cro. Jac. 263; **Shrewsbury's Case** (1610), 9 Co. Rep. 46 b; **Podger's Case** (1612), 9 Co. Rep.





also void, for the lessor being in possession had no reversion to grant.

(2) A lease intended to commence *in futuro* which mis-recites the prior lease on which it depends in a material point, shall begin immediately.

(3) A lease to commence after the determination of a prior lease shall begin presently if the prior lease was void in law.—*MILLER v. MANWARING* (1835), Cro. Car. 307; 79 E. R. 947.

*Annotations*:—*As to* (2) *Distd.* Lloyd v. Gregory (1839), Cro. Car. 501. *As to* (3) *Refd.* Foot v. Berklay (1870), 2 Keb. 654; Blackmore v. Cumberford (1880), Freem. K. B. 527. *Generally, Mentd.* Ward v. Lumley (1860), 24 J. P. 150.

**1220. Prior lease by ancestor of lessor.**—*MILLER v. MANWARING*, No. 1210, *ante*.

#### C. Effect of.

*See, now, Law of Property Act, 1925 (c. 20), s. 149 (1), (2), (4).*

**1221. Does not pass reversion—Right of lessor to distrain.**—Where A., being seised in fee, leased premises to B. for sixty-one years, & afterwards granted a lease to C. of the same premises, to commence at the expiration of the sixty-one years: *Held*: by the lease to C., A. did not part with his reversion, so as to disentitle him to distrain for rent due from B. under his lease.—*SMITH v. DAY* (1837), 2 M. & W. 684; Murp. & H. 185; 6 L. J. Ex. 219; 150 E. R. 931.

*Annotations*:—*Apld.* Lewis v. Baker, [1905] 1 Ch. 46. *Refd.* Hogan v. Hand (1861), 14 Moo. P. C. C. 310; Llangattock v. Watney, Combe, Reid (1909), 79 L. J. K. B. 233.

**1222. Does not enlarge original lease.**—*LEWIS v. BAKER*, No. 1444, *post*.

**1223.** ———] The expression “unexpired term” in Sched. II. of the Licensing Act, 1904 (c. 23), must be construed strictly & legal effect given to legal language. It does not include an interest in a reversionary lease which is a mere *interesse termini*.

*Resps.* were lessees of a public-house under a lease expiring at Christmas, 1909, & were also grantees of a lease of the same public-house for a term beginning from the day next but one after the expiration or other sooner determination of the expiring lease. The licence was renewed in Oct. 1908, & quarter sessions imposed a compensation charge under sect. 3, sub-sect. 1:—*Held*: the unexpired term did not include the lessees' interest in the reversionary lease, which was a mere *interesse termini*.—*LLANGATTOCK (LORD) v. WATNEY, COMBE, REID & CO., LTD.*, [1910] A. C. 394; 79 L. J. K. B. 559; 102 L. T. 518; 74 J. P. 194; 26 T. L. R. 418; 54 Sol. Jo. 456, H. L.

*Annotations*:—*Follid.* Knight v. City of London Brewery Co., [1912] 1 K. B. 10. *Refd.* Mann, Crossman & Paulin v. Land Registry (Registrar), [1918] 1 Ch. 202.

**1224.** ———] In 1875 the owner of licensed premises let them to a tenant for a term of forty years. In 1888 by a deed which recited an agreement to grant an extension of the lease he demised the premises to the tenant for a term of twenty-one years to commence immediately on the expiration of the forty years term at the same covenants as specified in the original lease. In 1897 by a deed which recited an agreement to grant a further extension of the lease he demised the premises for a further term of fifteen years to commence immediately at the expiration of the twenty-one years term at the same rent & subject to the same covenants. Both these two last-mentioned leases contained a proviso that in the

event of the forfeiture of the original lease they should be forfeited also. In 1910 the quarter sessions on the renewal of the tenant's licence imposed a compensation charge in respect of the premises under Licensing Act, 1904 (c. 23), s. 3:—*Held*: for the purpose of determining the amount of the tenant's “unexpired term” in the premises on the basis of which he was entitled to deduct a percentage of the compensation charge from his rent under that Act, the original lease & the extensions could not be treated as one term, & the deduction must be regulated by the unexpired portion of the original lease alone.—*KNIGHT v. CITY OF LONDON BREWERY CO.*, [1912] 1 K. B. 10; 81 L. J. K. B. 191; 106 L. T. 564.

*Merger.*—*See* Part XXIV., s. 3, *post*.

### SECT. 8. COMMENCEMENT, DURATION AND TERMINATION.

#### SUB-SECT. 1. COMMENCEMENT.

*See, now, Law of Property Act, 1925 (c. 20), s. 149.*

**1225. Certainty of commencement—Necessity for.**—*SAY v. SMITH*, No. 1218, *post*.

**1226.** ———]—*BATH'S (BP.) CASE*, No. 1215, *ante*.

**1227.** ———]—There is a rule in law, that every lease ought to have a certain time of beginning, & also of ending, yet if one makes a lease for twenty years & does not say when it shall commence, this is a good lease, for the law will suppose the lease to begin presently.—*MESKIN v. HICKFORD* (1624), J. Bridg. 16; 123 E. R. 1107; *sub nom.* *HICKFORD v. MACHIN*, Win. 82.

**1228.** ———]—*GOODRIGHT d. HALL v. RICHARDSON*, No. 1251, *post*.

**1229.** ———]—*Effect of uncertainty—Commencement “at least of our Lady.”*—A man made a lease for years to begin at the feast of our Lady Mary, for one & twenty years, without showing the certainty at which feasts the Annunciation, Purification, etc., yet the lease is good enough, & the lessee may determine the certainty of the beginning of the term by his entry, at which of the feasts the term shall begin. *ANON.* (1501), 1 Leon. 227; 71 E. R. 208.

**1230.** ———]—*Benefit of lessee.*—If the limitation be not certain when the term shall begin, it shall be taken most beneficial for the lessee (*CORE, C.J.*). *SEAMAN'S CASE* (1610), Godb. 160; 78 E. R. 101.

**1231.** ———]—*“After completion of repairs”*

—*Existing lease unexpired.*—Agreement in writing between landlord & tenant signed by the landlord for a new lease to be granted at any time after the completion of repairs to be made by the tenant with all convenient speed: but blanks were left for the day of the commencement; the repairs being completed, the landlord tendered a lease to commence from that time, & on refusal filed a bill; the answer admitted, that the agreement was accepted; but insisted, that the new lease was not to commence till the expiration of the old; & so it was decreed.—*PYM v. BLACKBURN* (1796), 3 Ves. 34; 30 E. R. 878.

**1232.** ———]—*MESKIN v. HICKFORD*, No. 1227, *ante*.

**1233.** ———]—*When to be ascertained.*—*GOODRIGHT d. HALL v. RICHARDSON*, No. 1251, *post*.

#### PART III. SECT. 8, SUB-SECT. 1.

**1225 I. Certainty of commencement—Necessity for.**—An agreement for a

lease specified no date as to the commencement of the term:—*Held*: the agreement was void for uncertainty

under Stat. Frauds.—*WAYNE v. HUGHAN* (1890), 9 N. Z. L. R. 295.—N.Z.



**Sect. 8.—Commencement, duration and termination:**  
**Sub-sects. 1 & 2, A.]**

**1234. From particular date—Whether such date included.]**—A declaration in ejectment, on a lease for years, *habendum a die datus, virtute cujus dimissionis* he entered & was possessed, is bad after verdict; for the lease did not commence till the day after the demise.—*DOUGLAS v. SHANK* (1600), Cro. Eliz. 766; 78 E. R. 997.

**1235. ———.]**—In ejectment on a demise *habendum a die datus*, the ejectment cannot be laid on the same day; but on a demise *habendum* from henceforth, it may.—*LLEWELYN v. WILLIAMS* (1610), Cro. Jac. 258; 79 E. R. 222.

**Annotations:—***Refd.* Bacon v. Waller (1816), 1 Roll. Rep. 387; Pugh v. Leeds (1777), 2 Cowp. 714.

**1236. ———.]**—A lease to commence from a given day should be taken as exclusive of that day.—*BACON v. WALLER* (1610), 1 Roll. Rep. 387; 3 Bulst. 203; 81 E. R. 554.

**Annotation:—***Refd.* Pugh v. Leeds (1777), 2 Cowp. 714.

**1237. ———.]**—From the first of June, then, is, that on the 2nd of June the tenancy begins, & holds to the first (LORD MANSFIELD).—*ANON.* (1773), Loftt, 275; 98 E. R. 648.

**1238. ———.]**—(1) One, under a power reserved in his marriage settlement to lease for twenty-one years in possession, but not in reversion, grants a lease to his only daughter for twenty-one years, to commence from the day of the date, adjudged a good lease.

(2) The word "from" may mean either inclusive or exclusive, according to the context & subject-matter; & the ct. will construe it so as to effectuate the deeds of parties, & not to destroy them.—*PUGH v. LEEDS (DUKE)* (1777), 2 Cowp. 714; 98 E. R. 1323.

**Annotations:—***As to* (2) *Apld.* Doed. Cox v. Day (1809), 10 East, 427. *Consd.* Welch v. Fisher (1818), 8 Taunt. 338; Isaac v. Royal Insee. (1879), L. R. 5 Exch. 296; Sidebotham v. Holland (1894), 64 L. J. Q. B. 200; Brakspear v. Barton, [1924] 2 K. B. 88. *Refd.* R. v. Gamlingay (1790), 3 Term Rep. 513; *Ex p.* Fallon (1793), 5 Term Rep. 283; Watson v. Pears (1809), 2 Camp. 294; Cockell v. Gray (1822), 6 Moore, C. P. 483; Ackland v. Lutley (1839), 9 Ad. & El. 879; Kerr v. Jaston (1842), 6 Jur. 1110; *Re* Railway Sleepers Supply Co. (1885), 29 Ch. D. 204; English v. Cliff, [1914] 2 Ch. 876.

**1239. ———.]**—A tenancy under agreement for a term of years from Mar. 25, commences at midnight on Mar. 25, 26.—*MEGGESON v. GROVES*, [1917] 1 Ch. 158; 86 L. J. Ch. 145; 115 L. T. 683; 61 Sol. Jo. 115.

**Annotations:—***Refd.* Raikes v. Ogle, [1921] 1 K. B. 576; Brakspear v. Barton, [1924] 2 K. B. 88.

*See, also*, DEEDS, Vol. XVII., p. 359, No. 1691.

**1240. ———.]**—**"From henceforth."**—*LLEWELYN v. WILLIAMS*, No. 1235, *ante*.

**1241. ———.]**—If a lease is made to commence from henceforth, the day on which the lease is sealed is included (POWELL, J.).—*BELASYSE v. HESTER* (1697), 2 Lut. 1589; 125 E. R. 873; *sub nom.* *BELLASIS v. HESTER*, 1 Ld. Raym. 280.

**Annotations:—***Mentd.* Story v. Atkins (1726), 2 Ld. Raym. 1427; Coleman v. Sayer (1728), 1 Barn. K. B. 303; R. v. Adderley (1780), 2 Doug. K. B. 463; Hill v. White & Williams (1839), 8 Scott, 249; Young v. Higgon (1840), 6 M. & W. 49; Dundalk Western Ry. v. Tapster (1841), 2 Ry. & Can. Cas. 586.

*See, also*, DEEDS, Vol. XVII., pp. 270, 359, Nos. 842, 1692.

**1242. Agreement to commence before date of lease.]**—*LEWIS v. HELLIOR* (1667), 2 Keb. 291, 377; 84 E. R. 182, 236.

**1243. — Memorandum on lease—Admissibility in evidence—On action for rent.]**—A memo-

randum signed by the lessee on the margin of a lease, & stating that the lessee was to be tenant & pay rent for a period of six weeks antecedent to the term granted by the lease:—*Held*: admissible in evidence on the part of the lessor, to show the amount of rent due.—*COWNE v. GARMENT* (1834), 1 Bing. N. C. 318; 1 Scott, 275; 131 E. R. 1139.

**1244. Lease by memorandum during life estate—To commence immediately—Immediate estate out of reversion.]**—Where a party, entitled to a remainder in tail expectant upon the determination of a life estate, grants a term of years to commence immediately, the grantee, without entry, takes an immediate vested estate carved out of the remainder; 4 Ann. c. 16, s. 9, making the conveyance as effectual as if attornment had been made by the tenant of the particular estate.—*DOE d. AGAR v. BROWN* (1853), 2 E. & B. 331; 1 C. L. R. 1048; 22 L. J. Q. B. 432; 21 L. T. O. S. 300; 17 Jur. 1161; 118 E. R. 791.

**Annotations:—***Consd.* Wordsley Brewery Co. v. Halford (1903), 90 L. T. 89. *Refd.* French v. Tucker, Smerdon v. Tucker, Bickley v. Tucker (1859), 1 L. T. 549.

**From what time deed is effective.]**—*See* DEEDS, Vol. XVII., p. 228, Nos. 425–433.

**Where deed has no date or impossible date.]**—*See* DEEDS, Vol. XVII., p. 358, No. 1689.

**Admission of extrinsic evidence as to date.]**—*See* DEEDS, Vol. XVII., p. 334, No. 1456.

**Validity of deed where commencement uncertain.]**—*See* DEEDS, Vol. XVII., p. 361, No. 1732.

**SUB-SECT. 2.—DURATION.**

**A. In General.**

**1245. Meaning of "term."]**—In a lease for years, the word term is held to imply merely the space of time for which the interest is granted; & such a demise, with a remainder over of the residue, should the lessee die within the term, will enure according to the expressed intention of the parties.—*RIGHT v. CARTWRIGHT* (1757), 1 Keny. 529; 96 E. R. 1080; *sub nom.* *WRIGHT d. PLOWDEN v. CARTWRIGHT*, 1 Burr. 282.

**Annotations:—***Apld.* Evans v. Vaughan (1825), 4 B. & C. 261. *Consd.* Cotte v. Richardson (1851), 7 Exch. 143. *Refd.* Johns v. Pink, [1900] 1 Ch. 296.

**1246. ———.]**—The "term" in the lease only designates the time for which it is to run, by way of calculation, not as conveying any interest (PARKE, B.).—*COOPER v. ROBINSON* (1842), 10 M. & W. 694; 12 L. J. Ex. 48; 152 E. R. 651.

**1247. Whether term must be certain.]**—If a man leases land to another till the lessee hath levied £20 it is a good lease, notwithstanding the uncertainty (*per* CUR.).—*ANON.* (1557), Bro. N. C. 125; 73 E. R. 901.

**1248. ———.]**—(1) Lease for ten years by indenture, wherein the lessor grants that if the lessee pay at the end & term of every ten years ten thousand tiles, that then he shall have a perpetual demise of the land, from ten years to ten years continually following, & out of the memory of man, this is a good lease for no more than ten years, for beyond that no other term has any certain commencement, continuance, or end.

(2) Every contract sufficient to make a lease for years ought to have certainty in three limitations, viz. in the commencement of the term, in the continuance of it, & in the end of it: so that all

**1234 I. From particular date—Whether such date included.]**—*Detd.* hired premises from plt. from Apr. 30, 1892, for one year thereafter at the annual

rental, etc.:—*Held*: the tenancy began on May 1.—*GRAY v. SHIELDS* (1894), 26 N. S. R. 363.—*CAN.*

**PART III. SECT. 8, SUB-SECT. 2.—A.**  
**1247 I. Whether term must be certain.]**—*HAY v. M'CRACKEN* (1807), Hume, 832.—*SCOT.*

these ought to be known at the commencement of the lease, & words in a lease, which don't make this appear, are but babble, & these three are in effect but one matter, showing the certainty of the time for which the lessee shall have the land, & if any of these fail, it is not a good lease, for then there wants certainty. Here in the principal case there is none of these three certainties for any term beyond the first ten years, for when the first ten years are passed, there is a condition here appointed, which shall be performed before any new term shall commence, & before the condition is performed there shall be no lease, for such is the limitation of the lessor. Every lease for years ought to have a certain end or determination. Where the demise & grant is to hold from ten years to ten years out of memory, if the words, out of memory, be referred to the time to come, it does not signify any certainty of continuance, for he said that a thousand years to come are not more out of memory than a day to come, for that which is not come is not within memory, but memory is referred to the time passed. So that if it be referred to the time to come, it cannot be known whether ten, or a hundred, or a thousand years be intended thereby, for the one of these is not more out of memory than another (*per CUR.*). —*SAY v. SMITH* (1503), 1 Plowd. 269; 75 E. R. 410.

*Annotations:—As to* (1) *Refd.* *Stafford's Case* (1609), 8 Co. Rep. 73 a. *As to* (2) *Consd.* *G. N. Ry. v. Arnold* (1916), 33 T. L. R. 114. *Refd.* *Wrathbone v. Newbery* (1615), 3 Bulst. 158; *Scattergood v. Edge* (1699), 12 Mod. Rep. 278. *As to* (3) *Appl.* *Gwynne v. Mainstone* (1828), 3 C. & P. 302.

**1249. — Or capable of being rendered certain.]** —*Ptfs.* in Mar. 1916, informed deft. that they would let certain premises to him "for the period of the war, the rent payable weekly," & they said that they did not intend that he should be subject to a week's notice. Deft. agreed to these terms & the parties entered into a formal agreement by which ptfs. let the premises to deft. "for the period of the war at a weekly rent of £3 5s., payable weekly." In an action by ptfs. to recover possession on the footing that the agreement was void for uncertainty as a lease for years & only created a weekly tenancy or a tenancy at will:—*Held*: even if a lease for years must be for a period of time which was certain or which could be rendered certain, yet as the intention of the parties was that the tenancy should be for the period of the war, & as this intention could have been carried out by a lease extending over a long period but terminable at the end of the war, effect must be given to that intention & ptfs. could not recover.—*GREAT NORTHERN RY. CO. v. ARNOLD* (1916), 33 T. L. R. 114.

*Annotation:—Refd.* *Allison v. Scargall*, [1920] 3 K. B. 443.

**1250. How certainty ascertained.]—BATH'S (BP.) CASE, No. 1215, ante.**

**1251. — Need not be ascertained at time.]—**A lease in 1785, for three, six or nine years, deter-

minable in 1788, 1791, 1794, is a lease for nine years determinable at the end of three or six years by either of the parties, on giving reasonable notice to quit.

It is time that there must be a certainty in the lease as to the commencement & duration of the term; but that certainty need not be ascertained at the time; for if in the fluxion of time a day will arrive, which will make it certain, that is sufficient. As if a lease be granted for twenty-one years after three lives in being; though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty; & *id certum est quod certum reddi potest*: & such terms are frequently created for raising portions for younger children (*LORD KENYON, C.J.*). —*GOODRIGHT v. HALL v. RICHARDSON* (1789), 3 Term Rep. 462; 100 E. R. 678.

*Annotations:—Consd.* *Dann v. Spurrier* (1803), 3 Bos. & P. 399. *Refd.* *Chapman v. Towner* (1810), 6 M. & W. 100.

**1252. Term certain—Followed by uncertain term.]—SAY v. SMITH, No. 1218, ante.**

**1253. — — — ]—**An instrument by which A. agrees to let, & B. to take, certain premises, on the terms that A. shall pay certain specified rents, varying in amount, at the end of every three years, up to a specified date, & which provides, that, from & after that date, "he shall pay the clear annual rent of £9 till the end of the lease," but does not mention any time at which the lease is to terminate, is good only for the time previous to the date at which the £9 is to commence. —*GWYNNE v. MAINSTONE* (1828), 3 C. & P. 302, N. P.

**1254. Discrepancy in term.]—ANON. (1584), Sav. 71; 123 E. R. 1019.**

**1255. — — — ]—**A lease for three years & after for three years & so from three years to three years until ten years be expired, is a lease but for nine years, & the odd year shall not be accounted, because that does not happen to be determined by three years. *ANON.* (1605), Noy, 143; 74 E. R. 1105.

**1256. No term mentioned.]—**(1) One possessed of a term for two thousand years in land, grants the land to A. without mentioning any term. It is void for uncertainty.

(2) One seized in fee may create a term for years, to commence after his death without issue; but one possessed of a term for two thousand years, cannot out of that term carve a future term to commence after the determination of an estate in tail. —*KINGLEY v. DUCK* (1712), 2 Vern. 684; 23 E. R. 1044.

**1257. Cannot be in perpetuity.]—**(1) M. & R., by indenture of Feb. 1805, granted & leased certain premises unto & to the use of J., his heirs, exors., administrators & assigns for ever, yielding & paying therefor a yearly rent. Proviso for re-entry on non-payment of rent. Covenant by J. for payment of the rent, for repairs, & for insurance:—*Held*: in the absence of proof that the

**1249 I. — Or capable of being rendered certain.]—GREEN v. THOMPSON** (1901), 1 S. R. N. S. W. 16; 18 N. S. W. W. N. 22.—*AUS.*

**1249 II. — — — ]—**To create a valid tenancy the duration of the term must be fixed either by the express limitation of the parties when the lease is made or by reference to some collateral act which may with equal certainty measure its continuance.—*TOD v. MCGRAIL* (1899), 18 N. Z. L. R. 568.—*N.Z.*

**1252 I. Term certain—Followed by uncertain term.]—BEAUMONT v. LOVE** (1870), 1 V. R. (Law.) 227.—*AUS.*

**1256 I. No term mentioned.]—**Where no term is mentioned in a lease it may be either a tenancy terminable at the end of every year, or one for the life of the tenant, according to the terms of the lease.—*WATSON v. DOST MAHOMED KHAN, WATSON v. MOUVKE MAHOMED, ALLY KHAN, WATSON v. DOST MAHOMED KHAN CHOWDHRY* (1863), 2 Hay, 4.—*IND.*

**1256 II. — — — ]—**By a written contract of tenancy, not under seal, the landlord agreed that the tenant should not be disturbed in his holding so long as the rent for which he had stipulated was paid, & so long as the landlord should

be in possession of the premises himself. The agreement did not specify the nature or duration of the tenancy. In an action by the exors. & devisees of the landlord to recover possession, after the deaths of both landlord & tenant:—*Held*: the agreement created a tenancy for the lessee's life, if the landlord's estate continued so long.—*WOOD v. DAVIS* (1889), 6 L. R. Ir. 60.—*IR.*

**I. Whether anniversary of day of granting included.]—**A lease for five years entered into on June 17, 1905, expires at midnight on June 16, 1910. —*ROSSOUW v. NEW BETHEDD MUNICIPALITY* (1910), E. D. L. 367.—*S. AF.*

**Sect. 8.—Commencement, duration and termination :  
Sub-sect. 2, A., B. & C.]**

premises were at the date of the instrument in the occupation of tenants, & the expressed intention of the parties precluding the presumption of livery of seisin, the instrument could not operate as a conveyance of the fee subject to a rentcharge, but only to create a tenancy from year to year.

If it had been proved that the premises were in the occupation of tenants when the instrument was executed or if we were to presume livery of seisin it would operate as a conveyance in fee; but as there is no evidence that the premises were in the occupation of tenants, the description of the premises not being evidence against the lessor of pltf. who was not a party or privy to the instrument, if we do not presume livery of seisin, then, as the instrument cannot operate as a perpetual lease the premises must have been held upon a tenancy from year to year upon the terms contained in that instrument. An examination of the instrument shows that the parties intended it to operate as a perpetual lease, but as it cannot legally have that operation we must either presume that the premises have been held upon a yearly tenancy upon the terms contained in the instrument or we must presume livery of seisin—an act inconsistent with the expressed intention of the parties—so as to convert the instrument into a conveyance in fee (JERVIS, C.J.).—DOE d. ROBERTON v. GARDINER (1852), 12 C. B. 319; 21 L. J. C. P. 222; 138 E. R. 927.

*Annotation*:—**Reid**. Haddon v. Hosketh (1859), 4 H. & N. 175.

**1258.** —.—]—Now we have not by law any such thing as a lease in perpetuity. We have a fee simple subject to a rentcharge, & we have a lease for years, but we have no such thing as a lease in perpetuity; & therefore, when we find a perpetuity of this kind, if it carries, as I think it does carry, the right to possession, that could not be properly described as a lease or as a fee simple, because it was not intended to vest in the Dover Co. any of the soil, only the right of possession or occupation. Therefore I can well understand why the term "lease," or some similar term, was not used. But it is to my mind equivalent to a lease, so far as regards the possession of the surface & adjuncts necessary for the working of the line (JESSEL, M.R.).—SEVENOAKS, MAIDSTONE & TUNBRIDGE RY. CO. v. LONDON, CHATHAM & DOVER RY. CO. (1879), 11 Ch. D. 625; 48 L. J. Ch. 513; 40 L. T. 545; 27 W. R. 672.

*Annotations*:—**Fold**. Manchester Ship Canal Co. v. Manchester Racecourse Co., [1900] 2 Ch. 352. **Consd.** Foley's Charity Trustees v. Dudley Corpn., [1910] 1 K. B. 317. **Reid**. Taff Vale Ry. v. Amalgamated Soc. of Railway Servants, [1901] A. C. 426.

*See* Law of Property Act, 1922 (c. 16), s. 145.

**1259. Includes anniversary of day of granting.]**—The general understanding is, that terms for years last during the whole anniversary of the day from which they are granted (LORD DENMAN, C.J.).—ACKLAND v. LUTLEY (1839), 9 Ad. & El. 879; 1 Per. & Dav. 636; 8 L. J. Q. B. 164; 112 E. R. 1446.

*Annotations*:—**Consd.** Isaacs v. Royal Insee. (1870), L. R. 5 Exch. 296; Sidebotham v. Holland, [1895] 1 Q. B. 378. **Fold**. Groves, [1911] 1 Ch. 158. **Fold**. Raikes v. Ogil, [1921] 1 K. B. 576. **Reid**. R. v. St. Mary, Warwick (1853), 22 L. J. M. C. 109; Brakspear v. Barton, [1924] 2 K. B. 88. **Mentd.** Collier v. McBean (1865), 34 L. J. Ch. 555.

**Length of term where variance between habendum & reddendum.]**—*See* DEEDS, Vol. XVII., p. 389, No. 1982.

**Effect of habendum generally.]**—*See* Sect. 6, *ante*.

**B. Habendum from Past Date.**

**1260. Duration computed from habendum.]**—A lease *habendum* from the Lady Day then next last past, shall, in respect of time, be computed from that day, though it does not commence in interest till the day of its date.—MAYN v. BEAK (1598), Cro. Eliz. 515; 78 E. R. 764.

**1261.** —.—]—An ejectment is good on a demise *habendum* from Michaelmas, *ante datum indenture*.—DARREL v. MIDDLETON (1598), Cro. Eliz. 606; 78 E. R. 848.

**1262.** —.—]—A lease Apr. 16, *habendum* from the Annunciation last past, *virtute cuius intravit et habuit tenementa prædicta* is good, & the lessee no disseisor.—WALLER v. CAMPAN (1602), Cro. Eliz. 906; 78 E. R. 1128.

**1263.** —.—]—A lease *habendum à die confectionis*, & livery made afterwards, is good.—SMITH v. BOLE (1618), Cro. Jac. 458; 3 Bulst. 290; 79 E. R. 392.

*Annotations*:—**Reid**. Threadneedle v. Linum (1674), Freem. K. B. 179; Doe d. Bartlett v. Rendle (1814), 3 M. & S. 99; Doe d. Douglas v. Lock (1835), 2 Ad. & El. 705.

**1264.** —.—]—DINSDALE v. ISLES (1673), 3 Keb. 207; T. Raym. 224; 84 E. R. 679; *sub nom.* DISDALE v. ILES, 2 Lev. 88; *sub nom.* HINCHMAN v. ILES, 1 Vent. 247; *sub nom.* TURLESTON v. RIVES, Freem. K. B. 106.

*Annotations*:—**Consd.** Doe d. Davies v. Thomas (1851), 6 Exch. 854; Jervis v. Tomkinson (1856), 1 H. & N. 195. **Reid**. Hogan v. Hand (1861), 14 Moo. P. C. 310.

**1265.** —.—]—In an action for the breach of a covenant for repair in a lease, a tenant is not liable for acts done before the time of the execution of the lease, although the *habendum* of the lease states the premises to be held from a day prior to its execution.

The *habendum* in a lease only marks the duration of the tenant's interest, & its operation as a grant is merely prospective.—SHAW v. KAY (1847), 1 Exch. 412; 17 L. J. Ex. 17; 154 E. R. 175.

*Annotation*:—**Consd.** Bird v. Baker (1858), 1 E. & E. 12.

**1266.** —.—]—A declaration stated, that by deed, pltf. let to defts. a certain mine of rock salt for twenty-one years from June 25, 1851, & defts. covenanted with pltf., that they would in every year during the term, get & raise from the mine 2,000 tons of rock salt, & in case of default would, at the expiration of the year, pay pltf. 6d. a ton for every ton by which the quantity was less than 2,000: & also that they would, with all reasonable diligence, sink a shaft to the salt rock in order to get at the salt: & would also during the continuance of the term, work the mine in a proper & workmanlike manner. First breach: that although defts. did not raise or get out of the mine the annual quantity of 2,000 tons of salt, yet they have not paid for the quantity short of 2,000 tons. Second breach: that defts. did not in every year of the term get & raise 2,000 tons, & did not pay for the quantity short of 2,000 tons, but on the contrary got & raised no salt whatever, & refused to pay pltf. any sum whatever. Third breach: that they did not use all reasonable diligence to sink a shaft to the salt rock in order to get at the salt; but wholly omitted & neglected so to do. Fourth breach: that defts. did not during the continuance of the term work the mine in a proper & workmanlike manner, but permitted the same to be unworked. Defts. pleaded, secondly: that the deed provided that in case the rock salt should, during the continuance of the term, fail by any inevitable accident, then, on payment of all rent due & performance of all covenants on the part of the defts., the term should cease & determine to all intents & purposes what-

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**Sect. 8.—Commencement, duration and termination:**  
**Sub-sect. 2, C. & D.; sub-sect. 3. Sects.**  
**10: Sub-sect. 1.]**

over, or otherwise depart with the lease:—*Held*: the tenant having become bkpt. & his assignees having possessed themselves of the premises & sold the lease, & the bkpt. being out of the actual possession & occupation of the farm, the lessor might maintain ejectment without a previous re-entry, the continuance of the term itself being made to depend upon the lessee's actual occupation.—*DOE d. LOCKWOOD v. CLARKE* (1807), 8 East, 185; 103 E. R. 313.

**1283. Term determinable on lives of lessors—Effect of death of one lessor.]**—If two make a lease for sixty years, if they so long live, then if either of them dies, the estate is determined for this is not a limitation but a condition.—*ANON.* (undated), *Plowd. Queries*, 31; 75 E. R. 902.

**1284. ———.]**—*DANIEL v. WADDINGTON* (1615), 3 Bulst. 130; *Cro. Jac.* 377; 1 Roll. Rep. 309; 81 E. R. 111.

**1285. Lease during continuance of partnership.]**—When the premises upon which a partnership business is carried on are, & are declared by the partnership deed to be the property of one partner, & the partnership deed contains no provision as to the tenancy of the partnership but only a general direction that all rent is to be paid out of profits, the ct. will infer that the partnership was intended to hold the premises on a tenancy during the continuance of the partnership & not on a tenancy from year to year at will.—*POCOCK v. CARTER*, [1912] 1 Ch. 663; 81 L. J. Ch. 391; 106 L. T. 423; 56 Sol. Jo. 362.

*D. Provision made for Continuance.*

**1286. Lease for life of lessee—Proviso if lessee die within term of sixty years—Remainder to executors of lessee.]**—*GRAVENOR v. PARKER* (1556), 1 And. 19; 123 E. R. 331; *sub nom. PARKER v. GRAVENOR*, 1 Dyer, 150 a.

*Annotations:—**Refd. Cromwell's Case, Cromwell v. Andrews* (1601), 2 Co. Rep. 69 b; *Spark v. Spark* (1601), *Cro. Eliz.* 840.

**1287. Lease from three years to three years—During life of lessee.]**—*WRATHBONE v. NEWBURY* (1615), 3 Bulst. 158; 81 E. R. 135.

**1288. ———.]**—*TURINGHAM v. GRAY* (1677), 3 Keb. 768; 84 E. R. 1001.

**1289. Lease for seven, fourteen or twenty-one years—Lease for seven years certain.]**—Lease for seven, fourteen, or twenty-one years, as lessee shall think proper, is a good lease for seven years, whatever may be its validity, as to the two other eventual terms of fourteen or twenty-one years.—*FERGUSON v. CORNISH* (1760), 2 Burr. 1032; 97 E. R. 691.

*Annotations:—**Folld. Goodright v. Richardson* (1789), 3 Term Rep. 462. *Consd. Dann v. Spurrier* (1803), 3 Bos. & P. 399.

**1290. Lease for three, six or nine years.]**—*GOODRIGHT d. HALL v. RICHARDSON*, No. 1251, *ante*.

**PART III. SECT. 8, SUB-SECT. 2.—D.**

**h. Permission to remain in occupation.]**—A provision in the lease that the tenant might after six months remain in occupation at a monthly rent till called on to vacate does not extend the term for which the lease is granted.—*MORO VITHAL v. TUKARAM VALAD MALHARJI* (1868), 6 Bom. A. C. 92.—*IND.*

**PART III. SECT. 8, SUB-SECT. 3.**

**1293 I. Necessity for certain determination.]**—*MORRISSEY v. CLERMONT* (1885),

11 V. L. R. 13.—*AUS.*

**1293 II. ———.]**—*PREM SUKH DAS v. BHUPIA* (1879), 1 L. R. 2 All. 517.—*IND.*

**1294 I. By condition indorsed on lease.]**—*OSMENT v. DUNDAS* (1903), 7 Terr. L. R. 339.—*CAN.*

**1294 II. ———.]**—*WOOD v. SAUNDERS* (1912), 21 W. L. R. 195; 3 D. L. R. 342.—*CAN.*

**1294 III. ———.]**—*RINK v. MILOS*, [1918] 2 W. W. R. 1021; 11 Sask. L. R. 371; 42 D. L. R. 732.—*CAN.*

**1291. Lease for three years—Copyhold land—Renewal every three years for twenty-one years.]**—Demise of freehold & copyhold lands at an entire rent, *habendum* so much as freehold for twenty-one years, & so much as copyhold for three years warranted by the custom, & covenant for renewal of the lease of the copyhold every three years, *toties quoties* during the twenty-one years under the like covenants, & that in the meantime, & until such new leases should be executed, the lessee should hold the said land as well copyhold as freehold, etc.:—*Held*: this was only a lease of the copyhold for three years, & the lessor after the three years might recover the premises in ejectment against the lessee, there not having been any fresh lease granted.—*FENNY v. CHILD* (1814), 2 M. & S. 255; 105 E. R. 376.

**1292. ——— To continue from year to year unless determined by notice—Lease for three years certain.]**—A demise by deed for the term of three years "determinable on a six months' previous notice to quit by either lessor or lessee, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, & the tenancy cannot be determined sooner than by a six months' notice ending with the third year.—*JONES v. NIXON* (1862), 1 H. & C. 48; 31 L. J. Ex. 505; 6 L. T. 330; 8 Jur. N. S. 648; 158 E. R. 796.

**SUB-SECT. 3.—DETERMINATION.**

**1293. Necessity for certain determination.]**—*SAY v. SMITH*, No. 1248, *ante*.

**1294. By condition indorsed on lease.]**—(1) A lease for years made by a husband to trustees for the use of his wife, with a condition indorsed on the back of it, to be void on his making her a jointure is good, if executed in pursuance of a promise of such jointure made previous to & in consideration of their intermarriage.

(2) A lease may be determined by a condition indorsed.—*GRIFFIN v. STANHOPE* (1617), *Cro. Jac.* 454; 79 E. R. 389.

*Annotations:—**Generally, Mentd. Balnbridge v. Gardiner* (1665), O. Bridg. 402; *Machell v. Clarke* (1702), 2 Ld. Raym. 773.

**1295. Quarterly letting—At yearly rent.]**—H. occupied a house for years under the following agreement: W. agrees to let & H. agrees to hire the house No. 62 George Street quarterly at a yearly rent of £25 to be paid on the usual four quarter days, a quarter's notice to be given by either party:—*Held*: it was at the option of either party to have determined the tenancy before the end of the first year; but on the authority of previous cases, inasmuch as the tenancy amounted to a tenancy for a year defeasible by notice & had, in fact endured more than a year, H. had gained a settlement by renting a tenement, for a whole year within 6 Geo. 4, c. 57.—*HASTINGS UNION v. ST. JAMES, CLERKENWELL* (1865), 1 L. R. 1 Q. B.

**1294 iv. ———.]**—*WILKINS v. M'GINITY*, [1907] 2 I. R. 660.—*IR.*

**k. Death of lessor.]**—M. conveyed the land in question to J., the wife of R. alone executed a lease to deft., & died during the term before his wife:—*Held*: on R.'s death the term expired.—*BURNS v. MCADAM* (1865), 24 U. C. R. 449.—*CAN.*

**l. ———.]**—*BADRINATH v. BHAJAN LAL* (1882), 1 L. R. 5 All. 191.—*IND.*

**m. Abandonment of tenure.]**—*RAJA-*



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*Sect. 10.—Operation of invalid lease: Sub-sects. 1 & 2, A. (a).]*

**1302.** ———. ———.]—*PARKER v. TASWELL*, No. 777, *ante*.

**1303.** ———. ———.]—By agreement, not under seal, pltf. agreed to let, & deft. to hire, certain premises for seven years; & it was further agreed that a good & sufficient lease, embodying the terms of the agreement, should be prepared, at the joint expense of the parties. In an action for not accepting a lease:—*Held*: though the instrument was void as a lease by Real Property Act, 1845 (c. 106), s. 3, it was good as an agreement.—*BOND v. ROSLING* (1861), 1 B. & S. 371; 30 L. J. Q. B. 227; 4 L. T. 442; 26 J. P. 4; 8 Jur. N. S. 78; 9 W. R. 746; 121 E. R. 753.

*Annotation*:—*Reid*. *Tidey v. Mollett* (1864), 16 C. B. N. S. 298.

**1304.** ———. ———.]—*ROLLASON v. LEON*, No. 978, *ante*.

**1305.** ———. ———.]—*ELECTRIC TELEGRAPH CO. v. MOORE* (1861), 2 F. & F. 363.

**1306.** ———. ———.]—*COWEN v. PHILLIPS*, No. 1347, *post*.

**1307.** ———. ———.]—(1) In an agreement between A. & B., not under seal, expressed to be made "in consideration of the rents & covenants to be reserved & contained in the lease agreed to be granted," it was provided that, as soon as B. should have executed certain specific repairs, etc., A. would lease certain premises to him, his exors., etc., for thirty-five years from a day past, at the yearly rent of £15; such lease to contain certain specified covenants on the part of B., as to rent & other matters, & also all other usual & proper covenants, & especially a proviso for re-entry for non-payment of rent or non-performance of covenants; & it was further agreed that, until the lease should be granted, pltf., his exors., etc., should have the same powers & remedies for recovering & enforcing payment of the rent & performance of the covenants as fully as if the lease had been actually granted; the repairs to be completed by a given day. Then followed this proviso, "Provided always, that, if the rent should be in arrear, etc., or if B., his exors., etc., should make default in the observance & performance of the covenants & conditions on his or their part herein contained, then & in either of the said cases it shall be lawful for the said B., his exors., etc., to enter the said premises, etc., & the same to have again & enjoy as in his or their former estate, & the said B. & all other occupiers thereof thereout to remove, & thenceforth these presents & everything herein contained shall cease & be void." B. was let into the premises & paid rent. The repairs not having been done by the time agreed on:—*Held*: A. was entitled to re-enter.

(2) An agreement creating a present demise, void as a lease by Real Property Act, 1845 (c. 106), s. 3, may still enure as an agreement.—*HAYNE v. CUMMINGS* (1864), 10 C. B. N. S. 421; 4 New Rep. 61; 10 L. T. 341; 10 Jur. N. S. 773; 143 E. R. 1191.

*Annotations*:—*As to* (2) *Consd.* *Tidey v. Mollett* (1864), 16 C. B. N. S. 298. *Generally, Mentd.* *S.S. Magnhild v. McIntyre*, [1930] 3 K. B. 321.

**1308.** ———. ———.]—(1) Pltf. declared upon an agreement for a tenancy in these terms, "T. (ptf.) engages to complete the whole work necessary

by June 14 next." Then followed an enumeration of the matters to be done by pltf.; & the agreement concluded, "In consideration of these conditions being fulfilled, M. (def't.) engages to take the house for three years, at the annual rent of £130, to be paid quarterly. Rent to begin from Midsummer next":—*Held*: the completion of the "work necessary" by the day named for that purpose was a condition precedent to pltf.'s right to sue def't. for not becoming tenant.

(2) An instrument which is void as a lease, by reason of the provision in Real Property Act, 1845 (c. 106), s. 3, may nevertheless enure as an agreement.—*TIDEY v. MOLLETT* (1864), 16 C. B. N. S. 298; 4 New Rep. 109; 33 L. J. C. P. 235; 10 L. T. 380; 10 Jur. N. S. 800; 12 W. R. 802; 143 E. R. 1143.

*Annotation*:—*As to* (2) *Reid*. *Stranks v. St. John* (1867), 1 R. 2 C. P. 376.

#### SUB-SECT. 2.—NATURE OF TENANCY CREATED.

##### A. Before Judicature Acts—Tenancy from Year to Year.

###### (a) In General.

**1309. On entry by tenant.**—Though by Stat. Frauds it is enacted that all leases by parol, for more than three years shall have the effect of estates at will only, such a lease enures as a tenancy from year to year.—(*LAYTON v. BLAKEY* (1798), 8 Term Rep. 3; 101 E. R. 1234.

*Annotations*:—*Reid*. *Doe d. Rogers v. Pullen* (1836), 2 Bing. N. C. 749; *Croft v. Blay*, [1919] 1 Ch. 277.

**1310.** ———.]—In ejectment on the demise of the churchwardens & overseers of a parish, laid after the passing of Poor Relief Act, 1818 (c. 12), sect. 17 of which vests all real property belonging to the parish in the churchwardens & overseers in succession, as a corp'n., the lessors of pltf. proved that def't., ever since the passing of the statute, & for many years before, had paid rent to the churchwardens of the parish for the time being, & that the late churchwardens & overseers, who came into office after the statute passed, had given him notice to quit. Def't. produced a lease for years, by T. & J., therein described as churchwardens of the parish, to E., made before the statute, in consideration of the surrender of a former lease; & also a lease for a term of years, yet unexpired, made before the statute, by M. & C., described as churchwardens of the parish church, to E.'s personal representative, through whom def't. claimed, in consideration of the surrender of the lease first mentioned. In the last-mentioned lease the premises were described as "belonging to the parish church," & the rent was reserved payable to "the said churchwardens & their successors." On a special case, stating these facts:—*Held*: the property appeared to be parish property, the leases passed no legal interest; & the property, since the statute, was in the churchwardens & overseers in succession, who were entitled to treat def't. as tenant from year to year, & to recover the premises upon giving notice to quit.—*DOE d. HIGGS v. TERRY* (1835), 4 Ad. & El. 274; 1 Har. & W. 547; 5 Nev. & M. K. B. 556; 3 Nev. & M. M. C. 385; 5 L. J. M. C. 27; 111 E. R. 790.

*Annotations*:—*Follid.* *Doe d. Hobbs v. Cockell* (1836), 4 Ad. & El. 478. *Mentd.* *Allason v. Stark* (1838), 9 Ad. & El. 255; *Graves v. Colby* (1838), 9 Ad. & El. 358; *Doe d. Robinson v. Hird* (1843), 1 L. T. O. S. 58; *Rumball v.*

#### PART III. SECT. 10, SUB-SECT. 2.—A. (a).

p. *General rule.*—A lease for life for a nominal rent, not under seal,

although it could not pass a freehold interest, would operate as a lease from year to year.—*DOE d. LAWSON v. COURTIS* (1837), 5 O. S. 499.—*CAN.*

q. ———.]—*WHITE v. NELSON* (1860), 10 C. P. 158.—*CAN.*

r. ———.]—*CAVERHILL v. ORVIS* (1862), 12 C. P. 392.—*CAN.*

Munt (1846), 8 Q. B. 382; St. Nicholas Deptford v. Sketchley (1847), 8 Q. B. 394; Haigh v. West, [1893] 2 Q. B. 19.

**1311.** —[.]—In ejection by churchwardens & overseers, on demises laid after Poor Relief Act, 1818 (c. 12), it appeared that defts., before & since the statute, had paid rent to the successive churchwardens, & that the late churchwardens & overseers, appointed since the statute, had given a proper notice to quit. Defts. produced a lease, made before the statute, for fifty-nine years, to parties under whom they claimed, purporting to be made with the consent of the vicar, the majority of the aldermen & burgesses of the borough of R. & of others the inhabitants of the parish, whose names were subscribed to a memorandum on the back of the lease expressing such consent. The churchwardens were the demising parties, & the rent was made payable to them & their successors for the time being. The premises were described as belonging to the parish church. On a special case stating these facts:—*Held*: notwithstanding the consent expressed as above, the premises must be taken to have been parish property, demised by the churchwardens as such: & consequently the lease passed no legal interest in the term, & the present churchwardens & overseers might treat the lessees as tenants from year to year.—*DOE d. HOBBS v. COCKELL* (1836), 4 Ad. & El. 478; 6 Nev. & M. K. B. 179; 3 Nev. & M. M. C. 581; 5 L. J. M. C. 81; 111 E. R. 866.

*Annotation*:—*Mentd.* St. Nicholas Deptford v. Sketchley (1847), 8 Q. B. 394.

**1312.** —[.]—A party signed an instrument, by which he agreed to take certain premises, at a fixed yearly rent, commencing at a specified time, & which was directed to the landlords of the premises, who did not execute it; but it was proved, that he was put into possession; that certain fixtures belonging to the landlords were appraised to him, & that he was in possession at the expiration of a year:—*Held*: there was evidence from which the jury might infer a demise from year to year.—*TAYLOR v. YOUNG* (1837), 6 L. J. K. B. 141; 1 J. P. 107.

**1313.** —[.]—In 1769, A. being tenant for life of certain premises, demised them for forty-six years, to commence on the expiration of a former term expiring in 1785. In 1775 A. died. In 1795, the term granted by A. vested by assignment in B., who in that year demised the premises to C. for the term of thirty-four years & three-quarters. In 1812, C. demised them to D. for eighteen years & a quarter wanting ten days. In an action by the personal representatives of C. against D., for a breach of covenant in not repairing the premises:—*Held*: pltf. was properly described in the declaration as being possessed of the residue of the term of thirty-four years & three-quarters, & of the reversion expectant on the determination of the demise to deft.; for that, although, after the death of A., B. became only tenant from year to year to the remainderman, yet, as he actually continued in possession during the remainder of the term granted to him, his interest, & that of his underlessees, might be described in pleading either as an estate from year to year, or as an estate for the term of years.

If a tenant from year to year demises for a term of years, & the original tenancy from year to year lasts beyond that term, such a demise is not an assignment, but there is a reversion, on which covenant may be maintained (*POLLOCK, C.B.*).—*OXLEY v. JAMES* (1844), 13 M. & W. 209; 13 L. J. Ex. 358; 3 L. T. O. S. 222; 153 E. R. 87.

*Annotations*:—*Reid.* Catley v. Arnold, Banks v. Arnold (1859), 1 John. & H. 651; Gray v. Spyer, [1922] 2 Ch. 22.

**1314.** —[.]—A lease void under Real Property Act, 1845 (c. 106), s. 3, for want of a seal, is still good as an agreement; & the tenant who enters under it becomes tenant from year to year, according to its terms.—*HEARD v. CAMPLIN* (1850), 15 L. T. O. S. 437.

**1315.** —[.]—*ARDEN v. SULLIVAN*, No. 583, *ante*.

**1316.** —[.]—*DOE d. ROBERTON v. GARDINER*, No. 1257, *ante*.

**1317.** —[.]—T. & S., after Real Property Act, 1845 (c. 106), came into operation, executed a written instrument not under seal, by which T. agreed to let & S. to hire land for a term exceeding three years, at a rent payable monthly. S. entered; & it was afterwards orally agreed that the rent should be paid quarterly:—*Held*: Real Property Act, 1845 (c. 106), s. 3, though rendering the lease void, as not being by deed, still made it void only as a lease, & did not prevent it from indicating the terms on which D. held as tenant from year to year; & consequently, S.'s tenancy might be determined, during the term, by a half year's notice, but, at the end of the term, expired without notice.—*TRESS v. SAVAGE* (1854), 4 E. & B. 36; 2 C. L. R. 1315; 23 L. J. Q. B. 339; 23 L. T. O. S. 208; 18 Jur. 680; 2 W. R. 564; 119 E. R. 15.

*Annotations*:—*Folld.* Martin v. Smith (1874), L. R. 9 Exch. 50. *Reid.* Tooker v. Smith (1857), 1 H. & N. 732; Smart v. Jones (1861), 15 C. B. N. S. 717.

**1318.** —[.]—*COWEN v. PHILLIPS*, No. 1317, *post*.

**1319.** —[.]—One who enters upon, occupies & pays rent for corporate property under a demise for a term of years, made on behalf of the corp., but not sealed with their common seal, becomes tenant from year to year of the corp., on such terms of the demise as are applicable to a yearly tenancy.—*ECCLÉSIASTICAL COMRS. v. MERRAL* (1869), L. R. 4 Exch. 162; 38 L. J. Ex. 93; *sub nom.* *MERRAL v. ECCLÉSIASTICAL COMRS. FOR ENGLAND*, 20 L. T. 573; 17 W. R. 676.

*Annotations*:—*Consd.* Kildermister Corp. v. Hardwick (1873), L. R. 9 Exch. 13. *Reid.* Melbourne Banking Corp. v. Brougham (1879), 4 App. Cas. 156.

**1320.** —[.]—By an agreement not under seal, pltf. agreed to let to deft., & deft. to take of pltf., a house & premises for seven years, upon the terms, amongst others, that deft. would, in the last year of the term, paint, grain, & varnish the interior, & also whitewash & colour. Deft. entered under the agreement, & occupied & paid rent during the whole period of seven years. In an action for not painting, etc., the interior, & whitewashing & colouring in the seventh year:—*Held*: deft. must be taken to have occupied on the terms that, if he should continue to occupy during the whole period of seven years, he would do those things which were by the agreement to be done in the seventh year; & he was therefore liable.—*MARTIN v. SMITH* (1871), L. R. 9 Exch. 50; 43 L. J. Ex. 42; 30 L. T. 268; 22 W. R. 336.

**1321. On payment of rent.**—[.]—By indenture between A., B., & C., bailiffs, & D., E., & F., aldermen, with the assent of the burgesses of the borough of M. of the one part, & S. of the other part; the bailiffs, aldermen, & burgesses demised lands to S. for years, to be holden of the bailiffs, aldermen, & burgesses; & the deed was executed by A., B., & C., D., E., & F.; but not sealed with the corp. seal; S. having paid rent to the bailiffs as chief officers of the borough, held that their servant might make cognisance for taking a distress under a demise by the corp., notwithstanding a notice had been given by the aldermen, one of whom was a party to the indenture, to pay the rent to them; for the

**SECT. 10.—Operation of invalid lease: Sub-sect. 2, A. (a) & (b), & B.; sub-sect. 3. Sect. 11.]**

payment of rent to the bailiffs admitted a tenancy from year to year under the corp'n.—**WOOD v. TATE** (1806), 2 Bos. & P. N. R. 247; 127 E. R. 621.

*Annotations*.—**Consd. R. v. North Duffield** (1814), 3 M. & S. 247. **Fold. Ecclesiastical Comrs. v. Merral** (1869), L. R. 4 Exch. 162. **Consd. Kidderminster Corp'n. v. Hardwick** (1873), L. R. 9 Exch. 13. **Refd. Stafford Corp'n. v. Tull** (1827), 4 Bing. 75. **Mentd. Malcomson v. O'Dea** (1863), 10 H. L. Cas. 593.

**1322.** —.]—**DOE d. PENNINGTON v. TANIÈRE**, No. 274, *ante*.

**1323.** —.]—The perpetual curate of a curacy augmented by the governors of Queen Anne's bounty, with the confirmation of the ordinary & immediate patron, granted a lease for years of unopened mines, which had not before been leased; but the patron of the advowson was no party:—**Held**: the lease was void at common law, for want of confirmation by such patron paramount; & it was not set up by the acceptance of rent by the lessor's successor in the curacy, the only effect of such acceptance of rent being, to create a tenancy from year to year.—**DOE d. BRAMMALL v. COLLINGE** (1849), 7 C. B. 939; 18 L. J. C. P. 305; 13 L. T. O. S. 236; 13 Jur. 791; 137 E. R. 372.

**1324.** —.]—**DOE d. DAVENISH v. MOFFATT**, No. 1300, *ante*.

**1325.** —.]—The lessor of pltf. was heir-at-law of the surviving trustee & had received the rent reserved as to both moieties, but the moiety not belonging to testator had been conveyed to him under a decree of the Ct. of Ch.:—**Held**: he could not be estopped by the lease & the receipt of rent would only create a tenancy from year to year which had been determined by a notice to quit.—**DOE d. BLAgrave v. STEPHENS** (1850), 15 L. T. O. S. 541.

**1326.** —.]—**DOE d. PRIOR v. ONGLEY**, No. 110, *ante*.

**1327.** —.]—**ECCLESIASTICAL COMRS. v. MERRAL**, No. 1319, *ante*.

**1328.** —.]—**MARTIN v. SMITH**, No. 1320, *ante*.

**1329.** —.] **To remainderman—Void lease by tenant for life.** —If a tenant for life, under a limited power of leasing, grant a lease exceeding his power, the lease is void, & not capable of confirmation by the remainderman. But if the remainderman accept rent, as rent, after the death of the tenant for life, it is an admission that deft. is his tenant, & then he is entitled to notice to quit.—**DOE d. MARTIN v. WATTS** (1797), 7 Term Rep. 83; 101 E. R. 806.

*Annotations*.—**Refd. Zouch d. Forse v. Forse** (1806), 7 East, 186; **Roe d. Bruno v. Prideaux** (1808), 10 East, 158; **Doe d. Tucker v. Morse** (1830), 1 B. & Ad. 365; **Smith v. Widlake** (1877), 3 C. P. D. 10; **Lowe v. Adams**, [1901] 2 Ch. 598; **Croft v. Blay**, [1919] 2 Ch. 343; **Lloyd-Jones v. Clark-Lloyd**, [1919] 1 Ch. 424.

**1330.** —.]—Where tenant for life grants a lease for years, which is void against the remainderman, & the latter before he elects to avoid it receives rent from the tenant, whereby a tenancy from year to year is created, yet this is with reference to the old term, & therefore a half-year's notice to quit from the remainderman ending with the old year, is good.—**DOE d. COLLINS v. WELLER** (1798), 7 Term Rep. 478; 101 E. R. 1086.

*Annotations*.—**Refd. Dowell v. Dew** (1842), 1 Y. & C. Ch. Cas. 345; **Doe d. Buddle v. Lines** (1848), 17 L. J. Q. B. 108; **Toler v. Slater** (1867), 37 L. J. Q. B. 35; **Kelly v. Patterson** (1874), L. R. 9 C. P. 681; **Croft v. Blay**, [1919] 1 Ch. 277.

**1331.** —.]—Deft. came into possession under a lease from a tenant for life, whom the lessor of pltf. succeeded as remainderman. A money rent was to be paid; & by a further reservation, the tenant was to carry or cause to be carried three cart-loads of culm yearly to the landlord's dwelling-house. At the trial this lease was objected to as invalid, but it appeared that the lessor of pltf., at the Michaelmas after the tenant for life died, told his servant to go & look for carts to bring the culm home. The servant went to the tenants, & among others, to deft., who accordingly brought a load of culm to the dwelling-house, other persons who were tenants doing the same. On the following May day deft. sent two other cart-loads of culm to the house, where it was received, other loads being sent in by tenants at the same time. The jury found that the culm was carried by & received, from deft. in the way of rent under the reservation:—**Held**: such finding was grounded on sufficient premises, & allowing the lease to be void, the receipt of culm under the above circumstances was a recognition of deft. as tenant from year to year.—**DOE d. TUCKER v. MORSE** (1830), 1 B. & Ad. 365; 9 L. J. O. S. K. B. 77; 109 E. R. 822.

*Annotation*.—**Refd. Croft v. Blay** (1919), 35 T. L. R. 556.

**1332.** —.] **Of inadequate amount.** —Pltf. was owner in fee of certain cottages & land conveyed to him subject to an unexpired lease for sixty years. He received rent from the tenant under this lease at the nominal rate, reserved under the lease, of 6d. a year, & gave a receipt for it "for chief rent." The lease had been granted by a former tenant for life who had no leasing power, & contained a covenant for quiet enjoyment. In an action of ejectment by pltf. against the tenant in possession under this lease:—**Held**: (1) as the void lease gave no action on the covenant for quiet enjoyment to deft. against pltf., it afforded no defence to this action; (2) the receipt of rent under the circumstances did not create a tenancy from year to year.—**SMITH v. WIDLAK** (1877), 3 C. P. D. 10; 47 L. J. Q. B. 282; 20 W. R. 52, C. A.

*Annotations*.—**Generally**, **Mentd. Mercantile Investment & General Trust Co. v. River Plate Trust, Loan, & Agency Co.**, [1892] 2 Ch. 303.

**On what terms tenancy held.**—See Sub-sect. 2, A. (b), *post*.

**(b) On What Terms Tenancy held.**

**1333. Terms of agreement applicable to yearly tenancy.**—**DOE d. DAVENISH v. MOFFATT**, No. 1300, *ante*.

**1334.** —.]—**DOE d. ROBERTON v. GARDINER**, No. 1257, *ante*.

**1335.** —.]—**ROSKRUGE v. CADDY** (1852), 7 Exch. 840; 22 L. J. Ex. 16; 19 L. T. O. S. 68, 206; 155 E. R. 1190.

**1336.** —.]—**ECCLESIASTICAL COMRS. v. MERRAL**, No. 1319, *ante*.

**1337.** —.]—**MARTIN v. SMITH**, No. 1320, *ante*.

**1338. Repairs.**—**RICHARDSON v. GIFFORD**, No. 560, *ante*.

**1339. Liability of assignees of lessee.**—Defts. having for several years, as assignees under a void lease, paid the rent reserved, & not having re-assigned:—**Held**: liable to repair to the end of the term according to the covenant in the lease.—**BEALE v. SANDERS** (1837), 3 Bing. N. C. 850; 8

**PART III. SECT. 10, SUB-SECT. 2.—A. (b).**

**1333 I. Terms of agreement applicable**

**to yearly tenancy.**—**MOURANT v. QUENAVUT** (1875), 1 V. L. R. 35.—**AUS.**

**1333 II.** —.]—**LYMAN v. SNARR**

(1861), 10 C. P. 462.—**CAN.**

**1333 III.** —.]—**FIFE (EARL) v. WILSON** (1864), 3 Macph. (Ct. of Sess.) 323.—**SCOT.**

Hodg. 147; 5 Scott, 58; 6 L. J. C. P. 283; 132 E. R. 698.

*Annotations* :—*Reid*. Martin v. Smith (1874), 30 L. T. 26 Napier v. Williams, [1911] 1 Ch. 361.

1340. —. —.]—ARDEN v. SULLIVAN, No. 563, *ante*.

1341. —. —.]—MARTIN v. SMITH, No. 1320, *ante*.

1342. **Rent—Payable in advance.**—In 1851 A. became tenant to deft. of certain premises, under the terms of a written agreement, not under seal, for a term exceeding three years, the rent payable quarterly, in advance. A. occupied the premises for some time, & paid several quarters' rent, & the receipts given to him by deft.'s agent stated that such payment was in advance, although in fact A. never paid the rent in advance :—*Held* : although the agreement was void under Real Property Act, 1845 (c. 106), as not being under seal, still that the receipt taken was ample evidence of the tenancy being upon the terms of the rent being payable quarterly in advance. *Semble* : the agreement itself might also have been referred to for that purpose.—*LEE v. SMITH* (1854), 9 Exch. 602; 2 C. L. R. 1079; 23 L. J. Ex. 198; 23 L. T. O. S. 70; 2 W. R. 377; 156 E. R. 284.

1343. — **Use & occupation.**—G. having agreed to let premises to P. for a term of years, P. paying £100 for the fixtures, a lease by deed was prepared, & engrossed on parchment. B. paid down only £50; it was agreed between G. & P. that P. should be let into possession as tenant from year to year on the terms of the intended lease until he paid the balance of the £100. At the same time G. signed, sealed & delivered the deed, which however he retained in his own possession. No third person was present. No words qualifying the delivery, or expressly stating that it was as an escrow till the payment of the balance, appeared to have been used. G. brought use & occupation against the assignee of P.'s interest; &, on those facts appearing at the trial, an objection was taken that the action ought to have been on the covenants in the deed :—*Held* : the circumstances warranted an inference in fact that it was agreed by both G. & P., at the time of the execution of the instrument, that should not operate as a lease until the payment; &, if there was such an agreement by both, though no express words of delivery as an escrow were used, it would not operate as a deed till then; &, consequently, P. was tenant from year to year under the terms in the instrument, & not tenant under a deed; & the action for use & occupation would lie against him or the assignee of his interest.—*GUDDEN v. BENNET* (1856), 6 E. & B. 986; 26 L. J. Q. B. 36; 21 J. P. 196; 3 Jur. N. S. 212; 5 W. R. 47; 119 E. R. 1131.

*Annotations* :—*Mentd.* Furness v. Meek (1857), 27 L. J. Ex. 34; Rogers v. Hadley (1863), 9 Jur. N. S. 898; Pattle v. Hornbrook, [1897] 1 Ch. 25.

1344. **Notice to quit—Natural expiry of agreed term.**—If a landlord lease for seven years by parol, & agree that the tenant shall enter at Lady Day & quit at Candlemas though the lease be void by Stat. Frauds as to the duration of the term the tenant holds under the terms of the lease in other respects; & therefore the landlord can only put an end to the tenancy at Candlemas.—*DOE d. RIGGE v. BELL* (1793), 5 Term Rep. 471; 101 E. R. 205.

*Annotations* :—*Distd.* Doe d. Warner v. Browne (1807), 8 East, 165. *Consd.* Beale v. Sanders (1837), 3 Hodg. 147; Cattle v. Arnold, Banks v. Arnold (1859), 1 John. & H. 651. *Reid.* Doe d. Rogers v. Pullen (1836), 3 Scott, 271; Arden v. Sullivan (1850), 19 L. J. Q. B. 268; Adams v. Clutterbuck (1883), 10 Q. B. D. 403.

1345. —. —.]—*DOE d. DAVENISH v. MOFFATT*, No. 1300, *ante*.

1346. —. —.]—*TRESS v. SAVAGE*, No. 1317, *ante*.

1347. **Notice of alterations—Affecting premises.**—Although a tenant in the occupation of premises under an agreement, not under seal for a longer period than three years, is at law only a tenant from year to year, yet the agreement being enforceable in equity as an agreement for a lease, he is entitled as an "adjoining owner" to be served with the proper notice required by the Metropolitan Building Act, 1855 (c. 122), of the works intended to be executed by the "building owner."—*COWEN v. PHILLIPS* (1863), 33 Beav. 18; 8 L. T. 622; 9 Jur. N. S. 657; 11 W. R. 706; 55 E. R. 272.

*Annotations* :—*Consd.* Hunt v. Harris (1865), 19 C. B. N. S. 13. *Apld.* Fillingham v. Wood, [1891] 1 Ch. 51.

1348. —. —.]—A tenant in possession of part of a house under an agreement for a greater interest than as tenant from year to year is an "adjoining owner" under the Metropolitan Building Act, 1855 (c. 122), & entitled to be served with three months' notice under sect. 85 (1) before any alterations affecting his premises can be commenced by the "building owner"; in such a case service of a three months' notice on the person in receipt of the whole of the rents of the tenement is not sufficient.—*FILLINGHAM v. WOOD*, [1891] 1 Ch. 51; 60 L. J. Ch. 232; 64 L. T. 46; 39 W. R. 282; 7 T. L. R. 66.

1349. **Power to underlet premises—Void lease referring to terms of anterior lease—Anterior lease silent as to underletting.**—By an agreement in writing, but not under seal, plff. agreed to let & deft. to hire on lease for twenty-one years a house, etc., on the following terms :—The rent to be £55 *per annum*; the lease to commence from Mar. 25 next, & to contain an extract of the covenants in the original lease which plff. is bound under; that the proposed lease shall not be sold, parted with, or any portion of the property underlet without the consent in writing of plff. In the original lease were six covenants by the lessee, with a proviso for re-entry on the breach of any of them; but there was no covenant not to underlet without the consent of the landlord. Deft. entered & paid rent, & underlet the premises without the consent of plff., who thereupon brought ejectment, & was nonsuited :—*Held* : the nonsuit was right. Deft. held as tenant from year to year on such of the terms of the agreement as were applicable to that tenancy. The agreement incorporated the six covenants in the original lease, & the proviso for re-entry on the breach of any one of those covenants; but the agreement could not be read as applying the proviso for re-entry to the new clause as to not underletting; & on mere words of agreement a condition could not be created.—*CRAWLEY v. PRICE* (1875), L. R. 10 Q. B. 302; 33 L. T. 203; 23 W. R. 871.

#### B. Since Judicature Acts.

*See, now*, Law of Property Act, 1925 (c. 20), ss. 54, 55.

1350. **Terms of void lease—Lease void for want of seal.**—*FURNESS v. BOND*, No. 570, *ante*. Compare Part II., Sect. 4, sub-sect. 2, *ante*.

#### SUB-SECT. 3.—LEASES OF INCORPOREAL HEREDITAMENTS.

*See* GAME, Vol. XXV., p. 356, Nos. 73, 74.

#### SECT. 11.—COVENANTS.

*See* Part XI., *post*.

## SECT. 12.—OPTIONS.

## SUB-SECT. 1.—OPTION TO PURCHASE.

A. *In General.*

**1351. Power to grant option—Joint stock company—Grant ultra vires.**—By the terms of the deed of settlement of a joint stock salt co. it was declared that the co. was formed for the purpose of manufacturing salt on their works, & on such other hereditaments near thereto as might be purchased, & for vending the salt. Power was given to the directors to sell, exchange & lease all or any of the partnership property, & to enter into any contract; & the receipt clause provided that no lessee or purchaser should be bound to ascertain the regularity of any proceeding under the authority of that deed. It was also provided that no new rule or regulation altering the fundamental constitution of the partnership should be binding, unless confirmed by two-thirds of the votes of the partners present at two successive general meetings. The co. purchased works & carried on the manufacture of salt. In consequence of the rivalry of the Joint Stock Alkali co., the business was carried on at a loss. After negotiation, the managing director on behalf of the salt co., & a director on behalf of the Alkali co. entered into & signed an agreement, dated in May, 1846, whereby the former agreed to lease for the term of twenty-one years all their works to the latter at a specified rent. It was a term of the agreement that the lease should contain an option to the Alkali co. to purchase works at any time within twenty-one years at a price named; the agreement was to be subject to the consent of the proprietors of the salt co. At a meeting of proprietors properly convened, held in June, 1846, it was unanimously resolved that the agreement should be confirmed. The Alkali co. entered into possession of the works; disputes arose as to the state of the repairs, & the managing director for & on behalf of the salt co., by bill, alleged that the parties to the agreement were respectively duly authorised by their respective cos. to enter into the agreement, & also the confirmation thereof by the general meeting of the salt co., & sought to enforce the specific performance of the agreement. The answer admitted the due authority of the director of pltf.'s co. to enter into the negotiation, & that the general meeting authorised its being carried out, & no objection was taken to the agreement as being *ultra vires*.—*Held*: the directors had a power to lease or sell, or to do both: but the giving an option to the Alkali co., extending over twenty-one years, to purchase or not, at a price now fixed, was beyond the powers of the managing body; & a confirmation by a meeting of the shareholders could not effectually sanction the contract; also, the consent of every member of the co. was necessary to give validity to the contract; & this objection was available to deft. at the hearing, notwithstanding the admissions in the answer, & it had not been taken on the pleadings.—*CLAY v. RUFFORD* (1852), 5 De G. & Sm. 768; 64 E. R. 1337.

*Annotations*.—*Apld.* *Oceanic Steam Navigation Co. v. Sutherland* (1880), 43 L. T. 743. *Refd.* *Re Female Orphan Asylum* (1867), 17 L. T. 59. *Mentd.* *Grant v. United Kingdom Switchback Railways Co.* (1858), 40 Ch. D. 135.

## PART III. SECT. 12, SUB-SECT. 1.—A.

**1354 i. Nature of option—Outside relationship of landlord & tenant.**—A lease containing an option to purchase is not determined by the entry of the lessee into a binding contract to purchase, the contract to lease & the contract to purchase being distinct &

separate contracts.—*BEVAN v. DOBSON* (No. 2) (1907), 26 N. Z. L. R. 497.—N.Z.

t. — *Assignable.*—An option to purchase is assignable.—*SHRAGER v. WILDING* (1915), 15 S. R. N. S. W. 283; 32 N. S. W. W. N. 83.—AUS.

a. — —.—*LADHARHAI LA-*

**1352. — Corporation—Incorporated by private Act.**—*Re FEMALE ORPHAN ASYLUM*, No. 935, *ante*. **Administrator—Option granted with sub-lease.**—*See EXECUTORS*, Vol. XXIV., p. 568, No. 6062.

**1353. Lease containing option invalid—Option invalid.**—Under a will which empowered the trustees thereby appointed to grant building leases for ninety-nine years at increasing rentals, & ordinary leases for twenty-one years at the best rents which could be obtained, & provided that a lease granted under either power might contain an option of purchase by the lessee, the trustees demised to C. a piece of freehold & a piece of leasehold land for thirty-five years, at a nominal rent as to both for the first quarter, & afterwards, as to the freehold at an increasing rent, & as to the leasehold at a fixed rent. The lessee did not covenant to build, but only to repair all buildings erected or to be erected on the land, & to insure; & the lease gave him an option of purchase as to any part of the premises during the first twenty-one years. In exercise of this option, C. purchased the leasehold portion of the land, which was accordingly assigned to him. Doubts having afterwards arisen as to the validity of the lease, a notice was indorsed upon it, pursuant to Leases Act, 1849 (c. 26), & signed by C. & the trustees of the will, declaring that the lease should be considered in equity as a contract to grant a valid lease under the power to grant ordinary leases. Upon the sale by C. of the leasehold land purchased by him, objection was taken to the title on the ground that the lease, not being a building lease, & being granted for more than twenty-one years, was an invalid exercise of the power:—*Held*: (1) inasmuch as the lease did not contain any covenant to build, it was invalid as a building lease; the defect could not be remedied under Leases Act, 1849 (c. 26), by turning that which was a lease of one kind into a contract for a lease of another kind; & that, even if that could be done, the lease would still be invalid in consequence of the rent reserved in respect of the freehold portion being an increasing rent, which was not in accordance with the power to grant leases other than building leases; (2) the lease being bad, the option of purchase was ineffectual & could not be exercised.—*HALLETT v. MARTIN* (1883), 24 Ch. D. 624; 52 L. J. Ch. 804; 48 L. T. 894; 32 W. R. 112.

**1354. Nature of option—Outside relationship of landlord & tenant.**—*WOODALL v. CLIFTON*, No. 1357, *post*.

**1355. — —.**—An option contained in a lease to purchase the reversion & so destroy the tenancy is not one of the terms of the tenancy. It is a provision outside of the terms which regulate the relations between the landlord as landlord & the tenant as tenant, & is not one of the terms of the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease.—*Re LEEDS & BATLEY BREWERIES & BRADBURY'S LEASE, BRADBURY v. GRIMBLE & Co.*, [1920] 2 Ch. 548; 89 L. J. Ch. 645; 124 L. T. 189; 65 Sol. Jo. 61.

*Annotations*.—*Apld.* *McIlroy v. Clements* (1923), 67 Sol. Jo.

*KHMSI v. SIR JAMSETJI JIJIBHOY* (1917), L. L. R. 42 Bom. 103.—IND.

b. — —.—*STAPLES v. JOSEPH & WRIGHT* (1883), 2 N. Z. L. R. 20 (S. C.).—N.Z.

c. — —.—*MILL v. CROFT* (1886), 5 N. Z. L. R. 1.—N.Z.

d. — —.—*Whether absolute agree-*



402. *Distd. Rider v. Ford*, [1923] 1 Ch. 541. *Apprvd.* *Sherwood v. Tucker*, [1924] 2 Ch. 440. *Consd.* *Batchelor v. Murphy*, [1925] Ch. 220.

**1356.** — *Does not run with the land.*—*WOODALL v. CLIFTON*, No. 1357, *post*.

**1357. Must not offend perpetuity.**—A lease of land for ninety years granted in 1867 contained a proviso that in case the lessee, his heirs or assigns, should at any time during the term be desirous of purchasing the fee simple of the land at the rate of £500 per acre, the lessor, his heirs or assigns, on receipt of the purchase-money, would execute a conveyance of the land in favour of the lessee, his heirs & assigns.

In 1904 an action was brought by an assignee of the lease, who had given notice of his desire to exercise the option, against assigns of the lessor to compel a conveyance of the land accordingly:—*Held*: the proviso or covenant did not come within 32 Hen. 8, c. 34, so as to make the liability to perform it run with the reversion, & consequently the action could not be maintained against defts. *Semble*: also, that the option was void on the ground of remoteness.—*WOODALL v. CLIFTON*, [1905] 2 Ch. 257; 74 L. J. (Ch. 555; 93 L. T. 257; 54 W. R. 7; 21 T. L. R. 581, C. A.

*Annotations*:—*Apld.* *Re Leeds & Batley Breweries & Bradbury's Lease*, *Bradbury v. Grimbble*, [1920] 2 Ch. 548; *Sherwood v. Tucker*, [1924] 2 Ch. 440. *Refd.* *Worthing Corp'n. v. Heather*, [1906] 2 Ch. 532; *Dewar v. Goodman*, [1908] 1 K. B. 94.

**1358.** — *Option given for charitable purpose.*—In 1878 land was demised to pl'tfs.' predecessors for thirty years from Sept. 29, 1876, to be used as a public park; & the lease contained a proviso that at any time during the term the lessor, her heirs or assigns, would, on receiving notice from pl'tfs. of their desire to purchase the land, convey it to them for £1,325. The lessor died in 1902. In 1905 pl'tfs. served on her devisees notice of their desire to purchase. The devisees maintained that the option was void as infringing the rule against perpetuities; & the corp'n. brought this action against them & the lessor's exor. for specific performance of the contract to sell, or in the alternative, damages for breach of contract:—*Held*: the option to purchase was void for remoteness, & could not be enforced by specific performance; this defect was not cured by the fact that the option was given for charitable purposes, inasmuch as the interest of the charity did not become effective till the happening of the future event, but pl'tfs. were entitled to recover damages from defts. for breach of the covenant to convey.—*WORTHING CORPN. v. HEATHER*, [1906] 2 Ch. 532; 75 L. J. Ch. 761; 95 L. T. 718; 22 T. L. R. 750; 50 Sol. Jo. 668; 4 L. G. R. 1179.

**1359.** — *Option in agreement for lease—to purchase freehold.*—An agreement for a lease provided that the prospective tenant should "take the house for three, five, or seven years, & have the option of purchasing either the freehold or a lease of ninety-seven years." The tenant entered

into possession, but no lease was ever executed:—*Held*: (1) the option to purchase the freehold being unlimited as to time was void, under the rule against perpetuities, but the option to purchase the lease, being in fact an option to call for a lease, was outside the rule against perpetuities, & was exercisable so long as the relationship of landlord & tenant existed; (2) an option to call for a lease was outside the rule against perpetuities, although the terms of the new lease were not the same as the terms of the original lease.—*RIDER v. FORD*, [1923] 1 Ch. 511; 92 L. J. Ch. 565; 129 L. T. 347; 67 Sol. Jo. 484.

**1360.** — *To call for lease for ninety-seven years—On terms different from agreement.*—*RIDER v. FORD*, No. 1359, *ante*.

**1361. Agreement for new or extended lease—Agreement silent as to option—Whether option incorporated.**—A three years' lease or tenancy agreement terminating Dec. 25, 1917, gave the tenant an option to purchase the freehold for £700, "during the three years hereby provided for." In June, 1917, the landlord & tenant signed an indorsement agreeing "that this lease be extended for three years expiring Dec. 25, 1920." In Sept. 1920, the parties signed a further indorsement agreeing "that this lease be extended for three years expiring Dec. 25, 1923." These indorsements, though duly stamped, were settled informally by the parties themselves without legal aid. On the construction of these documents: *Held*: it was not intended to extend the lease or tenancy agreement with all its provisions, collateral or otherwise, & the option was not therefore extended. *SHERWOOD v. TUCKER*, [1924] 2 Ch. 440; 91 L. J. Ch. 66; 132 L. T. 86; 40 T. L. R. 782; 68 Sol. Jo. 769, C. A.

*Annotation*:—*Distd.* *Batchelor v. Murphy*, [1925] Ch. 220.

**1362.** — *Distd.*—*BATCHELOR v. MURPHY*, No. 1567, *post*.

### B. Exercise of Option.

#### (a) In General.

*See, generally*, SALE OF LAND.

**1363. When relation of vendor & purchaser arises—Giving of notice.**—*PERG v. WIDEN*, No. 1376, *post*.

**1364.** — *Richards v. Dunn* 39 Sol. Jo. 469.

**1365.** — *Payment of purchase-money.*—*RANELAGH (LORD) v. MELTON*, No. 1377, *post*.

**1366.** — *Acceptance of title—Payment of deposit.*—The underlessee of some property contracted to purchase it, paid a deposit, & accepted the title. By the contract the day fixed for completion was the date of the expiration of the lease, & the purchaser was to pay interest on the purchase-money in default of completion. The purchaser remained in possession, but refused to complete or pay the purchase-money; he claimed to be in possession under the sub-lease, not under

*ment.*—A lease contained an agreement that "the lessor agrees to give to the lessee the first privilege of purchasing the premises at any time within four years from the date hereof, at the price of \$1,000, payable in five yearly instalments."—*Held*: an absolute agreement.—*CASEY v. HANLON* (1875), 23 Gr. 445.—*CAN.*

**1361. Agreement for new or extended lease—Agreement silent as to option—Whether option incorporated.**—*HURD v. McDERMID* (1906), 25 N. Z. L. R. 901.—*N.Z.*

**e.** — *Not waiver of option.*—Where a lease for a term of years gives the lessee an option to purchase the

land, the latter's acceptance during the term of a new lease to begin on its expiration is not of itself a waiver or abandonment of the option.—*MATHEWSON v. BURNS* (1914), 18 D. L. R. 399; 50 S. C. R. 115.—*CAN.*

**f. Construction.**—*FREEMAN v. STEWART* (1904), 36 N. B. R. 465.—*CAN.*

**g. How avoided—By forfeiture of lease.**—Pl'tf. having forfeited his lease by his conduct:—*Held*: the option to purchase was dependent thereon, & was also avoided thereby.—*GUISEBAGLEY v. VICARS-SHEAR LUMBER CO* (1913), 23 O. W. R. 728; 4 O. W. N. 559; 9 D. L. R. 4.—*CAN.*

**h.** — *By notice of termination.*—

*Ward* (1834), 2 Meil. 162. **S. AF.**

**k. Necessity for writing.**—*VAN DER HOVEN v. COTTING* (1903), T. S. 299. — **S. AF.**

### PART III. SECT. 12, SUB-SECT. 1.—B. (a).

**1. Time for exercise—Whether day of commencement included.**—The lessee had the right of purchase, on his desiring to do so within the period of two years after the date of the commencement of the term, Apr. 1, 1852. Apr. 1, 1854, the desire of purchasing was declared:—*Held*: in time, the day of commencement of the term,



*Sect. 12.—Options: Sub-sect. 1, B. (a) & (b).]*

the contract, & now offered to pay rent. On motion for an order on the purchaser to pay the purchase-money into ct.:—*Held*: the purchaser had an option, & must elect to pay the purchase-money into ct. within a month or to give up possession; & if he should give up possession, he must pay interest on the purchase-money at four per cent. from the day fixed for completion.

There is no rule that a purchaser in possession loses this option by accepting the title.—*GREENWOOD v. TURNER*, [1891] 2 Ch. 144; 60 L. J. Ch. 351; 64 L. T. 261; 39 W. R. 315.

*Annotations*:—*Apld. Re Cassano & Mackay's Contract* (1919), 64 Sol. Jo. 259. *Refd. Cook v. Andrews* (1896), 66 L. J. Ch. 137.

—*See, generally, SALE OF LAND.*

**1367. Title of landlord—Whether good title must be shown.**—By an agreement between A. & B., A. agreed to lease to B. a piece of land for ninety-nine years, at the rent of £10, & to convey the inheritance to B. for the price of £180, at any time within a certain period from the date of the agreement, on notice being given by B. of his intention to purchase; B. agreed that, in case of such purchase, he would accept A.'s title without dispute. B. gave notice of his intention to purchase:—*Held*: B., on such notice being given, became bound to accept A.'s title, even though it should be bad; & A. was entitled to a specific performance of the agreement so far as related to the purchase.—*DUKE v. BARNETT* (1846), 2 Coll. 337; 15 L. J. Ch. 173; 6 L. T. O. S. 478; 10 Jur. 87; 63 E. R. 759.

*Annotation*:—*Refd. Re Scott & Alvarez's Contract*, Scott v. Alvarez, [1895] 2 Ch. 603.

**1368.** —*See, generally, By an agreement entered into between pltf. & deft., the latter agreed with the former to grant him a lease for a term of ninety-nine years, subject to a yearly rent & certain covenants to be inserted in the proposed lease. The agreement contained an option on the part of pltf. to purchase the premises within three years. Pltf. having elected to purchase, deft. refused to produce his title to the premises:—Held: the right of pltf. was that of an ordinary purchaser, who was entitled to have a good title produced in the absence of any condition to the contrary, & the onus was upon deft. to show that that right had been waived.—WELCHMAN v. SPINKS* (1861), 5 L. T. 385, L. C.

**1369.** —*Only interest held at time of lease.*—By a lease dated Apr. 15, 1920, landlords demised premises to tenants for the term of three years. The lease contained a provision that the tenants should at any time during the term "have the option of purchasing all the estate, interest & title which is at the date of these presents vested in the landlords in & to the freehold premises hereby demised & the fixtures & fittings . . . at a price not exceeding £3,000." On Apr. 15, 1921, the tenants wrote exercising the option to purchase for £3,000. They subsequently found that the premises had not at the date of the lease been vested in the landlords for an unencumbered estate in fee simple, but had been mortgaged in 1910 to secure a loan of which £500 was at the date of the lease & was still owing:—*Held*: under the option the tenants were only entitled to acquire for £3,000 the actual interest in the premises that the landlords had at the time of the

lease, & therefore, the landlords were under no obligation to pay off the mtge. & convey the unencumbered fee simple in consideration of the purchase price of £3,000.—*POWELL v. WILLIS*, [1922] 2 Ch. 514; 91 L. J. Ch. 772; 128 L. T. 500; 66 Sol. Jo. 576.

**1370. Exercise independent of contract of letting—Forfeiture of lease.**—The owner of a plot of ground agreed to grant a lease of it to A. as soon as the latter had erected a villa thereon. But it was stipulated, that if A. should not perform the agreement on his part, the agreement for a lease was to be void, & that the owner might re-enter. A. was to insure in a particular way, & he was to have the option of purchasing the fee within two years. A. erected the villa, but insured in the wrong office & in the wrong name:—*Held*: the contract for a lease was independent of the option to purchase, & notwithstanding the forfeiture of the first, the latter still subsisted, & a specific performance of the contract for sale was decreed.—*GREEN v. LOW* (No. 1) (1856), 22 Beav. 625; 27 L. T. O. S. 269; 20 J. P. 564; 2 Jur. N. S. 848; 4 W. R. 669; 52 E. R. 1249.

*Annotations*:—*Distd. Re Adams & Kensington Vestry* (1884), 27 Ch. D. 394. *Refd. Woodall v. Clifton* (1905), 93 L. T. 257.

**1371.** —*Determination of term.*—(1) Under the terms of a lease, the lessees had an option to purchase the fee simple of the property contained in the lease for a fixed sum, on giving notice before a fixed date. It was agreed that, if the premises were injured by fire to a certain extent, the terms should be absolutely determined. This event happened before the exercise of the option:—*Held*: the option to purchase continued, notwithstanding that the term had been put an end to.

(2) The lessor covenanted to insure the premises, & on the fire taking place received the insurance money. The lessees then gave notice of their intention to exercise their option of purchase, & claimed that the amount of the insurance money received by the lessor should be deducted from the purchase money:—*Held*: the lessees were not entitled to the insurance money.—*EDWARDS v. WEST* (1878), 7 Ch. D. 588; 47 L. J. Ch. 463; 38 L. T. 481; 26 W. R. 507.

*Annotations*:—*As to* (1) *Consd. Re Adams & Kensington Vestry* (1884), 27 Ch. D. 394; *Re Isaacs, Isaacs v. Reginald*, [1894] 3 Ch. 506. *Generally, Mentd. Re Dyson, Challinor v. Sykes*, [1910] 1 Ch. 750.

**1372.** —*Breach of conditions.*—By a building agreement deft. agreed to erect certain buildings & carry out certain works on pltf.'s land within a specified time, & "forthwith to proceed" with & complete the works, when a lease for ninety-nine years was to be granted; the agreement provided that if deft. did not perform the several stipulations therein contained pltf. might by notice in writing determine the agreement & re-enter; it also contained an option to deft. to purchase the freehold. Pltf. being dissatisfied with the slow progress made by deft., gave him notice to determine the agreement; but deft. having previously given notice to pltf. of his intention to exercise the option to purchase declined to give up possession. On an action by pltf. to restrain deft. from trespassing on or interfering with pltf.'s possession of the land:—*Held*: (1) on the evidence that deft. had made default in not "forthwith proceeding" to carry out the stipulations of

Apr. 1, 1852, being exclusive.—*SUTHERLAND v. BUCHANAN* (1862), 9 Gr. 135.—*CAN.*

m. Exercise after breach of condition

of lease—*Before landlord's election to terminate lease.*—A lessor on learning of breach of a condition in the lease, did not elect at once to terminate the lease. Later the tenant gave notice

of his intention to exercise his option to purchase:—*Held*: the option had not been validly exercised.—*PENMAN v. MACKAY*, [1922] S. C. 385.—*SCOT.*

the agreement; but as there was no condition precedent that deft. should not have committed any breach of the conditions contained in the building agreement, the option to purchase was well exercised & a binding contract was thereby made for the sale & purchase of the property; (2) the determination of the leasing part of the building agreement by the notice given to deft. for breach of its conditions did not destroy or affect the contract for sale created by the exercise of the option to purchase, & plff.'s action must therefore be dismissed.—*RAFFETY v. SCHOFIELD*, [1897] 1 Ch. 937; 66 L. J. Ch. 448; 76 L. T. 648; 45 W. R. 460.

*Annotation*:—As to (2) *Consd. Sherwood v. Tucker*, [1924] 2 Ch. 440.

**1373. Presumption of exercise—Evidence rebutting presumption.**—By an indenture of lease dated 1598 a farm was demised for a thousand years, with a covenant by the lessor to convey the fee simple to the lessee within five years if required. The farm was assigned as a leasehold in 1777, since which time it had been three times devised as freehold, & on the ct. rolls of the manor of which the farm formed part the land was called freehold:—*Held*: under the circumstances, it remained leasehold as between the heir & the administrator of an intestate owner.

If a presumption arises that the covenant in the deed of 1598 to assure the fee simple within five years was complied with, then the fee simple would have been conveyed to O. but then there would have been an end to rent & services & heriots . . . mentioned in the ct. rolls. . . . It would seem to me a violent presumption in that state of things to hold that the tenure created by a deed of lease had been turned in some way or other into a tenure by freehold (*LORD CAIRNS, C.*).—*PICKETT v. PACKHAM* (1868), 4 Ch. App. 190; 16 W. R. 1177, L. C.

*Annotation*:—*Refd. Walters v. Webb* (1869), L. R. 9 Eq. 83.

**1374. Right to insurance moneys.**—Under the terms of a lease the tenant was bound to insure against fire, & had an option of purchasing the property. He insured in a sufficient sum. The premises were damaged by fire, & it then appeared that the landlord had a policy on the premises in another office, of which the tenant had no notice. The two offices apportioned the amount of loss between the two policies, & the landlord received what was thus payable under the policy effected by him. The tenant shortly after the fire gave notice to exercise his option of purchase, & proposed that the insurance moneys under both policies should go in part payment of the purchase-money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, & insisted on the money under the other policy being applied in re-instating the premises, & on the tenant declining to do this, brought ejectment against him:—*Held*: the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in re-instating the property after the tenant had exercised his option of purchase.—*REYNARD v. ARNOLD* (1875), 10 Ch. App. 386; 23 W. R. 804, L. J.J.

*Annotation*:—*Distd. Edwards v. West* (1878), 7 Ch. D. 858.

**1375.** —.—.]—*EDWARDS v. WEST*, No. 1371, *ante*. —.—.]—*See Law of Property Act*, 1925 (c. 20), s. 47.

**Operation as conversion of property.**—*See EQUITY*, Vol. XX., pp. 356-358, Nos. 951-958.

(b) *Performance of Conditions Precedent.*

**1376. General rule—Conditions must be strictly complied with—Notice.**—A tenant was to have a purchasing clause, at any time within nine years, by giving three months' notice. He gave the notice at the end of four years; & delays occurring, the three months elapsed. Afterwards, the landlord threatened hostile measures to compel a completion, but subsequently gave notice that, unless the purchase should be completed within six weeks, he should treat the notice void & the right of purchasing as forfeited. The purchase was not completed within the six weeks:—*Held*: (1) though a conditional right to purchase must be strictly complied with, yet time was not, in this case, of the essence of the contract; (2) if it had been, it was waived by the landlord's insisting on the contract after the expiration of the three months; (3) time was not made of the essence of the contract by the notice; (4) six weeks was not, under the circumstances, a reasonable time.

As soon as the notice was given the relation of landlord & tenant ceased & that of vendor & purchaser was constituted (*ROVILLY, M.R.*).—*PEARCE v. WISDEN* (1852), 16 Beav. 239; 20 L. T. O. S. 174; 16 Jur. 1105; 1 W. R. 43; 51 E. R. 770.

*Annotation*:—As to (3) *Refd. Green v. Savin* (1879), 13 Ch. D. 589.

**1377. Payment of purchase-money—On fixed date—Time essence of contract.**—Arts. of agreement for a lease contained a proviso that if, at any time within a certain period the lessees should desire to purchase the fee simple & should give three months' notice of such their desire, & should, "at the expiration of such notice, pay unto him, the lessor, the sum of £210 in respect of each plot, etc., then the lessor shall & will convey the freehold" to the lessee. Notice to purchase was given in due course; but the three months after the notice having been allowed to elapse without the money being paid, the lessor refused to carry out the agreement for sale. Upon bill by lessee for specific performance:—*Held*: (1) "at the expiration" meant the precise day on which the notice expired; (2) until the condition of paying the money was performed the relation of vendor & purchaser did not arise; (3) time was of the essence of the contract; & the money not being paid at the fixed time the lessee had lost his right to purchase.—*RANELAGH (LORD) v. MELTON* (1864), 2 Drew. & Sm. 278; 5 New Rep. 101; 34 L. J. Ch. 227; 11 L. T. 409; 28 J. P. 820; 10 Jur. N. S. 1141; 13 W. R. 150; 62 E. R. 627.

*Annotation*:—As to (2) *Refd. Re Adams & Kensington Vestry* (1841), 27 Ch. D. 394.

**1378.** —.—.]—In a lease there was a covenant on the part of the lessor that if the lessee should be desirous, at the expiration of the term of purchasing the inheritance of the property comprised in the lease, & should give six months' notice to the lessor, & should pay to him, his heirs, or assigns, £2,000, & all arrears of rent, the lessor should convey the property to the lessee.

p. —.—.]—*MILLER v. ALLEN* (1912), 23 O. W. R. 627; 4 O. W. N. 346; 7 D. L. R. 438.—*CAN.*

q. —.—.]—*MURRAY v. SHIRLEY* (1905), 24 N. Z. L. R. 712.—*N.Z.*

**PART III. SECT. 12, SUB-SECT. 1.—B. (b).**

n. *General rule—Conditions must be strictly complied with.*—The party entitled to an option to purchase must

show that he has performed all the terms upon which alone he is entitled to exercise that option.—*FORRESTER v. CONNOLLY* (1857), 5 Gr. 657.—*CAN.*

o. —.—.]—*DOYLE v. DILL* (1890), 23 N. S. R. 78.—*CAN.*

**Sect. 12.—Options: Sub-sect. 1, B. (b), (c) & (d), & C.]**

At the end of the term the lessee gave such notice to the lessor, but the lessee did not tender the purchase-money on the day when the notice expired, alleging that owing to the delay of the lessor in furnishing the abstract, he was unable to complete the conveyance. The lessee subsequently filed a bill claiming the benefit of the covenant, & praying that the contract, which he alleged to be still binding, might be specifically performed:—*Held*: the payment of the purchase-money by the lessee at the expiration of the notice was a condition precedent, time was of the essence of the contract, & by reason of the non-payment of the money, there was no contract binding on the lessor.—*WESTON v. COLLINS* (1865), 5 New Rep. 345; 34 L. J. Ch. 353; 12 L. T. 4; 29 J. P. 409; 11 Jur. N. S. 190; 13 W. R. 510, L. C.

*Compare* No. 1376, *ante*.

**1379. Due payment of rent—Irregular payment.]**

—Pltf. made a mtge. to the first husband of female deft., who after that husband's death lent pltf. £200; subsequently she bought the estate for an additional £400. Soon afterwards she granted a lease to pltf., & signed an agreement indorsed on the lease, that pltf. might repurchase within five years, paying the rent as it became due. The rent was not regularly paid, in some instances not until distresses were levied:—*Held*: this was not a case of forfeiture, but of particular indulgence; from all the evidence the ct. was of opinion that the transactions were not contemporaneous, & the terms not having been fulfilled, the bill must be dismissed.—*DAVIES v. THOMAS* (1830), Taml. 416; 48 E. R. 166.

**1380. — Punctuality not necessary.]**—Deft., the lessee of a house, let the house to pltf. at a rent payable quarterly in advance. The tenancy agreement gave pltf. an option to purchase deft.'s interest in the house on pltf. giving deft. notice in writing of the intention to purchase, provided pltf. should "in the meantime have duly paid the rent hereby reserved." Pltf. did not pay the rent due on Dec. 25, 1907, until Jan. 10, 1908. On Mar. 20, 1908, pltf. gave notice of her intention to purchase:—*Held*: (1) "duly" did not mean punctually, & the condition precedent to the exercise of the option had been fulfilled; (2) the fact that the agreement provided that part of the purchase-money should be left on mtge. did not make the agreement an agreement for a loan, & specific performance of the agreement must be ordered.—*STARKEY v. BARTON*, [1909] 1 Ch. 284; 78 L. J. Ch. 129; 100 L. T. 42.

**1381. Notice of intention to exercise option—Six months before fixed date—Notice out of time.]**—*RIDDELL v. DURNFORD* (1893), 37 Sol. Jo. 267.

—*See, further*, Sub-sect. 1, B. (c), *post*.

**1382. Waiver of performance.]**—*PEGG v. WISEDEN*, No. 1376, *ante*.

**(c) Notice to Purchase.**

**Necessity for.]**—*See* No. 1381, *ante*.

**1383. Service of notice—Validity—Infant heir of lessor.]**—*WOODS v. HYDE*, No. 1387, *post*.

**1384. — One of several trustees.]**—A lease for seven years was granted by three

trustees, & an option was given to the lessee to purchase the fee at any time during the term on giving notice in writing of his intention "to the said lessors, or the survivors or survivor of them, or the exors., administrators, or assigns of such survivors." The lessee during the term gave notice in writing of his intention to purchase to one only of the trustees, all three of them being alive, & afterwards commenced an action for specific performance of the agreement to sell the property to him:—*Held*: notice ought to have been given to all the trustees, or the survivors or survivor of them; notice to one was insufficient, & therefore the lessee could not enforce a sale to him of the property.—*SUTCLIFFE v. WARDLE* (1890), 63 L. T. 329.

**Time for—Condition precedent.]**—*See* No. 1381, *ante*.

**1385. Waiver of right to notice—Estoppel from objection to validity.]**—*Held*: deft., an assignee of the lessor, had waived his right to receive notice of pltf.'s option to purchase the freehold & therefore was precluded from taking the objection that pltf. was not entitled to exercise the right of pre-emption.—*FRIARY HOLROYD & HEALEY'S BREWERIES, LTD. v. SINGLETON*, [1899] 2 Ch. 261; 68 L. J. Ch. 622; 81 L. T. 101; 47 W. R. 662; 15 T. L. R. 448; 43 Sol. Jo. 622, C. A.

*Annotations*:—*Reid*. Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608; Woodall v. Clifton, [1905] 2 Ch. 257.

**(d) By and Against Whom Exercisable.**

**1386. By whom exercisable—Not equitable assignee—Though in possession—& paying rent.]**—The equitable assignee of a lease who has omitted to perfect his title by legal assignment although in possession of the premises & paying the rent reserved by the lease is not entitled to the benefit of an option to purchase given to the lessee, his exors., administrators & assigns. In a covenant giving an option to purchase the word "assigns" means the persons entitled to the term as between them & the lessor, & to the benefit of the covenants entered into by the lessor & lessee respectively which run with the land demised.—*FRIARY HOLROYD & HEALEY'S BREWERIES, LTD. v. SINGLETON*, [1899] 1 Ch. 86; 68 L. J. Ch. 13; 79 L. T. 405; 47 W. R. 93; 15 T. L. R. 23; 43 Sol. Jo. 43; *revid.* on other grounds, [1899] 2 Ch. 261, C. A.

*Annotations*:—*Consd.* Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608. *Reid*. Woodall v. Clifton, [1905] 2 Ch. 257.

**Heir of lessee—Heir also administrator of personality.]**—*See* EXECUTORS, Vol. XXIII., p. 295, No. 3598.

**1387. Against whom exercisable—Heir of lessor—Infant.]**—A lease for twenty-one years contained a proviso, that if the lessees should be desirous of purchasing the fee, & should give to the lessor, his heirs or assigns, notice of such desire, they should be entitled to become & be the purchasers of the premises at the price named;

& the lessor, his appointees, heirs or assigns, would, on the payment of the purchase-money, do all acts for effectually conveying the premises to the use of the purchasers. The lessor died, having devised all his real estate to trustees, who disclaimed, & leaving an infant heir. The lessees having served on the infant & his guardian notice

**13791. Due payment of rent—Irregular payment.]**—*MCLELLAN v. ROGERS* (1855), 12 U. C. R. 371.—CAN.

**F. Notice of intention to exercise option.]**—*SMITH v. DAWSON* (1884), 2 N. Z. L. R. 411 (S. C.).—N.Z.

**1.**—*MERRIE v. MCKAY* (1897), 16 N. Z. L. R. 134.—N.Z.

**a. —.]**—*BUCKERIDGE v. TUCKER, TUCKER v. BUCKERIDGE* (1899), 17 N. Z. L. R. 513.—N.Z.

**PART III. SECT. 12, SUB-SECT. 1.—B. (d).**

**b. Against whom exercisable—Personal representatives.]**—An option

to purchase leased property within a limited time may properly be inserted in a lease, & as such binds the personal representatives of a deceased lessor, but only within the time stated.—*YCELL v. WHITE* (1901), 22 C. L. T. 312; 5 Terr. L. R. 275.—CAN.

**a. — Liquidator.]**—*MCCARTER v.*

of their election to purchase, it was held that such notice was effectually served, & constituted a valid & binding contract, which the ct. would not refuse to carry out on the ground that the infant could not give a discharge for the purchase-money.—*WOODS v. HYDE* (1862), 31 L. J. Ch. 295; 6 L. T. 317; 10 W. R. 339.

*C. Enforcement of Contract—Remedies for Breach.*

*See, generally, SPECIFIC PERFORMANCE.*

**1388. Specific performance—Only if full relief obtainable.]**—A. demised a house to B. for a term of years at a certain rent; & the lease contained a proviso that B. should, at any time during the term, be enabled, upon giving a certain notice, to purchase the house at a price to be fixed by two surveyors to be named, the one by A., & the other by B., his exors., administrators, or assigns; A. sold his reversion to C., who bought it with notice of the proviso, & the lessee gave notice to C. that he was ready to purchase according to the proviso, & named a surveyor; C., however, refused to sell, or to name a surveyor on his part:—*Held*: B. could not maintain a bill against C. for the specific performance of the agreement in the proviso.

The ct. will not interfere in cases of specific performance, unless it can give complete & not merely a partial relief.—*AGAR v. MACKLEW* (1825), 2 Sim. & St. 418; 4 L. J. O. S. Ch. 16; 57 E. R. 405.

*Annotation:—Mentd. Richardson v. Smith* (1870), 5 Ch. App. 649, n.

**1389. — Counter action for ejectment by lessor —Injunction restraining ejectment.]**—A yearly tenant, having the option of purchasing the property, filed his bill against the landlord for a specific performance of the contract for sale; the landlord having proceeded to eject plff. the latter applied for an injunction to restrain him; but the ct. declined granting it, except on the terms of plff. undertaking to continue to pay the rent, without prejudice.—*PYKE v. NORTHWOOD* (1838), 1 Beav. 152; 48 E. R. 897.

**1390. — Against infant tenant in tail.]**—Where testator had, in his lifetime, agreed to give an option to his lessee to purchase the fee, & the lessee did not declare for the option until after testator's decease, an infant tenant in tail of the legal estate under testator's will is not a trustee for the lessee desirous of purchasing, within the meaning of the Trustee Act, 1850 (c. 60), but a claim for specific performance was directed to be filed.—*Re WEEDING'S ESTATE* (1858), 4 Jur. N. S. 707.

**1391. — Delay bar to relief.]**—M. became tenant to A. of leasehold property for ten years from Dec. 1861, M. to have the option at any time during the term to purchase the premises for £3,500 & upon payment thereof to A. the term of ten years & the rent should thereupon cease & M. should thereupon be entitled to an assignment. M. entered into possession & afterwards A. made a mtge. to G. In July, 1867, M. gave written notice to A. & to G., that he elected

to purchase. A draft assignment was prepared, which could not be settled since neither A. nor G. would assent to the purchase-money being paid to the other of them. A correspondence took place, which ended in Mar. 1868, G. having given notice to M. to pay his rent to him, M. made to him various irregular payments for most of which receipts were given expressing them to be on account of rent, & this went on after the end of the term of ten years. In Nov. 1872, A. became bkpt. On May 1, 1873, the solr. of A.'s trustees in bkpy. called on M. & stated that the trustee was going to sell, & wished to give him the refusal. M. desired time to consider & did not say that he had already agreed to purchase. On the next day his solr. discussed the matter with the trustee's solr. but did not set up any claim as having purchased. On May 13, however, he wrote to the trustee's solr. insisting on M.'s right under the agreement of 1861 & the notice of July, 1867, & the trustee disputing this right M. filed a bill for specific performance:—*Held*: (1) the option in the agreement of 1861 & the notice of July, 1867, made a binding contract, although the purchase-money was not paid within the term; (2) M.'s right to specific performance was lost by the delay from Mar. 1868, to May, 1873, which was not excused by his having been in possession; for that possession in order to have that effect, must be a possession under the contract, & such that the vendor must know, or be taken to know, that the purchaser claimed to be in possession under the contract, & in this case plff. did not, from Mar. 1868, to May, 1873, claim possession under the contract; nor did it appear that the vendors recognised him or were bound to recognise him as claiming possession under it.—*MILLS v. HAYWOOD* (1877), 6 Ch. D. 196.

**1392. — — Damages in lieu.]**—*WORTHING CORPN. v. HEATHER*, No. 1358, *ante*.

**1393. Action for damages Lessor unable to make good title—Measure of damages.]**—A plff. took possession of premises under an agreement between him & deft., by which certain premises were demised to plff. for two years certain, with liberty at his own expense to make such improvements as he chose, with the option of purchasing upon giving notice to deft. at the end of or during the term, "it being understood that deft. was possessed of the premises for his own life & that of Mrs. M., & the survivor of them." Plff. laid out a large sum on the premises, & then gave notice of his intention to purchase, deft. could not make the title he represented, whereupon plff. brought an action of *assumpsit* for breach of the agreement, & sought to recover as damages the amount expended in improvements:—*Held*: plff. was entitled to recover as damages the value of the lease at the time the notice to purchase was given, & the value of the improvements was not to be considered in estimating them.—*WORTHINGTON v. WARRINGTON* (1849), 8 C. B. 134; 18 L. J. C. P. 350; 13 L. T. O. S. 303; 137 E. R. 450.

*Annotations:—Consd. Bain v. Fothergill* (1871), L. R. 7 H. L. 158. *Held. Pounsett v. Fuller* (1856), 17 C. B. 660; *Wright v. Fitch* (1868), L. R. 3 Q. B. 314; *Schreiber v. Dinkel* (1886), 54 L. T. 911.

YORK COUNTY LOAN CO. (1907), 10 O. W. R. 165; 14 O. L. R. 420.—*CAN.*

**PART III. SECT. 12, SUB-SECT. 1.—C.**

**1391 I. Specific performance—Delay bar to relief.]**—*YOUNG v. BOWN* (1858), 6 Gr. 402.—*CAN.*

**1391 II. — — —.]**—*MOIR v. PAL-*

*MATIER* (1900), 19 C. L. T. 287; 20 C. L. T. 89; 13 Man. L. R. 34.—*CAN.*

d. — — —.]—*RICHARDSON v. KEAR-TON* (1882), 8 V. L. R. 201.—*AUS.*

e. — — — *Where condition in lease not completed—Lessee not at fault.]*—*HUNT v. SPENCER* (1867), 13 Gr. 225.—*CAN.*

f. — — —.]—*ONTARIO ASPHALT CO. v. MONTRÉUIL* (1915), 52 S. C. R. 541.—*CAN.*

g. — — — *Option must constitute complete contract.]*—*BOCALTER v. HAZLE*, [1925] 4 D. L. R. 948; 3 W. W. R. 577; *retrag.*, 19 Sask. L. R. 417; [1925] 2 W. W. R. 436.—*CAN.*

Sect. 12.—Options: Sub-sects. 2 & 3. Sect. 13: Sub-sect. 1, A., B. & C.]

SUB-SECT. 2.—OPTION TO RENEW.

See Part IX., Sect. 2,

SUB-SECT. 3.—OPTION TO DETERMINE.

See Part XXIV., Sect. 5, *post*.

## SECT. 13.—RESCISSION AND RECTIFICATION OF LEASES.

### SUB-SECT. 1.—RESCISSION.

#### A. In General.

**1394. Jurisdiction of court.**—Although rectification or setting aside of deeds is assigned to the Ch. Div. by Jud. Act, 1873 (c. 66), s. 34 (3), still a right to rectification or to set aside a deed may be set up as an answer to an action in one of the other Divs., by virtue of sect. 24 (2) of that Act, which gives an equitable jurisdiction to such other Div. to that extent.

Where in an action for rent due under a lease of coal mines it was shown in the defence that pltf. had no title to part of the mines, & that he knew this when he granted the lease, but that deft. did not know & had not the means of knowing it, & that deft. had not entered into possession or done anything to prevent his repudiating the lease, it was held that as equity under such circumstances would set aside the lease, although there had been no actual fraud on the part of pltf., deft. was entitled to repudiate & the defence so shown was a good answer to the action.—**MOSTYN v. WEST MOSTYN COAL & IRON CO.** (1876), 1 C. P. D. 145; 45 L. J. Q. B. 401; 34 L. T. 325; 40 J. P. 455; 24 W. R. 401; 2 Char. Pr. Cas. 43.

*Annotations*.—**Refd.** Breslaue v. Barwick (1876), 36 L. T. 52. **Mentd.** Baynes v. Lloyd, [1895] 2 Q. B. 610; Budd-Scott v. Danell, [1902] 2 K. B. 351; Carlisle v. Salt, [1906] 1 Ch. 335; Markham v. Pagot, [1908] 1 Ch. 697.

**1395.** — **County court.**—**ANGEL v. JAY**, No. 1408, *post*.

**1396. Lease in excess of power.**—Right of lessee to compensation for improvements.]—(1) College made a lease, the rent subject to taxes; the tenant by mistake did not deduct them; equity will not allow him those already paid, nor decree the account back.

(2) If a lease or grant is good at law, equity will not set it aside without allowing for lasting improvements.—**A.-G. v. BALIOL COLLEGE, OXFORD** (1744), 9 Mod. Rep. 407; 88 E. R. 538, L. C.

*Annotations*.—**Generally.** **Mentd.** Brown v. Blount (1830), 9 L. J. O. S. Ch. 74; Willats v. Busby (1842), 5 Beav. 193; Bourne v. Keane, [1919] A. C. 815.

See CHARITIES, Vol. VIII., p. 363, Nos. 1645–1650.

**1397. Absence or inadequacy of consideration.**—Leases for lives, obtained by agents of a deceased person of weak intellect, upon inadequate considerations set aside as fraudulent.—**GARTSIDE v. ISHERWOOD** (1783), 1 Bro. C. C. 558; 2 Dick. 612; 28 E. R. 1297.

*Annotation*.—**Refd.** Andrews v. Mowbray (1807), Wils. Ex. 71.

### PART III. SECT. 13, SUB-SECT. 1.—A.

**h. Lease in excess of power.**—**KER v. DUNGANNON (LORD)** (1841), 1 Dr. & War. 509.—**IR.**

**k. —.**—**ROSSITER v. WALSH** (1843), 4 Dr. & War. 485; 2 Con. & Law. 562.—**IR.**

**1397 i. Absence or inadequacy of consideration.**—**WYSE v. LAMBERT** (1865),

16 I. Ch. R. 378.—**IR.**

**1401 i. — Lessee in fiduciary relationship to lessor.**—Pltf. instituted proceedings to have a lease cancelled, alleging as grounds of relief, inadequacy of rent, want of proper advice by pltf. in the execution thereof, & the fiduciary relation towards herself which L. had assumed. In the circumstances the ct.

**1398. —.**—(1) Bill to set aside leases, obtained by an agent & attorney from his principal, dismissed as to voluntary leases; being pure gift; & no fraud, misrepresentation, etc.; with costs as to some, intended as a provision upon, & inducement to, the marriage of deft.: without costs as to others: the relation of the parties & the circumstances upon general principles of public

(2) Another lease decreed to be delivered up: the verdict in an issue establishing, that a full consideration was not paid.—**HARRIS v. TREMENEERE** (1808), 15 Ves. 31; 33 E. R. 668.

*Annotations*.—As to (1) **Consd.** Hunter v. Atkins (1834), 3 My. & K. 113; Hindson v. Weatherill (1853), 1 Sm. & G. 604; Morgan v. Minett (1877), 6 Ch. D. 638. **Appl. Re.** Coomber, Coomber v. Coomber, [1911] 1 Ch. 723. **Refd.** Nicol v. Vaughan (1834), 7 Bl. N. S. 395; Tomson v. Judge (1855), 3 Drew. 306; O'Brien v. Lewis (1862), 4 Giff. 221.

**1399. —.**—Lease set aside with costs; as obtained by the contrived & habitual intoxication of the lessor, immediately on coming of age, at a very inadequate rent; & acts of confirmation held not sufficient.—**SAY v. BARWICK** (1812), 1 Ves. & B. 195; 35 E. R. 76.

**1400. — Lease to charity.**—The owner of land having, at his own expense, built a chapel, which was used for the purpose of public worship, & the congregation having subscribed a sum of money for the purpose of enlarging & improving the same, he, in consideration that the money so subscribed should be expended for that purpose, demised the premises by lease for twenty-three years, reserving a peppercorn rent, during his life, & £10 per annum after his death. A declaration of trust was afterwards executed by some of the lessees declaring that they would hold the premises in trust for the congregation assembling at the chapel, & that in case the public worship should be there discontinued, then that they would assign the premises for civil purposes.—**Held**: neither the sum agreed to be expended on the premises, nor the rent reserved at the death of the lessor, could be considered a full consideration paid for the lease, so as to bring the case within Charitable Uses Act, 1735 (c. 36), s. 2.—**DOR d. WELLARD v. HAWTHORN** (1818), 2 B. & Ald. 96; 106 E. R. 302.

*Annotation*.—**Refd.** Bourne v. Keane, [1919] A. C. 815.

**1401. — Lessee in fiduciary relationship to lessor.**—A young lady, two years after she came of age, granted a mining lease, as to part of the property in possession, & as to rest, in reversion to her brother-in-law & uncle, at the suggestion & advice of her father's exor., & with no independent advice. Three months afterwards the exor. was taken into partnership with the lessees. It appeared that applications of other persons to become lessees had been discountenanced, & concealed from the knowledge of the lady.—**Held**: to support the lease in equity, the lessees were bound to show that no better terms could have been obtained; the grantor had the fullest information on the subject; she had separate, independent & disinterested advice, & she had deliberately & intentionally made the grant; & the lessees having failed in proving this, the lease was cancelled.—**GROSVENOR v. SHERRATT** (1860),

granted the relief asked.—**SEATON v. LUNNEY** (1879), 27 Gr. 169.—**CAN.**

**1401 ii. —.**—The evidence disclosing gross inadequacy of consideration, especially as there was a fiduciary relationship between the parties.—**Held**: the lease should be cancelled & set aside.—**MCCARTHY v. MFLD.** (1893), 7 Nfld. L. R. 764.—**MFLD.**



28 Beav. 659; 3 L. T. 76; 6 Jur. N. S. 1228; 8 W. R. 682; 54 E. R. 520.

**1402. Absence of title to part of land demised.]—**

(1) Where there is a demise of premises, & an entire rent reserved, if any part of the premises could not be legally demised, the whole demise is void.

(2) In a lease of lands, for which the lessor is bound to reserve the best rent that can be got, he must reserve the best rent that can be got at the time the lease is made, without any regard to a former lease in which the rent might have been fairly reserved on account of money to have been then expended in improvements.—*DOE d. GRIFFITHS v. LLOYD* (1800), 8 Esp. 78, N. P.

**1403. —.]—***MOSTYN v. WEST MOSTYN COAL & IRON CO.*, No. 1394, *ante*.

**1404. Competence of parties—Lunatic lessor.]—***GARTSIDE v. ISHERWOOD*, No. 1397, *ante*.

**1405. — Question for jury.]—**The mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion is connected with the subject-matter of such disposition or contract; it is a question for the jury whether the delusion affected the disposition or contract . . . A lessor at the time when he made a lease of a farm laboured under the delusion that it was impregnated with sulphur. On an issue directed as to the capacity of the lessor to make the lease rational letters by the lessor relating to the lease were put in evidence. The judge did not tell the jury that the letters did not displace the effect of the delusion but directed them that it was a practical question whether the lessor was so insane as to be incompetent to dispose of his property though believing it to be full of sulphur. The jury found that the lease was valid:—*Held*: there was no misdirection.—*JENKINS v. MORRIS* (1880), 14 Ch. D. 674; 49 L. J. Ch. 392; 42 L. T. 817, C. A.

*Annotation:—Mentd.* Imperial Loan Co. v. Stone (1892), 61 L. J. Q. B. 449.

**1406. — Lunatic lessee.]—**To constitute a defence to an action for use & occupation of a house taken by deft. under a written agreement, at a stipulated sum *per annum*, it is not enough to show that deft. was a lunatic, & that the house was unnecessary for her; but it must be also shown that pltf. knew this, & took advantage of deft.'s situation; & if that be shown, the jury should find for deft.; & they cannot, on these facts, find a verdict for pltf. for any smaller sum

than that specified in the agreement.—*DANE v. KIRK WALL* (1838), 8 C. & P. 679, N. P.

*Annotations:—Reld.* Campbell v. Hooper (1855), 3 Sm. & G. 153. *Mentd.* Molton v. Camroux (1848), 2 Exch. 487; Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599.

**1407. — Lessor intoxicated.]—***SAY v. BARWICK*, No. 1399, *ante*.

**B. Fraud and Misrepresentation.**

*See, generally, MISREPRESENTATION & FRAUD.*

**1408. Whether ground for rescission—Innocent misrepresentation.]—**A ct. of equity will not grant rescission of an executed lease on the ground of an innocent misrepresentation.

By County Courts Act, 1888 (c. 43), s. 67, the county ct. shall have all the powers of the High Ct. in actions for the cancelling of any agreement for the lease of any property where the value of the property shall not exceed £500.

Pltf. agreed to take, & deft. agreed to grant, a lease of certain premises for a term of years. The value of the interest which deft. agreed to grant to pltf. did not exceed £500; neither did the value of deft.'s whole interest in the premises exceed £500; the value of the freehold interest in the premises exceeded £500: *Held*: the county ct. had no jurisdiction to order cancellation of the agreement.

*Semble*: the words "the value of the property" in the above enactment mean the value of the fee simple.—*ANGEL v. JAY*, [1911] 1 K. B. 660; 80 L. J. K. B. 458; 103 L. T. 809; 55 Sol. Jo. 140, D. C.

*Annotations:—Reld.* Armstrong v. Jackson, [1917] 2 K. B. 822. *Mentd.* First National Reinsurance Co. v. Greenfield, [1921] 2 K. B. 260.

**1409. — Fraud & surprise.]—**A lease sought to be set aside, as having been obtained by surprise, & fraud, but, under the circumstances, the bill dismissed.—*SMYTH v. SMYTH* (1817), 2 Madd. 75; 56 E. R. 263.

**1410. — Willful misrepresentation.]—***CAVALIERO v. PUGET*, No. 404, *ante*.

**C. Grounds for Refusing**

**1411. Acquiescence by lessor.]—**In 1804, A., tenant for life under a settlement with a power to grant leases for twenty-one years, concurred with B., the next tenant for life, in an agreement to grant to the steward & solr. of A. a lease of part of the lands, etc., in settlement for twenty-one years absolute at a rent fixed upon a valuation, which omitted to estimate certain rights of common annexed to the lands, on the alleged ground that those rights were disputed by the copyholders of

**1401 iii. —.]—***A. G. v. CASHEL CORPN.* (1842), 3 Dr. & War. 294; 2 Con. & Law 1.—*IR.*

**1401 iv. —.]—***MULHALLAN v. MARUM* (1843), 3 Dr. & War. 317.—*IR.*

**1. Premises uninhabitable by reason of smoke.]—***BEARDMORE v. BELLVUE LAND CO.* (1905), Q. R. 15 K. B. 43.—*CAN.*

**m. Crown lease issued through inadvertence.]—***R. v. CRUMB* (1913), 14 Exch. C. R. 230.—*CAN.*

**n. Lease by administrator—Sale required by beneficiaries—Knowledge of lessee.]—**Lease by an administrator to a party having notice, that a sale was required by the persons beneficially interested, set aside.—*DROHAN v. DROHAN* (1809), 1 Ball & B. 185.—*IR.*

**o. Mistake in amount of rent—Knowledge of lessee.]—***GUN v. MCCARTHY* (1883), 13 L. R. Ir. 304.—*IR.*

**p. Landlord unable to give possession.]—***DRUMMOND v. HUNTER*

(1869), 7 Macph. (Ct. of Sess.) 317; 41 Sc. Jur. 203.—*SCOT.*

**q. Premises becoming unsanitary.]—**The tenant of a dwelling-house is entitled to give up the lease on the ground that the house has become unsanitary.—*M'KIMMIE'S TRUSTEES v. ARMOUR* (1899), 2 F. (Ct. of Sess.) 156; 37 Sc. L. R. 109; 7 S. L. T. 246.—*SCOT.*

**r. Inclusion of additional term by one party.]—***VAN DER BYL v. VAN DER BYL & CO.* (1899), 16 S. C. 338.—*S. AF.*

**PART III. SECT. 13, SUB-SECT. 1. - B. 1410 I. Whether ground for rescission—Willful misrepresentation.]—***BABY v. CAVANAGH* (1856), 5 Gr. 378.—*CAN.*

**1410 II. —.]—***ROBINSON v. ESTABROOK & MCALARY* (1909), 4 N. B. Eq. Rep. 168; 7 E. L. R. 131.—*CAN.*

**1410 III. —.]—***ALEXANDER v. HERMAN* (1912), 21 O. W. R. 461; 3 O. W. N. 755; 2 D. L. R. 239.—*CAN.*

**1410 IV. —.]—***ANARULLAH SHEIKH v. KOYLASH CHUNDER BONE* (1881), 1 L. R. 8 Cal. 118; M. C. KOYLASH CHUNDER BONE v. ANARULLAH SHEIKH, 9 C. L. R. 467.—*IND.*

**1410 v. —.]—***PERTAP CHUNDER GHONE v. MOHENIDRANATH PURKAIT* (1889), 1 L. R. 17 Cal. 291; L. R. 16 Ind. App. 233.—*IND.*

**1410 VI. —.]—***LEGGE v. CROKER* (1811), 1 Ball & B. 506.—*IR.*

**1410 VII. —.]—***DONEGAL (MARQUIS) v. GREY* (1849), 13 I. Eq. R. 12.—*IR.*

**1410 VIII. —.]—***OLIVER v. SUTTIE* (1840), 2 Duml. (Ct. of Sess.) 514; 15 Fac. Coll. 551.—*SCOT.*

**t. — Fraud.]—**A mistake had been made by pltf. in inserting a clause; deft. knew its insertion was a mistake, & his action in requiring pltf. to pay taxes, etc., was equivalent to fraud:—*Held*: the lease should be rescinded.—*BOURGOIGNA v. SMITH* (1921), 48 N. B. R. 212; 68 D. L. J. 515.—*CAN.*

**Sect. 13.—Rescission and rectification of leases:**  
**Sub-sect. 1, C.; sub-sect. 2.]**

the manor. In 1809, B., having become tenant for life, on the death of A., executed a lease, according to the agreement.

In 1810, under an Act for inclosure of waste lands, a very large allotment of the waste was made, in respect of the lands leased, the rights of common having been admitted. B. died in 1816, when the reversion of the lands, subject to the lease, vested in C., who accepted the rent reserved till 1821, when he filed a bill to set aside the lease:—*Held*: relief was barred by acts of confirmation & acquiescence.—*SELSEY v. RHOADES* (1827), 1 Bli. N. S. 1; 4 E. R. 774.

**Annotations.**—*Consd.* Baker v. Read (1854), 18 Beav. 398. *Reid.* Nicol v. Vaughan (1832), 6 Bli. N. S. 104; Nicol v. Vaughan (1834), 7 Bli. N. S. 395; Trevelyan v. Charter (1835), 4 L. J. Ch. 209; Rudd v. Sewell (1840), 4 Jur. 882; Waters v. Shaftesbury (1866), 14 L. T. 184; Dunne v. English (1874), L. R. 18 Eq. 524.

**1412. Acquiescence by lessee—Retention of possession.**—A. agreed with P., in consideration of £165,000 to grant to P. a lease of certain mines, as trustee for a joint-stock co. which P. undertook to form; the consideration to be paid partly in shares in the co., partly in money to be raised by calls on the remaining shares. The lease was afterwards executed; & the co. having been formed, with power to sue & be sued by one of the directors, entered into possession & worked the mines & paid part of the purchase-money. Upon A.'s death P., his exor., filed a bill against V., then managing director of the co., for an account & payment of what remained due to A. of the purchase-money. V. answered, & then filed a cross bill on behalf of the co., setting forth various matters as evidence of misrepresentations, concealment, & other frauds practised by A. & P. on the co.; & prayed that the consideration might be declared exorbitant & fraudulent, & that the co. was entitled to a valid lease of the mines at their true reduced value; or that the said agreement might be declared fraudulent & void, & the co. discharged therefrom, & entitled to a lien on A.'s estates, for the payments made to him:—*Held*: the co. were not entitled to any relief from the agreement, by reason of acts & misrepresentations which proceeded from themselves, or were adopted by them & acquiesced in after full knowledge, while they continued to work & exhaust the mines.—*VIGERS v. PIKE* (1842), 8 Cl. & Fin. 562; 8 E. R. 220, H. L.

**Annotations.**—*Consd.* Erlanger v. New Sombbrero Phosphate Co. (1878), 3 App. Cas. 1218. *Reid.* Wilde v. Gibson (1848), 1 H. L. Cas. 605.

**1413.** ———.]—A. leases to C. the T. ferry & all the rights of shore thereto appertaining, with a covenant by C. not to erect any building upon the ferry or landing place without the consent in writing of A. C. obtaining verbal permission from A. commenced building a bridge upon the foreshore; & subsequently, in Jan. 1852, executed a deed tendered to him by A.'s solr., acknowledging in consideration of permission to complete the bridge, the right to insist upon its removal, & agreeing to pay A. the yearly rent of £20 for the concession, & £500 on failure to remove the bridge after notice. C. subsequently discovered that the title to the foreshore upon which the bridge was built was claimed by the Crown, a circumstance in the knowledge of A. in Jan. 1852, obtained a

lease of the soil from the Crown, but continued to pay a rent to both A. & the Crown. Upon notice from A. to remove the bridge, & action brought for the £500 penalty accruing from non-compliance, C. filed a bill against A. to set aside the deed of Jan. 1852, for an account of the rent paid, & in restraint of the action:—*Held*: C. being in ion either under the original lease or the deed of 1852, could not set aside that contract without also giving up possession, he could not have set up the adverse title of the Crown.—*WILLOUGHBY v. CHAMBERLAINE* (1857), 5 W. R. 328.

**1414.** ———.]—It is not open to a lessee who has known for years of operations which he alleges constitute a trespass to make such operations subsequently the ground for an action for rescission of the contract of lease.—*SOUTH AFRICAN BREWERIES, LTD. v. DURBAN CORPN.*, [1912] A. C. 412; 81 L. J. P. C. 217; 106 L. T. 385, P. C.

**1415. Application of Statute of Limitations—Improvident lease by charity.**—Charities are trusts, & are as such within the operation of Real Property Limitation Act, 1833 (c. 27).

Sect. 1 of the statute extends the word "person" to a class of persons as well as to individuals. The poor of a parish are a class of persons within the meaning of that sect.

Lands were given for the benefit of the poor of two parishes, & were placed under the management of the rectors & churchwardens, who, with the consent of the vestries, might lease them. The rectors, etc., executed a lease of them for ever to the president & scholars of a college subject to a fixed rentcharge. Above sixty years after the execution of this lease, the fairness of which at the time of its execution was not impeached, the A.-G. filed an information against the lessees, praying that it might be cancelled:—*Held*: real ptfs. in this suit were the poor of the two parishes; they were in the situation of a *cestui que trust*, the suit by information of the A.-G., who had no independent rights, was a suit by them; they could not maintain such suit unless against their trustees except within twenty years, this was not such a suit; but was a suit against purchasers for value, & therefore that it was barred.—*ST. MARY MAGDALEN, OXFORD (PRESIDENT, ETC.) v. A.-G.* (1857), 6 H. L. Cas. 189; 26 L. J. Ch. 620; 29 L. T. O. S. 238; 21 J. P. 531; 3 Jur. N. S. 675; 10 E. R. 1267, H. L.; *sub nom.* A.-G. v. MAGDALEN COLLEGE, OXFORD, 5 W. R. 716.

**Annotations.**—*Fold.* A.-G. v. Davey (1859), 4 De G. & J. 136; A.-G. v. Payne (1859), 27 Beav. 168; Magdalen Hospital v. Knotts (1878), 8 Ch. D. 709. *Mentd.* Bobbett v. S. E. Ry. (1882), 9 Q. B. D. 424.

**1416.** ———.]—An improvident lease was granted by a charitable corpn. to a trustee for the master:—*Held*: after twenty years' enjoyment under it the rights of the A.-G. to question its validity was barred by the Real Property Limitation Act, 1833 (c. 27).—*A.-G. v. PAYNE* (1859), 27 Beav. 168; 7 W. R. 604; 54 E. R. 65. *Annotation.*—*Fold.* Magdalen Hospital v. Knotts (1878), 8 Ch. D. 709.

*See* CHARITIES, Vol. VIII., p. 354, Nos. 1506–1508.

**SUB-SECT. 2.—RECTIFICATION.**

*See, generally, MISTAKE.*

**1417. Lease of infant's property—Sanctioned by court.**—Where a lease under the sanction of the

501; 9 D. L. R. 519.—*CAN.*

**PART III. SECT. 13, SUB-SECT. 1.—C.**  
**1412 i. Acquiescence by lessee—Retention of possession.**—*GOLDSMITH v. WATKINS* (1914), 16 W. A. L. R. 22.—*AUS.*

**1412 ii.** ———.]—Pltf., lessee, having altered the *status quo*, after learning of his rights:—*Held*: he was not entitled to rescission.—*RUFF v. McFEE* (1912), 23 O. W. R. 597; 4 O. W. N.

**PART III. SECT. 13, SUB-SECT. 2.**  
*a. General rule.*—*MORTIMER v.*

ct. had been deliberately entered into & formally executed for the benefit of an infant, a bill for the rectification of the lease, on the ground that it contained an improper demise of trade fixtures, & an improper covenant by the lessees to render up such fixtures at the end of the term; also, that it did not reserve to the outgoing lessee the growing crops, etc., conformably with the custom of the country, was dismissed with costs.—*SEATON v. STANILAND* (1862), 4 Giff. 61; 7 L. T. 347; Jur. N. S. 69; 66 E. R. 620.

**1418. Unilateral mistake—Option of rectification in lieu of rescission.]**—Where there is mutual mistake in a deed or contract, the remedy is to rectify by substituting the terms really agreed to. Where the mistake is unilateral the remedy is not rectification but rescission, but the ct. may give to a deft. the option of taking what pltf. meant to give in lieu of rescission. Pltf. wrote a letter offering to deft. to make a lease to him of a portion of a block of three houses, consisting of the first, second, third, & fourth floors of all three houses, at a rent of £500 a year. Deft. wrote in answer, accepting the offer; & a lease was executed whereby all the upper floors of the block were demised by pltf. to the deft. at the rent of £500. Pltf. alleged that the first floor of one of the houses was included in the offer, & in the lease, by mistake, & that he always intended to reserve such first floor for his own use. Deft. denied that he accepted the offer, or executed the lease, under any mistake. The ct. having found upon the evidence that a common mistake was not sufficiently proved, but that mistake on the part of pltf. was, gave judgment for rescission with an option to deft. to accept rectification instead.—*PAGET v. MARSHALL* (1884), 28 Ch. D. 255; 54 L. J. Ch. 575; 51 L. T. 351; 49 J. P. 85; 33 W. R. 608.

*Annotations*:—*Expld.* May v. Platt, [1900] 1 Ch. 616. *Refd.* North v. Porcival (1898), 78 L. T. 615.

**1419. Common mistake.]**—Where in a grant or devise the description of parcels is made up of more than one part, & one part is true & the other false, then, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected as *falsa demonstratio*, & will not vitiate the grant or devise. The doctrine is not to be confined to cases where the first part of the description is true & the latter untrue, it being immaterial in what part of the description the *falsa demonstratio* occurs.

Rooms on the second floor of Nos. 13 & 14, Old Bond Street, were demised, together with free ingress & egress for the lessee "through the stair-

case & passages of No. 13" to & from the demised premises; there was no staircase in No. 13 leading to the demised premises, but there was a staircase in No. 14:—*Held*: there had been a common mistake, the intention of the parties being that the lessee should have the use of the staircase of No. 14, & accordingly the doctrine of *falsa demonstratio* did not apply; but the ct. ordered the lease to be rectified by the substitution of the staircase of "No. 14" for that of "No. 13."—*COWEN v. TRUEFIT, LTD.*, [1899] 2 Ch. 309; 68 L. J. Ch. 563; 81 L. T. 104; 47 W. R. 601; 43 Sol. Jo. 622.

*Annotations*:—*Refd.* Eastwood v. Ashton, [1915] A. C. 900; Watcham v. East Africa Protectorate, [1919] A. C. 533; Craddock v. Hunt, [1923] 2 Ch. 136. *Mentd.* Anderson v. Berkeley, [1902] 1 Ch. 936.

**1420. Lease containing arbitration clause—Whether rectification included.]**—By a deed, dated in 1901, pltf. co. leased its undertaking, business, & goodwill to the M. co. for a term of twenty-one years, subject to certain powers of determination & renewal therein mentioned. The deed contained a proviso giving an option to the M. co. & the L. co., or either of them, of purchasing the undertaking of pltf. co. The deed also contained an arbn. clause which provided that "any dispute, difference, or question which may at any time arise between all or any of the parties hereto touching the construction, meaning or effect of these presents, or any clause or thing herein contained, or the rights or liabilities of the said parties respectively, or any of them under these presents or otherwise howsoever in relation to these presents shall be referred" to arbn. In 1903 the M. co. & the L. co. agreed to amalgamate, & for that purpose they were respectively wound up, & a new co., deft. co., was formed to take over their undertakings & assets. By a deed dated in 1905 & made supplemental to the deed of 1901, deft. co. was substituted for the M. & L. cos. in the latter deed, & undertook the obligations, & became entitled to the benefits of those cos. under that deed. Questions having arisen with reference to the option to purchase given by the deed of 1901, pltf. co. brought an action claiming by its writ (*inter alia*) a declaration that the option was void & of no effect; in the alternative, that is, if the option was not void, a declaration that in ascertaining the price to be paid for the demised premises on the purchase thereof under the option the value of a certain obligation should be taken on a particular footing; as an alternative to the latter, rectification of the lease.

On a motion by deft. co. under Arbitration Act, 889 (c. 49), s. 4, that the proceedings in the action might be stayed in order that the questions raised

*SHORTALL* (1842), 2 Dr. & War. 363.—*IR.*

b. —.]—The ct. cannot rectify or cancel a deed or agreement because its terms operate differently from what the parties intended owing to their mistake as to the general law applicable to the transaction. Rectification is only applicable to a case in which there is an agreement & a subsequent failure to express it as made.—*JACKSON v. STOFFORD*, [1923] 2 I. R. 7.—*IR.*

c. *Unilateral mistake.*—Pltfs. having a term of ten years, commencing from June 1, 1892, in a piece of land in S., sublet a portion thereof for a term of ten years from May 1, 1893. They had previously agreed to let the premises for two years & five months, with an option for an extension to six or nine years. In the year 1899 they discovered the mistake:—*Held*: pltfs. were entitled to a rectification.—*WEST END CLUB v. HORWOOD* (1900), 8 Nfld. L. R. 371.—*NFLD.*

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d. *Common mistake.*—A lease was in the short form & contained in the printed form a covenant "to pay taxes." There was also a later covenant in writing "to pay taxes on any building that he, the lessee, may hereafter see fit to erect." The judge found that the first covenant, in print, had been retained in the lease by mistake:—*Held*: the lease should be rectified by striking out the printed words "to pay taxes."—*BOOTH v. CALLOW* (1913), 18 B. C. R. 499.—*CAN.*

e. —.]—*HORROWES v. DELANEY* (1889), 24 L. R. Ir. 503.—*IR.*

f. —.]—*KEILEY v. KAVANAGH* (1898), 17 N. Z. L. R. 449.—*N.Z.*

g. *Taxes more than stated.*—*COATES v. BACON* (1874), 21 Gr. 21.—*CAN.*

h. *Variation between agreement & lease—Admissibility of parol evidence.*

D. & F. made a written agreement for a lease, & a lease was executed according to the expressed terms of the

agreement. In a suit, instituted by D., to reform the lease, by introducing a new term:—*Held*: parol evidence was not admissible to show, that the lease, though in strict conformity with the terms of the written agreement, was contrary to its spirit, as there was something dehors the contract agreed upon between the parties, yet omitted in the lease.—*DAVIES v. FITTON* (1842), 2 Dr. & War. 225.—*IR.*

k. —.]—*WILLIAMS v. PEARCE* (1875), 3 C. A. 142; 1 J. R. N. S. 15; *affo.* 2 J. R. 156.—*N.Z.*

l. *Misdescription of land.*—*CLAYTON v. MORRISON* (1873), 2 C. A. 263.—*N.Z.*

m. *Lease in excess of power—Rectification by separating excess.*—Where the terms of the lease exceeded the powers contained in the settlement:—*Held*: the lease would be good in equity, the excess being separable; & the ct. would therefore rectify it by cancelling the objectionable

**Sect. 13.—Rescission and rectification of Sub-sect. 2. Part IV. Sects. 1, 2 & 3: Sub-sect. 1.]**

therein might be referred to arbn. :—*Held* : (1) the question as to rectification of the lease of 1901 was not one which fell within the arbn. clause ; (2) the questions as to the construction of the option to

purchase & rectification were so intimately connected that it was convenient that they should be dealt with together by the ct. ; & the application to stay the proceedings in the action must be refused.—*PRINTING MACHINERY CO., LTD. v. LINOTYPE & MACHINERY LTD.*, [1912] 1 Ch. 566 ; 81 L. J. Ch. 422 ; 106 L. T. 743 ; 28 T. L. R. 224 ; 56 Sol. Jo. 271.

## Part IV.—Underleases.

### SECT. 1.—IN GENERAL.

**1421. Whether underlease created—Lease to underlessor subsequent to underletting—Question of fact.]**—If a person comes in as an under-tenant, before any lease was granted to the person of whom he took the premises, & that person afterwards take a lease, if there is no evidence that he knew of the lease, it will be for the jury to say whether he is not an undertenant, & not an assignee of the lease.—*TORRIANO v. YOUNG* (1833), 6 C. & P. 8, N. P.

*Annotation* :—*Mentd.* *Martin v. Gilham* (1837), 7 Ad. & El. 540.

**1422. Title of lessor—Constructive notice—What amounts to.]**—Bequest of leaseholds to a married woman "for her whole & sole use during her life, free from the control of any future husband, & not to be sold or mortgaged, & after her decease, to her heir or heirs, & provided her child or children should die before her, then that she may, at her decease, leave them to whom she will for the remainder of the term." The husband & wife demised the premises to a purchaser, & the purchaser demised them to another. The wife then filed her bill to have the underlease set aside :—*Held* : the underlessees from the purchaser must be treated as having notice of the wife's interest ; & the underlease to the purchaser should be set aside, but without costs.—*STEEDMAN v. POOLE* (1847), 6 Hare, 193 ; 11 Jur. 449 ; 67 E. R. 1136 ; *sub nom.* *STEADMAN v. POOLE*, 16 L. J. Ch. 348 ; *sub nom.* *STEDMAN v. POOLE*, 9 L. T. O. S. 218.

*Annotations* :—*Mentd.* *King v. Lucas* (1883), 23 Ch. D. 712 ; *Harrison v. Harrison* (1888), 13 P. D. 180.

*See, also*, Part II., Sect 6, *ante*.

**1423. Evidence of fact of undertenancy—What amounts to.]**—In an ejectment against two defts. for premises of which the husband of one had formerly been tenant to plffs., evidence that after his death, above twenty years ago, his widow had remained for some time in possession of the premises, but that within the twenty years, the premises being occupied by the other deft., her son-in-law, she admitted that she had paid rent :—*Held* : evidence that the other deft. was undertenant to her.—*HOGG v. NORRIS & BERRINGTON* (1860), 2 F. & F. 246, N. P.

**1424. Whether a "lease."]**—The import of the term "lease" is well defined, & includes a lease by a leaseholder as much as one by a freeholder. Consequently, to speak of an underlease as a "lease" is not necessarily a misdescription, especially where it appears that the purchaser

could have ascertained the fact from the particulars & conditions of sale & other documents furnished by the vendors.—*CAMBERWELL & SOUTH LONDON BUILDING SOCIETY v. HOLLOWAY* (1879), 13 Ch. D. 754 ; 49 L. J. Ch. 361 ; 41 L. T. 752 ; 28 W. R. 222.

*Annotations* :—*Reid.* *Broom v. Phillips* (1896), 74 L. T. 459. *Mentd.* *Blenkhorn v. Penrose* (1880), 43 L. T. 668 ; *Re Boyfus & Masters's Contract* (1888), 39 Ch. D. 110.

**1425. —.]**—Houses offered for sale were stated in the particulars to be held for ninety years from June 24, 1844, at a ground rent of £21. The fourth condition provided that the title should commence "with the lease under which the vendor holds dated July 11, 1845." The fifth condition stated that "the description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." The vendor was in fact entitled to an underlease for the residue of the term of ninety years less two days at a peppercorn rent, & the owner of the two days could not be found :—*Held* : the representation that the property was held by lease when it was in fact held by underlease was a fatal misdescription, unless it was cured by the fifth condition, & the fifth condition did not apply for that "error in the description of the property" meant a misdescription of the corporeal property, not a mistake in the description of the vendor's title.—*Re BEYFUS & MASTERS'S CONTRACT* (1888), 39 Ch. D. 110 ; 59 L. T. 740 ; 53 J. P. 293 ; 37 W. R. 261 ; 4 T. L. R. 590, C. A.

*Annotations* :—*Mentd.* *Debenham v. Sawbridge*, [1901] 2 Ch. 98 ; *Lee v. Rayson*, [1917] 1 Ch. 613.

**1426. —.]**—Under a contract of sale a vendor agreed to sell two messuages described as held by an indenture of lease dated Aug. 1, 1872, for the unexpired residue of the term of eighty years computed from Mar. 15, 1866. The title was to commence with the lease ; & the purchaser was to be deemed to buy with full notice thereof. The lease contained covenants referring to the lessor & his superior landlord. The lease was in fact an underlease :—*Held* : as the purchaser could not be considered to have had notice that the property she was intending to purchase was in fact held by an underlease, the representation that it was held by a lease was a fatal misdescription, & a good title had not therefore been shown.—*BROOM v. PHILLIPS* (1896), 74 L. T. 459.

**1427. Whether a "derivative" lease.]—Qu. :** whether "underlease" & "derivative lease" are

provision.—*COVERLID v. JOEL* (1879), O. B. & F. 138.—N. Z.

*n. Acceptance of rent after discovery of mistake.]*—A lessor is not estopped from seeking to rectify a mistake in the description of the land in his lease by having received the whole rent since the discovery of the mistake, if at the

time he was still asserting the mistake.—*FARELLEY v. EVANSON* (1886), 5 N. Z. L. R. 155 (S. C.).—N. Z.

*o. Misrepresentation—In advertisement—Not ground for rectification.]*—*HAMILTON v. MONTROSE (DUKE)* (1906), 8 F. (Ct. of Sess.) 1026 ; 43

Sc. L. R. 764 ; 14 S. L. T. 209.—SCOT.

### PART IV. SECT. 1.

*p. Whether underlease created.]*—*REYNOLDS v. METCALF* (1863), 12 C. P. 382.—CAN.

*q. Whether new underlease created—Raising sub-tenant's rent.]*—Raising

convertible terms.—*BRUMFIT v. MORTON* (1857), 30 L. T. O. S. 98; 3 Jur. N. S. 1198.

**What amounts to underlease—Assurance of less than lessee's term.]—***See Nos. 1430–1434, post.*

**—Assurance for whole of lessee's term.]—***See Nos. 1435–1445, post.*

**1428. Whether underlessee an owner—***Metro-polis Management Act, 1855 (c. 120), ss. 105, 250.]—Where a lessee sub-lets the premises at the same rent as he was liable for to his landlord, & though collecting the rent from the sub-lessee pays it over to his own landlord, & derives no benefit or profit therefrom for himself, he is not liable to contribute as "owner" to the expense of paving the street by the district board.—*WALFORD v. HACKNEY BOARD OF WORKS* (1894), 43 W. R. 110; 11 T. L. R. 17; 15 R. 10, D. C.*

**1429. —Public Health (London) Act, 1891 (c. 76), s. 141.]—**Where the lessee of premises not let at a rack rent has sub-let them for the whole term, less a few days, the rent reserved & the covenants & conditions being the same as in the original lease, the sub-lessee & not the lessee is the "owner" of the premises within the above Act.—*TRUMAN, HANBURY, BUXTON & Co. v. KERSLAKE*, [1894] 2 Q. B. 774; 63 L. J. M. C. 222; 58 J. P. 766; 43 W. R. 111; 10 T. L. R. 668; 10 R. 489, D. C.

## SECT. 2.—UNDERLEASE FOR LESS THAN LESSEE'S TERM.

**1430. General rule.]—**An assurance for a period less than the whole term is an underlease & not an assignment (*A. L. SMITH, L.J.*).—*BRYANT v. HANCOCK & Co.*, [1898] 1 Q. B. 716; 67 L. J. Q. B. 507; 78 L. T. 397; 62 J. P. 324; 46 W. R. 386; 14 T. L. R. 320, C. A.; *affd.*, [1899] A. C. 442, H. L.

**Annotations:—***Expld.* *John Bros. Abergarw Brewery Co. v. Holmes*, [1900] 1 Ch. 188. *Consd.* *Mumford v. Walker* (1901), 71 L. J. K. B. 19; *Wilson v. Twamley*, [1904] 2 K. B. 99. *Distd.* *South of England Dairies v. Baker*, [1906] 2 Ch. 631. *Refd.* *Holloway v. Hill*, [1902] 2 Ch. 612; *Villiers v. Oldcorn* (1903), 20 T. L. R. 11; *Teape v. Douse* (1905), 92 L. T. 319. *Mentd.* *Palothorpe v. Home Brewery Co.* [1906] 2 K. B. 5; *Williams v. Lassell & Sharman* (1906), 22 T. L. R. 443.

**1431. Lease for life—By lessee for lives.]—***ANON.* (undated), *Plowd. Queries* 11; 75 E. R. 872.

**1432. Subsequent lease for remainder of term to same lessee—To commence on termination of first lease.]—***ANON.* (undated), *Plowd. Queries* 59; 75 E. R. 940.

**1433. ———.]—***HYDE v. WARDEN*, No. 1470, *post*.

**1434. Underlease to commence on death of underlessor—Underlessor dying within the time.]—**An underlease made by a lessee for years determinable on a future day certain & to commence immediately on his death is good; he dying within the time.—*CHILD v. BAYLIE* (1622), as reported in *Cro. Jac.* 459; 79 E. R. 393.

**Annotations:—***Mentd.* *Grig v. Hopkins* (1661), 1 Sid. 37; *Love v. Windham* (1670), 1 Sid. 450; *Burgis v. Burgis* (1673), 1 Mod. Rep. 115; *Huntbatch v. Lee* (1676), 2 Keb. 750; *Gibbons v. Summers* (1681), 3 Lev. 22; *Howard v. Norfolk* (1682), 3 C. as in Ch. 14; *Lamb v. Archer* (1692), *Carth.* 266; *Scattergood v. Edge* (1699), 12 Mod. Rep. 278; *Stanley v. Leigh* (1732), 2 P. Wms. 686; *Thellusson v. Woodford* (1799), 4 Ves. 227.

## SECT. 3.—UNDERLEASE FOR WHOLE OF OR MORE THAN LESSEE'S TERM.

### SUB-SECT. 1.—IN WRITING.

Assignment of leases, generally, *see Part XXI, post*.

Parol underleases for whole term, *see Sub-sect. 2, post*.

**1435. Operation as assignment.]—**If a termor for years makes a lease for a time exceeding his interest it shall operate as an assignment.—*HICKS v. DOWNING* (1696), 1 Ld. Raym. 99; 3 Ld. Raym. 236; 1 Salk. 13; 91 E. R. 962.

**Annotations:—***Refd.* *Wollaston v. Hakewill* (1841), 3 Man. & G. 297; *Beardmore v. Wilson* (1868), 38 L. J. C. P. 91.

**1436. ———.]—**The lessee of two farms agreed with A. that he should have them during the leases for the same, A. to remain tenant to the lessee during the leases; & at the leaving of the farms A. was to be paid for the fallows & dung. A. took possession, & paid one year's rent growing due after the date of the agreement to the lessee, who afterwards distrained for rent in arrear: *Held*: this distress could not be supported, as the agreement operated as an absolute assignment of all the lessee's interest in the farms.—*PARMENTER v. WEBBER* (1818), 8 Taunt. 593; 2 Moore, C. P. 656; 129 E. R. 515.

**Annotations:—***Follid.* *Lewis v. Baker*, [1903] 1 Ch. 46. *Refd.* *Pluck v. Digges* (1831), 5 Bli. N. S. 31; *Wollaston v. Hakewill* (1841), 3 Man. & G. 297; *Pollock v. Stary* (1847), 9 Q. B. 1033; *Beardman v. Wilson* (1868), L. R. 4 C. P. 57; *Hyde v. Warden* (1877), 3 Ex. D. 72. *Mentd.* *Presee v. Corrie* (1828), 2 Moo. & P. 57; *Passcoe v. Passcoe* (1837), 3 Bing. N. C. 898; *Barrett v. Rolph* (1845), 14 M. & W. 348.

**1437. ———.]—**A lease having been granted for lives, with covenant for perpetual renewal, the grantees demised the lands by an indenture having all the forms & subject to all the obligations of a common lease, with covenants for payment of rent, & powers reserved of distress & re-entry for nonpayment, covenant for perpetual renewal, etc.; the *habendum* was for the same lives as in the original lease, but this fact did not appear by the indenture of lease. The rent being in arrear, & a distress thereupon taken for rent, upon replevin: *—Held*: the whole interest having been granted, it operated as an assignment.—*PLUCK v. DIGGES* (1831), 5 Bli. N. S. 31; 2 Dow. & Cl. 180; 5 E. R. 219, H. L.

**1438. ———.]—**A lease was granted in 1750 for ninety-nine years, if certain parties should so long live. The lessees in 1818 demised the premises to P. for sixty-two years, from Mar. 25, 1821, if their interest should so long continue, subject to a rent of £42 & various covenants, with a proviso for re-entry in case of default. P. had already the reversion in fee, subject to a mtg. granted by him before the last-mentioned demise. By lease & release executed in 1820, to which the mtg. was a party, P. in consideration of a sum of money conveyed the premises in fee to a purchaser, to whom the mtg. also assigned his term; & it was stipulated that the purchaser should retain £300 of the purchase-money, upon trust, that, if P. should pay the £42 rent & perform the covenants contained in the lease of 1818, the purchaser should pay over to him the £300 as the expiration of the term or extinguishment of the lease of 1750, & interest in the meantime: *—Held*: the

the rent of a sub-tenant is not a sub-letting.—*ROYAL TRUST CO. v. BELL* (1909), 12 W. L. R. 546.—*CAN.*

## PART IV. SECT. 3, SUB-SECT. 1.

**1435 I. Operation as assignment.]—**

Where the habendum of a mtg. of a lease reserves the reversion of a day generally without stating it to be the last day of the term, it is insufficient to give the instrument the character of a sub-lease.—*JAMISON v. LONDON*

& CANADIAN LOAN & AGENCY CO. (1897), 27 S. C. R. 435.—*CAN.*

**1435 II. ———.]—***PALMER v. SPRING* (1863), 14 I. Ch. R. 380.—*IR.*



*Seet. 3.—Underlease for whole of or more than lessee's term: Sub-sects. 1 & 2. Sect. 4.]*

deed of 1818 was an assignment of all the interest of the then lessees to P., & by the conveyance of 1820, that interest, as well as the reversion in fee, passed to the purchaser, & the mtge. being at the same time put an end to, the term became merged in the inheritance; & consequently, as soon as the term became vested in the purchaser, P. was discharged from the rent & covenants, & entitled to the £300.—*THORN v. WOOLLCOMBE* (1832), 3 B. & Ad. 586; 110 E. R. 213.

*Annotation:—Expld. & Distd. Baker v. Gostling* (1834), 1 Bing. N. C. 19.

**1439.** —[.]—Lessee for a term of years under-leased for a term longer than his own, the under-lessee covenanting to pay rent to lessee:—*Held*: the exor. of lessee might sue the underlessee for rent accruing during the continuance of lessee's term.—*BAKER v. GOSTLING* (1834), 1 Bing. N. C. 19; 4 Moo. & S. 539; 3 L. J. C. P. 292; 131 E. R. 1024.

*Annotations:—Refd. Pollock v. Stacy* (1847), 9 Q. B. 1033. *Mentd. Williams v. Hayward* (1859), 1 E. & E. 1040; *Baynton v. Morgan* (1880), 21 Q. B. D. 101.

**1440.** —[.]—In replevin, deft. avowed for rent in arrear, pltf. pleaded in bar, that by the demise in the avowry mentioned, the avowant demised & transferred the premises to pltf. for all the residue of the avowant's estate, term, & interest in the same, & that the avowant had not, at the time when, etc., or at any time during the demise, any reversionary estate, term or interest in the same:—*Held*: the plea alleged with sufficient certainty that the avowant at the making of the demise, did not reserve any reversion in himself.—*PASCOE v. PASCOE* (1837), 3 Bing. N. C. 898; 3 Hodg. 188; 5 Scott, 117; 6 L. J. C. P. 322; 132 E. R. 656.

*Annotation:—Consd. Jolly v. Arbuthnot* (1859), 4 De G. & J. 224.

—[.]—In covenant upon an indenture of lease for nonpayment of rent & nonreparation, the declaration alleged, that all the estate of the lessee, in a great part of the demised premises, came to & vested in deft. by assignment, whereupon & whereby deft. became possessed. Deft. pleaded, that the said part of the premises did not come to or vest in her by assignment:—*Held*: the allegation was sustained by showing that A., an assignee of the term, demised part of the premises, the rent sued for being specifically reserved in respect of such part, to B. for a period exceeding the then remainder of the term, reserving a new rent, payable to himself, exceeding in amount that reserved by the original lease, & that deft. was executrix of the exor. of B.; although deft. had not entered, or done any act beyond taking probate of B.'s will.—*WOLLASTON v. HAKEWILL* (1841), 3 Man. & G. 297; 3 Scott, N. R. 593; 10 L. J. C. P. 303; 133 E. R. 1157.

*Annotations:—Consd. Beardman v. Wilson* (1868), L. R. 4 C. P. 57; *Rendall v. Andrews* (1892), 61 L. J. Q. B. 630.

**1442.** —[.]—The doctrine of estoppel between landlord & tenant is founded upon the principle that a lessee, having accepted a lease, may not plead to the action of his lessor *nil habuit in tenementis*. But the lessee may plead to such an action that the lessor had an interest at the date of the lease, but that such interest had determined before the alleged cause of action arose. Therefore, if a termor affect to grant a lease for a term exceeding his own term in duration, & to reserve an annual rent, that would operate as an assignment of his term, & there would be no estoppel between him & the person to whom he made

such assignment; & accordingly, it would be doubtful whether the assignor would have any remedies for recovering the rent.—*LANGFORD v. SELMES* (1857), 3 K. & J. 220; 3 Jur. N. S. 859; 69 E. R. 1089.

*Annotation:—Refd. Bryant v. Hancock*, [1898] 1 Q. B. 716.

**1443.** —[.]—An underlease of the whole term amounts to an assignment.

Action by A., the assignee of the reversion of a lease on a covenant to repair. Deft. was the representative of W., who was an assignee of the lease, & had made an underlease ending at the same date as the original term:—*Held*: the underlease amounted to an assignment, & A. was not entitled to recover.—*BEARDMAN v. WILSON* (1868), L. R. 4 C. P. 57; 38 L. J. C. P. 91; 19 L. T. 282; 17 W. R. 54.

*Annotations:—Apld. Lewis v. Baker*, [1905] 1 Ch. 46. *Consd. Hallen v. Spaeth*, [1923] A. C. 684. *Refd. Hyde v. Warden* (1877), 3 Ex. D. 72; *Bryant v. Hancock*, [1898] 1 Q. B. 716.

**1444.** —[.]—(1) As a reversionary lease merely creates an *interesse termini* until entry thereunder, it does not enlarge the term of the original lease.

(2) A sub-lease for a period co-extensive with or longer than, the sub-lessor's term operates as an assignment & the sub-lessor cannot distrain for rent in arrear.—*LEWIS v. BAKER*, [1905] 1 Ch. 46; 74 L. J. Ch. 39; 91 L. T. 744; 21 T. L. R. 17.

*Annotation:—As to* (1) *Refd. Llangattock v. Watney*, Combe, *Reid*, [1910] 1 K. B. 236.

*See, also*, No. 42, *ante*.

**1445. Redemise to lessor—Surrender—Though rent reserved.**—[.]—If a lessee for years redemise his whole term to the lessor, with a reservation of rent, it operates as a surrender of the original lease; & therefore he cannot maintain debt for rent against the exor. of the original lessor, but must seek relief in equity; but if a lessee assign his whole term to a stranger, he may bring debt for the rent reserved on the contract against him or his personal representatives.—*LOYD v. LANGFORD* (1677), 2 Mod. Rep. 174; 86 E. R. 1008; *sub nom. FLOYD v. LANGFIELD*, Freem. K. B. 218.

*Annotations:—Consd. Baker v. Gostling* (1834), 1 Bing. N. C. 19. *Refd. Pluck v. Digges* (1831), 5 Bl. N. S. 31.

#### SUB-SECT. 2.—BY PAROL.

Assignment of leases, generally, *see* Part XXI., *post*.

Underleases by deed for whole term, *see* Sub-sect. 1, *ante*.

**1446. Whether an assignment—Lessee reserving rent to himself.**—[.]—If the lessee reserves the rent to himself on granting over [by parol], it is an underlease, & not an assignment, though he parts with the whole term.—*POULTNEY v. HOLMES* (1720), 1 Stra. 405; 93 E. R. 596, N. P.

*Annotations:—Consd. Palmer v. Edwards* (1783), 1 Doug. K. B. 187, n.; *Pluck v. Digges* (1831), 5 Bl. N. S. 31; *Baker v. Gostling* (1834), 1 Bing. N. C. 19. *Distd. Barrett v. Rolph* (1845), 14 M. & W. 348. *Consd. Pollock v. Stacy* (1847), 9 Q. B. 1033. *Refd. Preece v. Corrie* (1828), 5 Bing. 24; *Cottee v. Richardson* (1851), 7 Exch. 143.

**1447.** —[.]—Avowant, who had a term which expired on Nov. 11, 1826, let the premises orally from Sept. 11 to Nov. 11, in that year, for £270, payable immediately:—*Held*: this was a lease, of which parol evidence might be given, & not an assignment requiring a writing; but being a demise of the whole of avowant's interest, he had no right to distrain.—*PREECE v. CORRIE* (1828), 5 Bing. 24; 2 Moo. & P. 57; 6 L. J. O. S. C. P. 205; 130 E. R. 968.

*Annotations:—Consd. Pascoe v. Pascoe* (1837), 3 Bing. N. C.

898: *Lewis v. Baker*, [1905] 1 Ch. 46. *Refd.* *Hooker v. Nye* (1834), 1 Cr. M. & R. 258; *Angell v. Harrison* (1847), 17 L. J. Q. B. 25; *Pollock v. Stacy* (1847), 9 Q. B. 1033; *Jolly v. Arbuthnot* (1859), 4 De G. & J. 324.

**1448.** — *Intention of parties.*—*Semble*: an agreement by a lessee for the transfer of his interest in the term, not exceeding three years, which, not being in writing, is invalid as an assignment by Stat. Frauds, cannot operate as an underlease.

It is very difficult to say that, because an agreement is by parol, & therefore cannot operate as an assignment, it is to be construed to give a less interest than the parties intended (*PARKE, B.*).—*BARRETT v. ROLPH* (1845), 14 M. & W. 348; 14 L. J. Ex. 308; 153 E. R. 509.

*Annotations*.—*Consd.* *Pollock v. Stacy* (1847), 9 Q. B. 1033. *Refd.* *Cottee v. Richardson* (1851), 7 Exch. 143.

**1449.** — *Where a party, entitled to a term in land, demises the land to another, at a weekly rent, for the whole of such term, & it is the intention of the two to create the relation of landlord & tenant, use & occupation may be brought for the whole of such term, although the lessee has given a week's notice to quit before the expiration of the term, & has quitted accordingly. Such a demise will not be deemed an assignment, against the intention of the parties, though nothing be left in the party demising.*—*POLLOCK v. STACY* (1847), 9 Q. B. 1033; 16 L. J. Q. B. 132; 8 L. T. O. S. 388; 11 Jur. 267; 115 E. R. 1570.

*Annotations*.—*Expld.* *Bardman v. Wilson* (1868), L. R. 4 C. P. 57. *Refd.* *Cottee v. Richardson* (1851), 7 Exch. 143.

**1450.** — *Payment of rent by lessee—Accepted by lessor.*—A. let premises to B. for a term which expired at Lady Day, 1858. B. had underlet them for the whole term to C., who continued in possession; & B. afterwards sued him for the half-year's rent accruing at Michaelmas, 1858. The only evidence to show that B. still continued tenant of the premises to A. was, that, after action brought, he paid to A. & A. accepted the half-year's rent which would have been due from him assuming his tenancy to have been still subsisting:—*Held*: there was evidence for the jury that B.'s tenancy under A. continued, & consequently that the action was maintainable.—*LEVY v. LEWIS* (1861), 9 C. B. N. S. 872; 30 L. J. C. P. 141; 7 Jur. N. S. 759; 9 W. R. 388; 112 E. R. 313, Ex. Ch.

*Annotations*.—*Consd.* A. G. v. De Keyser's Royal Hotel, [1920] A. C. 508. *Refd.* *Hurley v. Hanrahan* (1867), 15 W. R. 990.

#### SECT. 4.—WHO MAY GRANT UNDERLEASES.

**1451. Yearly tenant.**—A tenant from year to year may make a lease for twenty-one years.—*MACKAY v. MACKRETH* (1785), 2 Chit. 461; 4 Doug. K. B. 213; 99 E. R. 846.

**1452.** — *PIKE v. EYRE*, No. 1492, *post*.

**1453.** — *A tenant from year to year, underletting from year to year, has a reversion which entitles him to distrain.*—*CURTIS v. WHEELER* (1830), 4 C. & P. 196; *Mood. & M.* 493, N. P.

*Annotations*.—*Apld.* *Oxley v. James* (1844), 13 M. & W. 209. *Mentd.* *Mercer v. Whall* (1845), 5 Q. B. 447.

**1454.** — *OXLEY v. JAMES*, No. 1313, *ante*.

**1455.** — *A tenant from year to year who has sub-let to a tenant from year to year, has a sufficient reversion to support a distress.*

It is a good sub-demise. Provided his original tenancy from year to year continues so long, he has always a reversion for the indefinite term, which may continue for years (*PARKE, B.*).—*COLLINS v. OZANNE* (1847), 10 L. T. O. S. 207.

**1456. Lessee of yearly tenant.**—*OXLEY v. JAMES*, No. 1313, *ante*.

**1457. Tenant at will.**—An action for use & occupation may be maintained by a grantee of an annuity after a recovery in ejectment against a tenant, who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee, & down to the day of the demise in the ejectment; but not afterwards.

If a tenant at will lease, it determines the will (*BULLER, J.*).—*BIRCH v. WRIGHT* (1786), 1 Term Rep. 378; 99 E. R. 1148.

*Annotations*.—*Consd.* *Pulteney v. Warren* (1801), 6 Vos. 73; *Re Brindley*, *Ex p. Hankey* (1829), Mont. & M. 247. *Refd.* *Donn v. Cartwright* (1803), 4 East. 29; *R. v. Herston-moneaux* (1827), 7 B. & C. 531; *Backworth v. Slingson* (1835), 5 Tyr. 344; *Doe d. Chadborn v. Green* (1839), 9 Ad. & El. 658; *Brydges v. Lewis* (1842), 3 Q. B. 803; *Doe d. Clarke v. Smuridge* (1845), 7 Q. B. 957; *Standen v. Christmas* (1847), 9 L. T. O. S. 169; *Blundell v. Drummond* (1848), 14 Jur. 573, n.; *Cattley v. Arnold*, *Banks v. Arnold* (1859), 1 John. & H. 651; *Wilkesdon Overseers v. Paddington Overseers* (1863), 3 B. & S. 593; *Do. Nichols v. Saunders* (1870), 22 L. T. 661; *Horn v. Board*, [1912] 3 K. B. 181; A. G. v. De Keyser's Royal Hotel, [1920] A. C. 508; *Wheeler v. Keeble* (1914), Ltd., [1920] 1 Ch. 57; *R. v. Paulson*, [1921] 1 A. C. 271. *Mentd.* *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Doe d. Fisher v. Giles* (1829), 5 Bing. 421; *R. v. St. Giles without Cripplegate* (1863), 4 B. & S. 509; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

**1458.** — *As against himself.*—C., the purchaser of land, was let into possession before execution of a conveyance. He let in his son as tenant at will. The son occupied, & built a cottage on, the land. Afterwards C. took a conveyance from the vendor; & some time after, he mortgaged the land. The son continued to occupy the premises in all respects as at first, till his death, which happened within twenty-one years of his entry. The son's widow continued to occupy till the expiration of twenty-one years from her husband's entry: *Held*: an action of ejectment afterwards brought against her was barred by Real Property Limitation Act, 1833 (c. 27), ss. 2, 7; for the tenancy at will was not determined by the father's taking a conveyance; & if it had, in point of law, been so determined by that event, or by the mtge., a tenancy by sufferance must be deemed to have commenced from such determination, there being no evidence of a new tenancy at will; & the tenancy, altogether, had continued more than twenty years from the end of the first year.

A tenant at will cannot, as against the landlord to whom he is tenant, constitute another person tenant at will; but he can make a tenant at will as against himself (*PATERSON, J.*).—*Doe d. Goody v. CARTER* (1847), 9 Q. B. 803; 18 L. J. Q. B. 305; 8 L. T. O. S. 409; 11 Jur. 285; 115 E. R. 1505.

*Annotations*.—*Mentd.* *Doe d. Carter v. Harvard* (1849), 18 L. J. Q. B. 306; *Doe d. Palmer v. Eyre* (1851), 17 Q. B. 336; *Randall v. Stevens* (1853), 2 E. & B. 641; *Wimbleton & Putney Commons Conservators v. Nicol* (1894), 10 T. L. R. 247.

**1459.** — *As against landlord.*—*Doe d. Goody v. CARTER*, No. 1458, *ante*.

**1460. Tenant at sufferance.**—Ejectment may be brought by a mtgee., without giving notice to quit, against one who was let into possession as tenant

#### PART IV. SECT. 3, SUB-SECT. 2.

**1448 i. Whether an assignment—Intention of parties.**—A lessee entered into a parol agreement for a sub-lease, which was partly performed, for a period co-extensive with the full

unexpired period of his lease:—*Held*: in an action for specific performance a decree would be made in such form as to give effect to the intention of the parties to constitute a sub-tenancy, with all its incidents, & not an assignment of the existing term.—*WHITE v.*

*KENNY*, [1920] V. L. R. 290.—*AUS.*

#### PART IV. SECT. 4.

**Tenant for determinate period.**—The right to assign or sub-let is as well established an incident of a tenancy at a rent for a determinate period when

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**Sub-sect. 1 & 2.]**

from year to year by the mtgor., after the mtge. made to the original mtgee., but before the assignment of it to the lessor.

A mtgor. is more than a tenant at sufferance, not entitled to notice to quit; & one tenant at sufferance cannot make another. Deft. never had any possession under the mtgee. from whence any tenancy could be inferred, & therefore was not entitled to any notice. He could not be said to have any possession under the mtgee., if the mtgor. had no authority to let (**LORD ELLENBOROUGH, C.J.**).—**THUNDER d. WEAVER v. BELCHER** (1803), 3 East, 449; 102 E. R. 609.

**Annotations:—****Consd.** Gibbs v. Cruikshank (1873), L. R. 8 C. P. 464. **Mentd.** Walmsley v. Milne (1859), 7 C. B. N. S. 115; Jones v. Mills (1861), 10 C. B. N. S. 788; Thorp v. Facey (1866), 12 Jur. N. S. 741; Simmons v. Crossley, [1922] 2 K. B. 95.

**SECT. 5.—INSPECTION OF HEAD LEASE BY UNDERLESSEE.**

**SUB-SECT. 1.—IN GENERAL.**

**1461. Right of underlessee to call for head lease**—**Waiver of right—Subsequent production showing defect of title.**—**WARREN v. RICHARDSON**, No. 712, *ante*.

**1462. —.]—GOSLING v. WOOLF**, No. 602, *ante*.  
**1463. Failure to inspect.**—**COSSER v. COLLINGE**, No. 1469, *post*.

**1464. —.]—PARKER v. WHITE**, No. 1516, *post*.

**1465. —Sub-term longer than original term—Sub-lessee's right to compensation.**—A. agreed to take an underlease for whatever term B. held. By mistake of B.'s solr. the underlease purported to grant a term seven years longer than that B. held. The underlease contained the usual qualified covenant for quiet enjoyment. A. entered into possession & held it until nearly the end of B.'s real term. Then B.'s exors., finding out the mistake, wrote to A. that they would be obliged to require him to give up possession at the end of the term which B. really held. A. procured a fresh lease from the ground landlord at an increased rent, & claimed the amount of such increased rent for the seven years as damages for misrepresentation & breach of the covenant for quiet enjoyment:—**Held**: it was the duty of A. to look at the original lease, & not having done so he could not recover damages for the common mistake.—**BESLEY v. BESLEY** (1878), 9 Ch. D. 103; 38 L. T. 844; 42 J. P. 806; 27 W. R. 184.

**Annotations:—****Consd.** Palmer v. Johnson (1884), 13 Q. B. D. 351. **Apprvd.** Clayton v. Leech (1889), 41 Ch. D. 103. **Refd.** Joffe v. Baker (1883), 11 Q. B. D. 255. **Mentd.** Allen v. Richardson (1879), 13 Ch. D. 524; Debenham v. Sawbridge, [1901] 2 Ch. 98.

**1466. —.]—L., a leaseholder, believing that her term had thirty years to run, agreed in writing with C. to grant him a lease for twenty-one years, nothing being said about compensation for misdescription. C. did not investigate the title, but took an underlease for twenty-one years. In the following year he discovered that L.'s term had only about fourteen years to run, & he claimed compensation. L. offered to grant a fresh lease for the residue of the term, less three days, but declined to give compensation. C. thereupon brought his action for rectification of the lease & compensation:—**Held**: as the compensation was claimed in respect of a defect of title which C. might have discovered before he**

took his lease, & there was no contract as to compensation, he was not entitled to compensation after taking it.—**CLAYTON v. LEECH** (1889), 41 Ch. D. 103; 61 L. T. 69; 37 W. R. 663, C. A.

**Annotations:—****Refd.** Baynes v. Lloyd, [1895] 1 Q. B. 820. **Mentd.** Debenham v. Sawbridge, [1901] 2 Ch. 98; Saunders v. Cockrill (1892), 87 L. T. 30.

**1467. —Notice—Whether binding—Express notice.**—Deft. advertised two houses to be let on lease, & stated that they would be "suitable for a private hotel or boarding-house." Pltf. entered into negotiations, which resulted in his taking an agreement for an underlease of the houses. Pltf. expressed his desire to make communications between the two houses, & the agreement in terms provided for such alterations upon the premises. Deft.'s lease from the superior landlord prohibited the alterations contemplated by pltf., & after pltf. took possession, & had commenced the alterations, they were interrupted for fifteen weeks by the superior landlord, who subsequently sanctioned them. Pltf. sued deft. for damages for the period during which the opening of his business had been so delayed:—**Held**: pltf. having been informed of the covenants in deft.'s lease, & having agreed to take the risk of the superior landlord's interference, judgment must be entered for deft.—**BROOKS v. TOLPUTT** (1884), 1 T. L. R. 39.

**Constructive notice.**—*See* Nos.

1469—1482, *post*.

**1468. Agreement providing for inclusion of particular restrictive covenant—Representation of ability to include such covenant.**—Where, in an agreement for the lease of a house to be granted by defts. to pltf., it was stipulated that the lease should contain the usual covenants between landlord & tenant, & that the house should not be converted into a school, it is immaterial whether pltf. had or had not notice that defts. derived their title under a lease from another person, because the agreement amounts to a representation on the part of the defts. that they were at liberty to grant a lease conformably to the terms of the agreement.—**VAN v. CORPE** (1834), 3 My. & K. 269; 6 L. J. Ch. 208; 1 Jur. 101; 40 E. R. 102.

**Annotations:—****Consd.** Porter v. Drew (1880), 5 C. P. D. 143. **Mentd.** Paris v. Hughes (1836), 1 Keen, 1; Steed v. Oliver (1847), 5 Hare, 492.

**SUB-SECT. 2.—CONSTRUCTIVE NOTICE.**

**1469. What amounts to—Opportunity of inspection.**—It is the duty of a person contracting for an underlease to inform himself of the covenants contained in the original lease; & if he enters & takes possession of the property, he will be bound by those covenants.

Where the original lease contained unusual covenants, & deft. entered into an agreement with pltf. for an underlease, & took possession of the premises, no reference to covenants being made in the agreement, but deft.'s solr. having had an opportunity of inspecting the original lease:—**Held**: deft. was bound to accept a lease with the unusual covenants contained in the original lease.—**COSSER v. COLLINGE** (1832), 3 My. & K. 283; 1 L. J. Ch. 130; 40 E. R. 108.

**Annotations:—****Distd.** Hyde v. Warden (1877), 3 Ex. D. 72. **Consd.** Porter v. Drew (1880), 5 C. P. D. 143; *Re* White & Smith's Contract, [1896] 1 Ch. 637. **Refd.** Hargreaves v. Rothwell (1836), 5 L. J. Ch. 118; Smith v. Capron (1849), 7 Hare, 185; Brumfit v. Morton (1857), 30 L. T. O. S. 98; Reeve v. Berridge (1888), 20 Q. B. D. 523; Molyneux v. Hawtrey, [1903] 2 K. B. 487.

the contract of letting is silent on the subject, as it is of an estate for life.—**VENKATASAMY NAIOK v. MUTHUVIJIA RAGUNADA RANI KATHAMA NATCHIAR** (*alias* KULANDAPURI NATCHIAR) (1869), 5 Mad. 227.—**IND.**

**1470.** ———.]—(1) Where a parol contract is made for the grant of an underlease subject to a question of title, possession taken with the knowledge & consent of the grantor is not of itself a waiver of an objection to title by the grantee, but it is only evidence of the acceptance of the title, which may be rebutted by other circumstances. (2) Upon an agreement to grant an underlease the grantee has constructive notice of the provisions of the original lease only when he has had a fair opportunity of ascertaining what they were. (3) Where a lessor, being himself a tenant for years, grants to his sub-lessee the residue of his interest from the termination of the existing sub-lease, the grant operates as an *interesse termini*, & the existing sub-lease does not merge; & a right of re-entry contained in the original lease would still exist & enable the lessor to re-enter for breach of covenant.—*Semble*: where two pieces of land are demised by one lease containing a power of re-entry over both, & afterwards the reversion in one of them is assigned to the lessee, the right of re-entry remains intact over the piece of land of which the reversion remains vested in the lessor.—*HYDE v. WARDEN* (1877), 3 Ex. D. 72; 47 L. J. Q. B. 121; 37 L. T. 567; 26 W. R. 201, C. A.

*Annotations*:—*As to* (2) *Apld.* *Reeve v. Berridge* (1888), 20 Q. B. D. 523. *Folld.* *Ice White & Smith's Contract*, [1890] 1 Ch. 637. *Consd.* *Molynaux v. Hawtrey*, [1903] 2 K. B. 487. *Refd.* *Wilmott v. Barber* (1880), 15 Ch. D. 96; *Barrow v. Isaacs*, [1891] 1 Q. B. 417. *As to* (3) *Refd.* *Burford v. Unwin* (1885), Cab. & El. 494; *Bishop v. Taylor* (1891), 60 L. J. Q. B. 556; *Harman v. Ainslie*, [1904] 1 K. B. 698; *Lewis v. Baker*, [1905] 1 Ch. 46. *Generally*, *Mentd.* *Evans v. Davis* (1878), 10 Ch. D. 747; *Re Davis & Cavey* (1888), 58 L. J. Ch. 143; *Eastern Telegraph Co. v. Dent*, [1899] 1 Q. B. 835; *Dougherty v. Oates* (1900), 45 Sol. Jo. 119.

**1471. By what covenants underlessee bound—Usual covenants.]**—(1) A party who enters into an agreement for an underlease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease. *Qu.*: whether he has such notice of unusual covenants.

(2) Where a party entered into an agreement with a lessee for an underlease, & informed him of the nature of the business which he meant to carry on in the premises, & the lessee did not apprise him that there was a covenant in the original lease prohibiting such business, the silence of the lessee was equivalent to a representation that there was no such prohibiting covenant.—*FLIGHT v. BARTON* (1832), 3 My. & K. 282; 40 E. R. 108.

*Annotations*:—*As to* (1) *Refd.* *Porter v. Drew* (1880), 5 C. P. D. 143. *As to* (2) *Refd.* *Morley v. Clavering* (1860), 29 Beav. 84.

**1472.** ———.]—The lessee of a house contracted to grant an underlease to deft. The lease contained a covenant not to exercise any obnoxious trade. In the absence of evidence of express notice of the covenant:—*Held*: notice of the existence of the lease did not imply notice of the contents of the lease, except of usual covenants; & the covenant in restraint of trade was not a usual covenant.—*WILBRAHAM v. LIVESLEY* (1854), 18 Beav. 206; 2 W. R. 281; 52 E. R. 81.

*Annotation*:—*Refd.* *Reeve v. Berridge* (1888), 20 Q. B. D. 523.

**1473.** ———.]—*MELZAK v. LILIENFELD*, No. 1514, *post*.

**1474.** ———.]—*Unusual covenants.]*—*COSSER v. COLLINGE*, No. 1469, *ante*.

**1475.** ———.]—*FLIGHT v. BARTON*, No. 1471, *ante*.

**1476.** ———.]—*MELZAK v. LILIENFELD*, No. 1514, *post*.

**1477.** ———.]—*FLIGHT v. BARTON*, No. 1471, *ante*.

**1478.** ———.]—*WILBRAHAM v. LIVESLEY*, No. 1472, *ante*.

**1479.** ———.]—*Restrictive covenants.]*—A. agreed to grant a lease to B., who knew that A. held under a leasehold title:—*Held*: B. must be deemed to have known that A. could only grant a lease with such restrictions as those under which he held. Specific performance of an underlease refused, the intended lessee having, with notice, committed acts which would have been a forfeiture of the original lease.—*LEWIS v. BOND* (1853), 18 Beav. 85; 52 E. R. 34.

*Annotations*:—*Consd.* *Rankin v. Lay* (1860), 2 De G. F. & J. 65. *Refd.* *Coat-sworth v. Johnson* (1880), 54 L. T. 320.

**1480.** ———.]—*CLEMENTS v. WELLES*, No. 1517, *post*.

**1481.** ———.]—Pltfs. were the owners of the reversion of the fee simple of a house, & also of adjoining premises, & they sued A. & his son B. to restrain them from using the house in such a way as to cause a breach of a restrictive covenant contained in a lease thereof granted by pltf.'s predecessor in title. The house was vested in B. for a term under an underlease which had been assigned to him. It was not shown that A. had any estate, legal, or equitable, in the house, but there was evidence to show that he was in substance managing the business carried on there, in which B. took part. The judge was of opinion that B. was a trustee of the underlease for A., & granted an *interim* injunction against both of them. A. appealed, alleging that he had no estate or interest in the house, & that an injunction could not be granted against him:—*Held*: although the exact business relation that existed between A. & B. was not clearly established yet, there was sufficient evidence to show that A. had considerably more to do with the business than he would have the ct. believe; & if A. was not actually a tenant at will, or with some other interest in the premises, he was there managing the business & carrying it on with notice of the restrictive covenant in the lease; also, without treating A. as equitable owner, he was in occupation, & that was enough to affect him with notice.—*MANDER v. FALCKE*, [1891] 2 Ch. 554; 65 L. T. 203, C. A.

*Annotations*:—*Refd.* *Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391; *Berton v. Alliance Economic Investment Co.* (1921), 38 T. L. R. 187.

**1482.** ———.]—By a lease dated Dec. 20, 1897, D. demised certain premises to G., who covenanted for himself, his exors., administrators, & assigns (*inter alia*) not to use or occupy the same or any part thereof as a dwelling-house or sleeping place, or to use the same so as to cause a nuisance, annoyance, or damage to the owners or occupiers of the offices or rooms in the same house or adjoining houses, & not to carry on any noisy or dangerous trade, & also not to do or suffer to be done upon the demised premises or any part thereof anything which might render any increased or extra premium payable for the insurance of the premises against fire, or which might make void or voidable any policy for insurance. There was also a covenant not to assign without licence. In Aug. 1903, G. assigned to E. with the lessor's consent, & on Oct. 18, 1904, E. sub-demised to D. On Nov. 12, 1904, the lessor consented to the underlease, but no explanation of what was intended to be done was given him, & no copy of the agreement was shown. The sub-lessee exhibited & sold an incandescent lamp in which

*Sect. 5.—Inspection of head lease by underlessee:*  
*¶ Sub-sect. 2. Sects. 6, 7, 8 & 9.]*

petrol was used. The insurance co. at the expiration of the period for which the premises were insured refused to renew, & although negotiations were entered into for the renewal of the insurance at 12s. 6d. instead of 2s. per cent. they fell through. The lessor now applied for an injunction restraining the sub-lessee from breaking the covenants:—*Held*: deft. must be restrained by injunction from using the premises in a manner prohibited by the lease of which he had constructive notice.—*TEAPE v. DOUSE* (1905), 92 L. T. 319; 21 T. L. R. 271; 49 Sol. Jo. 283.

*See, also, No. 600, ante.*

#### SECT. 6.—EFFECT OF PROVISION FOR LIKE COVENANTS IN UNDERLEASE.

**1483. Covenant to pay ground rent.]**—Testator possessed of leasehold property, by his will, gave the same to A. & B., upon trust to pay the rents to his wife for life, & after her decease he gave the same to A. for all his interest therein, subject nevertheless & upon condition that he should grant & execute an underlease of two of the houses unto B., for the residue of testator's estate & interest therein, wanting eleven days, at the yearly rent of £5 & containing covenants similar to those contained in the lease under which testator held the premises. A. & B. survived testator, but B. died in the lifetime of the widow:—*Held*: B.'s exor. was entitled to the underlease, but the underlease ought to contain a covenant by the exor. to pay the ground rent.—*TAYLOR v. COOPER* (1846), 8 L. T. O. S. 134; 10 Jur. 1078.

**1484. Covenant not to assign without lessor's permission—Name of underlessor to be inserted in underlease—As person whose permission required.]**—*WILLIAMSON v. WILLIAMSON*, No. 1518, *post*.

**1485. —Covenants agreed to be inserted without modification.]**—Pltf., who was lessee of part of the property of a hospital, agreed with deft. to grant him an underlease "to contain all usual covenants, including a covenant not to assign or underlet without the consent of pltf., such consent not to be withheld if the proposed assignee or tenant be respectable & responsible, together with such other covenants, clauses, & provisos as are contained in the lease under which the premises are held." The original lease contained a covenant that if any dispute relating to the demised premises should arise between the lessee & any other tenant of the hospital, it should be referred to the arbn. of the hospital; that the lessee, his exors., administrators, or assigns would not assign or sublet without the licence of the hospital; that all demises & assignments of the demised premises should be prepared by the solrs. of the hospital:—*Held*: the covenants in the original lease were not to be taken as models & inserted into the underlease with the names of the underlessor & underlessee substituted for the names of the original lessors & lessee respectively, but pltf. was entitled to have them inserted without modification, so as to bind the underlessee to refer disputes with tenants of the hospital to the arbn. of the hospital, not to assign or underlet without the consent of the hospital, & to have his demises & assignments prepared by the solrs. of the hospital.—*HAYWOOD v. SILBER* (1885), 30 Ch. D. 404; 54 L. T. 108; 34 W. R. 114, C. A.

**1486. Covenant against carrying on particular trade—Not contained in head lease.]**—T. agreed

in writing to take an underlease of two houses, subject to existing tenancies, the covenants to be similar to those in the original lease. T. died before the underlease was executed, but there was some evidence to show that he had seen & approved of the draft of the underlease which contained a covenant, not in the original lease, against carrying on the business of a grocer in either of the houses. The tenant of one of the houses had an agreement for a lease to contain the restrictive covenant. On bill filed against T.'s administrator for specific performance of the agreement, & a declaration that T. had accepted the underlease in the form of the draft:—*Held*: the administrator could not be compelled to accept an underlease containing the restrictive covenant.—*SNEELLING v. THOMAS* (1874), L. R. 17 Eq. 303; 43 L. J. Ch. 506.

**1487. Covenant by lessee to deliver up trade fixtures—Underlessee covenanting to deliver up landlord's fixtures.]**—*PORTER v. DREW*, No. 1521, *post*.

**1488. Covenant in head lease giving lessor power to determine—No unrestricted covenant for title—On quiet enjoyment.]**—*HOARE v. CHAMBERS* (1895), 11 T. L. R. 185.

**What are usual covenants.]**—*See Part XI., Sect. 2, post.*

#### SECT. 7.—DURATION OF UNDERLEASE.

**1489. Undertenant holding over after determination of original lease.]**—A., being in possession under a lease for years, underlet the premises from year to year to defts., who knew the extent of A.'s interest. Pltf. afterwards took a lease of the same premises, expectant on the determination of A.'s term: & defts., after the determination of A.'s term, continued in possession for a quarter of a year, when they paid the rent for that period, & claimed to give up the premises. In an action for use & occupation for a subsequent period:—*Held*: there was no evidence of a tenancy continuing beyond that quarter of a year.—*FREEMAN v. JURY* (1826), Mood. & M. 19, N. P.

*Annotations:—Refd. Woodcock v. Nuth* (1832), 8 Bing. 170; *Bayley v. Bradley* (1848), 5 C. B. 396.

**1490. —.]**—Pltf. being possessed of a term of years of which two years remained unexpired, demised to deft. for the remainder of his term minus three days. By the agreement of demise, deft. was to pay one hundred guineas for the fixtures, & a further sum if he agreed with the superior landlord for a longer term. Deft. remained in possession for about three-quarters of a year after the expiration of the original term, & paid the superior landlord for so doing at a higher rate than the rent under the lease. There was an interview between deft. & the original landlord at which the subject of a renewal was discussed, but the landlord proved that they came to no agreement personally, & that he referred the deft. to his solr.:—*Held*: deft. appeared to have remained in possession only as tenant by sufferance, & pltf. was not entitled to the further sum.—*SIMPKIN v. ASHURST* (1834), 1 Cr. M. & R. 261; 149 E. R. 1078; *sub nom. SIMPKIN v. ASHURST*, 4 Tyr. 781.

**1491. Underlessee holding over after determination of original lease.]**—B. holding land of A. for a term of years, underlet part to C. from year to year. At the expiration of the term B. agreed with A. to hold on from month to month:—*Held*: in the absence of any new agreement between B.



& C. the tenancy from year to year continued.—*PEIRSE v. SHARR & CLAUGHTON* (1828), 2 Man. & Ry. K. B. 418; *sub nom.* *PEARCE v. SHARD*, 6 L. J. O. S. K. B. 354.

**1492. During continuance of original lease.]**—A demise by a tenant from year to year to another, also to hold from year to year, is, in legal operation, a demise from year to year during the continuance of the original demise to the intermediate landlord, & is properly so described in pleading, although at the time of making the contract no such qualification is mentioned.—*PIKE v. EYRE* (1829), 9 B. & C. 909; 4 Man. & Ry. K. B. 661; 8 L. J. O. S. K. B. 69; 109 E. R. 338.

*Annotations:—**Reid. Price v. Williams* (1836), 1 M. & W. 6; *Oxley v. James* (1844), 13 M. & W. 209; *Weller v. Spiers* (1872), 26 L. T. 866. *Mentd. Cattle v. Arnold. Banks v. Arnold* (1859), 1 John. & H. 651; *London & Westminster Loan & Discount Co. v. Drake* (1859), 6 C. B. N. S. 798.

**1493. ———.]**—*WELLER v. SPIERS*, No. 284, ante.

**1494. ——— If underlessee should so long live.]**—S., a lessee of a house for a term of eighty years, which had fifty-nine years to run, agreed to let the same to K. at a fixed rent. The duration of the underlease was not specified; but the agreement went on to say that S. agreed to let K. have a lease at the same rent "at any period he may feel disposed;" & further agreed "not to molest, disturb, or raise the rent of" K. "after his having laid out money in improving the premises." K. did not at the time of the agreement know the nature of the interest of S. in the property. K. having gone into & remained in possession, & having laid out money in improving the premises, & the lease having over twenty years to run:—*Held*: K. was entitled only to an underlease for the residue of the term, less one day, if he should so long live.—*KUSEL v. WATSON* (1879), 11 Ch. D. 129; 48 L. J. Ch. 413; 27 W. R. 714, C. A.

*Annotations:—**Consd. Austin v. Newham*, [1906] 2 K. B. 187. *Reid. Cheshire Lines Committee v. Lewis* (1880), 50 L. J. Q. B. 121.

**1495. ———.]**—In a tenancy from year to year there is no implied covenant for quiet enjoyment against eviction by title paramount on the determination of the landlord's interest, & if, on such determination, the tenant is evicted by the superior landlord, he has, in the absence of an express agreement, no claim against his landlord for damages for such eviction by the superior landlord.—*SCHWARTZ v. LOCKET* (1889), 61 L. T. 719; 38 W. R. 142, D. C.

**1496. Lease by tenant for life.]**—Where a party had become tenant from year to year of premises, to a person who was only tenant for life, the tenant for life died, & the undertenant's interest having ceased thereby, he did no act whereby to continue possession or to surrender it. Afterwards he had another lease made to him, but did no act either as to any entry under it, or taking possession:—*Held*: without it he had no sufficient possession, either actual or constructive, to maintain trespass against a wrongdoer.—*BROWN v. NOTLEY* (1848), 3 Exch. 219; 18 L. J. Ex. 39; 12 L. T. O. S. 222; 154 E. R. 823.

## SECT. 8.—RENEWAL OF UNDERLEASES.

See Part IX., Sect. 2, sub-sect. 13, *post*.

## PART IV. SECT. 7.

**14921. During continuance of original lease.]**—A tenant by oral lease, for a definite period, over three years,

sub-let to defts., but not for any definite period:—*Held*: their term expired upon the day the original tenancy expired.—*MAGEE v. GILMOUR*

## SECT. 9.—RELATIONS BETWEEN LESSOR AND

**1497. Liability of lessee—For breach of covenant by underlessee—Injunction.]**—A., the proposed lessee of premises, underlet them to a tenant, who again, without the knowledge of the lessee, underlet them to a person who carried on the trade of a "mock auction." In the lease subsequently granted there was a covenant against carrying on, or permitting to be carried on, any offensive trade. Upon a bill to restrain the carrying on of the trade as a breach of the covenant: *Held*: without determining the question as to whether it was an offensive trade, *pltf.* was not entitled to relief.—*MOSES v. TAYLOR* (1862), 27 J. P. 36; 11 W. R. 81.

**1498. ——— Lessee underletting with knowledge of contemplated breach.]**—Where the covenantor underlets to a person who, to his knowledge, contemplates a breach of the covenant, & yet does not provide in the underlease against such breach of covenant, he is a proper party to a suit for an injunction to restrain the breach, & is liable to pay the costs of the suit.—*MITCHELL v. STEWARD* (1866), L. R. 1 Eq. 511; 35 L. J. Ch. 393; 14 L. T. 131; 30 J. P. 358; 14 W. R. 453.

*Mentd. Knight v. Shmonds*, [1866] 2 Ch. 291.

**1499. ——— Lessee representing act complained of might be done.]** A lease of a house was granted to B., which contained a covenant against "any art, trade or business" being carried on upon the premises. B. sub-leased the house to C., & by an inadvertence on the part of B., the sub-lease contained a clause permitting C. to carry on his business of a music teacher on the premises:—*Held*: B. was properly made a party to an action to restrain the breach of the covenant.—*TRITTON v. BANKART* (1887), as reported in 56 L. T. 306; 35 W. R. 474; 3 T. L. R. 120.

**1500. ——— To perform covenants in head lease—Underlease with option to purchase term.]**—By a written agreement between the holder of an emphyteutic lease of land in Quebec & a sub-lessee from him, it was agreed that the holder should be obliged to give to the sub-lessee a deed of sale of all his rights under the lease when the sub-lessee had paid to him two hundred dollars, & that thereupon the sub-lessee should enter into full proprietorship of the property, subject to the payment of the emphyteutic rent. The sub-lessee paid the two hundred dollars & remained in possession after the termination of the emphyteutic lease, but there was no deed of sale. In an action by the lessor against the sub-lessor for possession, rent, & damages for breach of covenant:—*Held*: upon the true construction of the agreement the sub-lessee had merely an option to purchase the emphyteutic lease, & the sub-lessor remained liable to perform the covenants contained in it.—*LAMPSON v. QUEBEC (CITY)*, [1921] 1 A. C. 294; 90 L. J. P. C. 25; 124 L. T. 456, P. C.

**1501. Liability of lessor—Agreement to purchase buildings at valuation—Underlease in breach of covenant—Buildings erected by underlessee.]**—Appl. let an estate in Fiji to resp. for a term of ten years, & covenanted that at the end of the term he would purchase "by valuation buildings erected

(1889), 17 O. L. 620.—CAN.

**149211. ———.]**—*GREEN v. THOMPSON* (1901), 1 S. R. N. S. W. 16; 14 N. S. W. W. N. 22.—AUS.

**Sect. 9.—Relations between lessor and lessee. Sect. 10: Sub-sects. 1 & 2, A.]**

by the said lessee," with a reference to arbn. if the parties were unable to agree the valuation. Resp. covenanted not to transfer the demised premises without the written consent of applt.; but, in breach of that covenant, he sub-leased for the entire term, there being similar covenants in the sub-lease. At the end of the term, applt. having resumed possession, resp. sued him to recover the value of buildings erected by the sub-lessee. There had been no agreement as to the amount of the valuation, and no arbn.:—*Held*: (1) the action failed, since upon the true construction of applt.'s covenant resp. could not recover in the absence of an agreement, or an award, as to the amount of the valuation; but (2) the buildings were within the covenant & an arbn. should be directed, since resp. was bound by contract to the sub-lessees in respect of them, & the fact that the sub-lease was in breach of resp.'s covenant was not material, there being no proviso for re-entry.—*Hallen v. Spaeth*, [1923] A. C. 684; 92 L. J. P. C. 181; 129 L. T. 803, P. C.

**SECT. 10.—RELATIONS BETWEEN LESSOR AND UNDERLESSEE.**

**SUB-SECT. 1.—IN GENERAL.**

**1502. No privity of estate.]—ANON.** (1540), Bro. N. C. 1; 73 E. R. 847.

**1503. —.]—**So if a tenant for thirty years makes a lease for ten years, & both of them surrender to him in the reversion in fee, the surrender is good for both the estates, & yet the lessee for ten years could not surrender by himself for want of privity, but when the other joined with him, his surrender shall be taken in law to proceed, & the surrender of the lessee for ten years to follow, so that the same shall be good (*per CUR.*).—*PARAMOUR v. YARDLEY* (1579), 2 Plowd. 539; 75 E. R. 794.

*Annotations:—Mentd.* Cheny & Smith's Case (1590), 1 Leon. 215; Bourne's Case (1590), 4 Co. Rep. 72 b; Bredon's Case, Gardiner v. Bredon (1597), 1 Co. Rep. 67 b; Dunmole v. Glycos (1609), 2 Brownl. 308; Manning's Case (1609), 8 Co. Rep. 94 b; Roberts v. Roberts (1613), 2 Bulst. 123; Blamford v. Blamford (1615), 3 Bulst. 98; Thurman v. Cooper (1618), Poph. 138; Howard v. Norfolk (1681), 3 Cas. in Ch. 14; Hitchens v. Basset (1688), 1 Show. 537; Fisher v. Wigg (1699), 1 Ld. Raym. 622; Idle v. Cooke (1706), 2 Ld. Raym. 1144; Darblison v. Beaumont (1713), Fortes. Rep. 18; Young v. Holmes (1717), 1 Stra. 70; Ulrich v. Litchfield (1742), 2 Atk. 372; Doe d. Saye & Sele v. Guy (1802), 3 East, 120; Doe d. Hayes v. Sturges (1816), 7 Taunt. 217; Sherratt v. Bentley (1834), 2 My. & K. 149; Newlands v. Palmer (1849), 13 L. T. O. S. 116.

**1504. —.]—HALL v. EWIN**, No. 1515, *post*.

**1505. —.]—SOUTH OF ENGLAND DAIRIES, LTD. v. BAKER**, No. 1532, *post*.

**1506. Surrender of underlease.]—PARAMOUR v. YARDLEY**, No. 1503, *ante*.

**1507. —.]—**A lessee of certain premises mortgaged them by sub-demise for the residue of the term less the last day which he covenanted to hold in trust for the mtgee. The mtgee. entered into possession of the premises. The mtgor. died intestate & insolvent. The mtgee. assigned

his interest in the premises. The assignee desired to surrender his interest, but difficulties arose from the existence of the outstanding day. The assignee applied for administration of the estate of the mtgor., limited to the outstanding day:—*Held*: on proof of due citation of the next of kin, the grant might be made as asked for.—*In the Goods of KINGWELL* (1899), 81 L. T. 461.

**1508. Whether affected by assignment.]—**An action will lie by the assignee of a reversion for years against an underlessee on a covenant to leave the premises in repair.—*MATURES v. WESTWOOD* (1598), Cro. Eliz. 599; Gouldsb. 175; 78 E. R. 842; *sub nom.* MATHURIS v. WESTORAY, Moore, K. B. 527; *subsequent proceedings, sub nom.* MATURES v. WESTWOOD, Cro. Eliz. 617.

*Annotations:—Reid.* Vandeput v. Lord (1718), 1 Stra. 78; Wright v. Burroughes (1846), 3 C. B. 685.

**1509. Forcible eviction of underlessee by lessee.—At end of lessee's term—Whether lessor entitled to possession—Notice.]—**If my lessee covenants, at the end of his term, to deliver possession to me, & in order to do so forcibly evicts one to whom he had sublet for a longer term, & I take possession without notice, surely I can keep it; at least at the common law I could (BRAMWELL, B.).—*HOOPER v. LANE* (1857), 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 30 L. T. O. S. 33; 3 Jur. N. S. 1026; 6 W. R. 146; 10 E. R. 1368, H. L.

*Annotations:—Reid.* Re London Celluloid Co. (1888), 39 Ch. D. 190. *Mentd.* Bateman v. Freston (1861), 3 E. & E. 578; Re Freston, Ex p. Freston (1861), 3 De G. F. & J. 612; Ockford v. Freston, Chapman v. Same (1861), 6 H. & N. 466; Tyne Improvement Comrs. v. General Steam Navigation (1866), 8 B. & S. 66.

**1510. Power of underlessee to enforce provisions of underlease—As against lessor.]—**The lessee of a house agreed to underlet a portion of it at less rent than he paid & taking a premium, & the provisions of the agreement differed in material respects from those of the lease. The underlessee paid the premium & took possession under the agreement. The lessee afterwards became bkpt.; his trustee in bkpcy. disclaimed the lease; & the lessor commenced an action of ejectment against the underlessee. Upon bill filed by the underlessee to restrain the action of ejectment & compel the lessor to grant him a lease in accordance with the terms of his agreement with the lessee:—*Held*: the underlessee had no equity to compel the lessor to grant him a lease in accordance with the terms of the underlease, & bill dismissed with costs.—*TAYLOR v. GILLOTT* (1875), L. R. 20 Eq. 682; 44 L. J. Ch. 740; 32 L. T. 795; 24 W. R. 65.

*Annotations:—Distd.* Smalley v. Hardinge (1881), 7 Q. B. D. 524. *Reid.* Wood v. Hayes (1885), 1 T. L. R. 207.

**1511. Winding-up order obtained by lessor—Effect on rights of underlessee.]—**Where the owner of the reversion of a theatre having by an order in a winding-up of a co. obtained the lease & property of the theatre, the lessee of property boxes & stalls brought an action, asking for an injunction to restrain the reversioner from preventing pltf. from having access to his boxes & stalls:—*Held*: the order in the winding-up did not affect the rights of third parties; deft. could only exclude pltf. by action for the recovery of land where third parties would have notice & an opportunity of appearing.—*LEADER v. HAYES* (1886), 54 L. T. 204.

**PART IV. SECT. 10, SUB-SECT. 1.**

**t. Liability of underlessee to eviction by lessor.]—**The voluntary cancellation by the parties for inability of the tenant to pay the rent of a lease

with a stipulation that failure to pay rent should dissolve it extinguishes a sub-lease of part of the premises notwithstanding the fulfilment of his obligations by the sub-tenant & an

action will be against the latter, in favour of the lessor, to recover possession of the part sub-leased.—*DUNCAN CO. v. BRIDGE* (1903), Q. R. 14 K. B. 133.—*CAN.*

SUB-SECT. 2.—LIABILITY OF UNDERLESSEE  
UNDER COVENANTS IN HEAD LEASE.

## A. In General.

**1512. Liable on same covenants as lessee.]**—A person who agrees to take a sub-lease impliedly stipulates to take subject to the same covenants as the lessee.—*COLLINS v. STUTELEY* (1859), 7 W. R. 710.

**1513. Effect of acknowledgment by lessee.]**—*ROE d. WEST v. DAVIS*, No. 1063, *ante*.

**1514. Liable on usual covenants only—Absence of knowledge of covenants in head lease.]**—An open contract for the grant of an underlease for a term carved out of the head lease is not a contract to grant a sub-lease with the same covenants as those in the head lease, but is a contract to grant a lease with the usual covenants, unless the grantee has been given the fullest opportunity to ascertain what the covenants in the head lease are & whether it contains any unusual covenants.—*MEZAK v. LILIENFELD*, [1926] 1 Ch. 480; 42 T. L. R. 364; 70 Sol. Jo. 487.

**1515. Negative covenants.]**—An underlessee for the residue of a term less one or more days, is, by reason of want of privity of estate, not bound at law by the covenants contained in the original lease, nor is he to be held liable, under the equitable principle of *Tulk v. Moxhay*, No. 647, *ante*, to be restrained by injunction where he has not himself been guilty of any violation of the covenants, but has merely refrained from taking legal proceedings against the tenant in possession who has committed a breach of the covenants.

The principle of *Tulk v. Moxhay* is not to be extended so as to compel a person acquiring property, either as purchaser in fee or as lessee, with notice of restrictive covenant, actively to do anything which may involve him in expense.—*HALL v. EWIN* (1887), 37 Ch. D. 74; 57 L. J. Ch. 95; 57 L. T. 831; 36 W. R. 84; 4 T. L. R. 46, C. A.

*Annotations*:—*Consd.* *Jueger v. Mansions Consolidated* (1903), 87 L. T. 690; *Wilson v. Twamley* (1903), 88 L. T. 803; *Teape v. Douse* (1905), 83 L. T. 319. *Apld.* *Powell v. Hemmley*, [1909] 2 Ch. 352. *Consd.* *Berton v. Alliance Economic Investment Co.*, [1922] 1 K. B. 742. *Distd.* *Atkin v. Rose*, [1923] 1 Ch. 522. *Refd.* *Clogg v. Hands* (1889), 44 Ch. D. 608, n.; *John Abernaw Brewery Co. v. Holmes*, [1900] 1 Ch. 189; *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386.

**1516. — Underlessee taking without notice—Actual & constructive notice.]**—An underlease of a ship contained express permission for the underlessee to carry on sales by auction there; but in the original lease there was a covenant, of which the underlessee had no actual notice, against permitting such sales to be carried on there without licence from the landlord. An injunction was granted, at the instance of the landlord, to prevent such sales from being carried on.

The circumstance of an underlease of a house occupied by a co. being made by the secretary of that co. who has of himself no power to alter the nature of the occupation, is of itself sufficient to put the underlessee on inquiry into the lessor's title.

A purchaser cannot plead no notice if he abstains from calling for information to which he is entitled.—*PARKER v. WHYTE* (1863), 1 Hem. & M. 167; 2 New Rep. 157; 32 L. J. Ch. 520; 8 L. T. 446; 27 J. P. 468; 11 W. R. 683; 71 E. R. 73.

*Annotations*:—*Apld.* *Silcock v. Farmer* (1882), 46 L. T. 404. *Consd.* *Hall v. Ewin* (1887), 57 L. J. Ch. 95. *Refd.* *Wilson*

*v. Hart* (1865), 2 Hem. & M. 561; *Gainsborough v. Watcombe Terra Cotta Clay Co.*, *Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991; *Teape v. Douse* (1905), 92 L. T. 319. *Mentd.* *Kaemena v. Central Bank of London* (1888), 4 T. L. R. 657.

**1517. — — — — —.]**—The underlessee of a person who has covenanted not to carry on a particular trade on the demised property will be restrained from carrying it on, although such covenant was not contained in the original lease, but only in an assignment thereof; & although the underlessee had no actual notice of it when he took his underlease; &, *semble*, even though he had no constructive notice. So also as to an assignee of the underlessee.—*CLEMENTS v. WELLES* (1865), L. R. 1 Eq. 200; 35 Beav. 513; 35 L. J. Ch. 265; 13 L. T. 548; 30 J. P. 100; 11 Jur. N. S. 991; 14 W. R. 187; 55 E. R. 995.

*Annotations*:—*Apld.* *Silcock v. Farmer* (1882), 16 L. T. 404. *Refd.* *Teape v. Douse* (1905), 92 L. T. 319.

**1518. — Covenant against underletting—Without consent of lessor.]**—The lease of certain mines contained a covenant that the lessee should not, without the consent of the lessor, let or assign the mines. The lessor granted to the lessee a licence to sub-let a part, but the licence provided that this should not authorise any further letting or assigning of the part of the mines the subject of the licence, without such consent as was required by the lease. The lessee then agreed to sub-let to an underlessee the part of the mines the subject of the licence, the underlease to contain provisions in all respects like those in the original lease:—*Held*: according to the agreement the underlease ought to contain a covenant by the underlessee against letting or assigning without the consent of the lessee, & not a covenant against letting or assigning without the consent of the lessor. *Semble*: neither under the lease nor under the licence would the underlessee be prevented from letting or assigning without the consent of the original lessor.—*WILLIAMSON v. WILLIAMSON* (1871), 9 Ch. App. 729; 43 L. J. Ch. 738; 31 L. T. 291.

*Annotations*:—*Distd.* *Haywood v. Silber* (1885), 30 Ch. D. 404. *Apld.* *Stough Picture Hall Co. v. Wade, Wilson v. Neville*, *Reid* (1916), 32 T. L. R. 512. *Consd.* *Mackusick v. Carmichael*, [1917] 2 K. B. 581. *Refd.* *Re Wedgwood Coal & Iron Co.* (1882), 17 L. T. 612; *Re Spark's House*, *Berge v. Jenkinson*, [1905] 1 Ch. 406.

**1519. — Covenants appearing only on assignment of original lease.]**—*CLEMENTS v. WELLES*, No. 1517, *ante*.

**1520. Special covenants—Inserted in new head lease—Co-extensive with covenants in surrendered head lease.]**—Premises being demised & underlet the first tenant surrendered his lease & took a new one with similar covenants. The under-tenant continued in possession & never surrendered. *Qu.*: whether special covenants in the new lease co-extensive with those in the old, as not to erect new buildings without leave, could be enforced by the head landlord against such under-tenant as "duties reserved" by the second lease within 4 Geo. 2, c. 28, s. 6.—*DOE d. PAJK v. MARCHETTI* (1831), 1 B. & Ad. 715; 9 L. J. O. S. K. B. 126; 109 E. R. 953.

*Annotations*:—*Mentd.* *West v. Dohb* (1870), 10 B. & S. 987; *Wadhain v. Postmaster General* (1871), L. R. 6 Q. B. 844; *Evans v. Davis* (1878), 10 Ch. D. 747; *Harman v. Atwell*, [1904] 1 K. B. 698.

**1521. Covenant to deliver up fixtures.]**—An underlease of a nursery ground contained a covenant that the tenant would, at the end of the term, deliver up all landlord's fixtures. The

## PART IV. SECT. 10, SUB-SECT. 2.—A.

**a. General rule.]**—*BERRY v. MOORE* (1791), 2 Ridg. Parl. Rep. 310.—*IR.*

**1521. Liable on same covenants as lessee.]**—*MONINDRO v. MONKRUDDEN* (1873), 11 B. L. R. App. 40; 20 W. R. 230.

## —IND.

**b. Negative covenants—Underlessee taking without notice.]**—*DOYLE v. HORT* (1878), 4 L. R. Ir. 455, 469.—*IR.*

**Sect. 10.—Relations between lessor and underlessee:**  
*Sub-sect. 2, A., B. & C. Sect. 11: Sub-sects.*  
*1 & 2, A.]*

underlessors held under a lease containing a covenant by them to deliver up at the end of the term, not only landlord's fixtures, but also trade fixtures. The underlessee, who knew there was a superior lease, erected greenhouses on the premises; & at the end of the term, having been restrained from removing them, brought an action for their value against the underlessors, who demurred:—*Held*: there was no implied representation & covenant giving the underlessee the right to remove trade fixtures & representing that the underlessors had not entered into any covenants inconsistent with that right.—*PORTER v. DREW* (1880), 5 C. P. D. 143; 49 L. J. Q. B. 482; 42 L. T. 151; 44 J. P. 267; 28 W. R. 672.

*Annotation*:—*Reid. Thomas v. Jennings* (1896), 66 L. J. Q. B. 5.

**1522. Covenant to leave produce on land.]**—A tenant held under a lease containing a covenant against sub-letting, & a clause giving the landlord a right to re-enter in case of breach of covenant, bkpcy., or liquidation on the part of the tenant. The tenant sub-let without leave. Afterwards the undertenant filed a liquidation petition, & the landlord then first heard of the subletting. The landlord then agreed with two of the undertenant's creditors to accept a new tenant on the old terms if one could be found in thirty-one days, & if no tenant was found, to give a reasonable time for the removal of the corn & other effects belonging to the estate of the undertenant. No new tenant was found, & the landlord took possession. The lease contained covenants by the tenant to do certain things during the last year of the term, & on delivering up the premises to leave thereon the hay & straw grown thereon during the last year on being paid for the same. In an action by the undertenant's trustee in bkpcy. against the landlord to recover the value of the hay & straw:—*Held*: the undertenant was bound by the terms of the lease, the lease having been determined by forfeiture in consequence of the undertenant filing a liquidation petition, the clause giving a right to payment for the hay & straw did not apply; deft.'s rights were not affected by the subsequent agreement, & he was entitled to judgment.—*SILCOCK v. FARMER* (1882), 46 L. T. 404, C. A.

*Annotations*:—*Distd. Re Morrish, Ex p. Hart Dyke* (1882), 22 Ch. D. 410. *Reid. Lybbe v. Hart* (1885), 29 Ch. D. 8.

**1523. Liability to injunction—Action against lessee—Underlessee not party.]**—Where the lessor does not add the sub-lessee as a party to his action for an injunction against his lessee for breach of the covenants contained in the lease, although he may be entitled to an injunction against such lessee, the scope of the injunction must be confined to the lessee, his servants & agents, & must not extend to the sub-lessee.—*METROPOLITAN DISTRICT RY. CO., LTD. v. EARL'S COURT, LTD.* (1911), 55 Sol. Jo. 807.

#### *B. Rent.*

*See, generally, Part XV., post.*

**1524. Whether rent recoverable—On covenant.]**

#### **PART IV. SECT. 10, SUB-SECT. 2.—B.**

**a. Whether rent recoverable.]**—A plea to an action of covenant for rent against the assignee of a lease, that all the estate of the lessee did not come to & vest in deft., as pttf. alleges, is a good plea.—*ANNIS v. CORBETT* (1844), 1 U. C. R. 303.—*CAN.*

**d. —.]**—In debt for rent on a lease, the declaration stated that the right & interest of the lessee in the demised premises came by assignment to & was vested in deft. It was in evidence that deft. was at most only underlessee for a part of the term:—*Held*: a nonsuit was rightly directed.—*LAWLER v. SUTHERLAND* (1851), 9 U. C. R. 305.—*CAN.*

—A landlord cannot maintain an action of covenant, for rent, against an undertenant.—*HOLFORD v. HATCH* (1770), 1 Doug. K. B. 183; 99 E. R. 119.

*Annotations*:—*Apld. Brewer v. Hill* (1794), 2 Anst. 413. *Reid. Pollock v. Stacy* (1847), 8 L. T. O. S. 388; *South of England Dairies v. Baker*, [1906] 2 Ch. 631.

**1525. — Separate promise to pay—Consideration.]**—If an underlessee promises the original lessor to pay him the rent & arrears if he can show him a deed by which it was due, & the lessor shows him the lease, it is a sufficient consideration to maintain an *assumpsit*.—*STURLEY v. ALBANY* (1589), Cro. Eliz. 150; 78 E. R. 408.

*Annotation*:—*Reid. Whitehead v. Grestham* (1825), M'Cle. & Yo. 205.

—*See, also, Nos. 1560–1562, post.*

—**By execution of lessor—Against administrator of underlessee.]**—*See EXECUTORS*, Vol. XXIV., p. 640, No. 6654.

—**Liability on receipt of notice from lessor—Service of notice.]**—*See DISTRESS*, Vol. XVIII., p. 308, No. 436.

**Claim against lessee in respect of distress.]**—*See BANKRUPTCY*, Vol. IV., p. 261, Nos. 2465–2467; *DISTRESS*, Vol. XVIII., pp. 303, 304, 318, 345, 387, Nos. 406–409, 529, 808, 1272.

#### *C. Repairs.*

**1526. Whether underlessee bound—Insolvency of lessee.]**—Lessee, where there is a covenant by him to repair, makes an underlease to S. who is in possession, the underlessee is not liable to this covenant in law, nor bound by it in equity, unless perhaps the first lessee is insolvent.—*GODDARD v. KEATE* (1682), 1 Vern. 87; 23 E. R. 330.

**1527. Liability to assignee of reversion.]**—*MATURES v. WESTWOOD*, No. 1508, *ante*.

**1528. — Liability for contribution—Original lease forfeited for breach.]**—*WEBBER v. SMITH*, No. 1560, *post*.

### **SECT. 11.—RELATIONS BETWEEN LESSEE AND UNDERLESSEE.**

#### **SUB-SECT. 1.—IN GENERAL.**

**1529. Covenant by underlessee to observe covenants in head lease—Underlessee estopped from denying head lease—Or covenants.]**—If an underlessee covenant to perform all the covenants in the original lease, & an action for breach of covenant be brought by his lessor, declaring, "that by an indenture made between the parties aforesaid, it was covenanted, etc." these words imply, that the original lease was executed by pttf., & if they did not, deft. is estopped, by having executed the underlease, in which the original lease is recited, from saying, that there is no such lease or covenants.—*ATKINSON v. COATSWORTH* (1722), 8 Mod. Rep. 33; 1 Stra. 512; 88 E. R. 25.

*Annotation*:—*Consd. Wood v. Day* (1817), 1 Moore, C. P. 389.

**1530. Breach of covenant involving forfeiture—Of lease & underlease—Lessee obtaining extension.]**—Building lease from A. to B. B. underlet to C. C. was to build houses; but, by his inability to do so, his lease became forfeited to B., & B.'s lease

#### **PART IV. SECT. 10, SUB-SECT. 2.—C.**

**a. Whether underlessee bound—Covenants in sub-lease different from head lease.]**—*DWAN v. BRANDON*, [1919] N. Z. L. R. 810.—*N.Z.*

#### **PART IV. SECT. 11, SUB-SECT. 1.**

**1. Underlease in breach of covenant—Lessee's rights on underlease.]**—The

also became forfeited to A. B. assigned all his interest to D., who applied to A. for an extension of time to complete the original contract, which was granted. D. brought an ejectment against C., for his breach of covenant, & recovered a verdict. Motion for an injunction to stay execution of the writ of possession, refused.—*HILLIER v. PARKINSON* (1881), 9 L. J. O. S. Ch. 156, L. C.

**1531. Effect of assignment.]**—Where a lessee grants an underlease, reserving a rent which is incident to the reversion on the underlease, the rent, the reversion, & the benefit of the covenants will not pass by a subsequent mere assignment of the term, nor unless expressly assigned.—*FRANKLIN v. HOWES* (1871), 24 L. T. 348; 19 W. R. 581.

**1532. Underlessee not an assign of lessee.]**—(1) An underlessee is not entitled to sue the assign of the freehold & leasehold reversions in the premises comprised in his underlease in respect of a positive covenant by the ground landlord with the original lessee, where the latter has not assigned or demised the benefit of such covenant to, or entered into a similar covenant with, the underlessee.

On the demise of a part of a freehold house the lessee covenanted to pay one-third of the water rate payable in respect of the house, & the lessor covenanted to pay all rates & taxes except the water rate to the extent covenanted to be paid by the lessee. The lessee sub-demised to ptfs., who, with knowledge of the superior lease, covenanted to pay one-third of the water rate payable in respect of the house. Subsequently the freehold reversion & the superior lease became vested in deft., who, the local authority having separately assessed the part comprised in the lease & underlease, refused to pay any of the rates & taxes in respect of such part. The local authority distrained, & ptfs. sought to recover from deft. the amount which they had been compelled to pay:—*Held*: the action must fail, there being no privity between the parties or any principle of equity upon which the ptfs. were entitled to succeed.

(2) An underlessee is not an "assign" of his lessor, the original lessee, so as to be entitled to the benefit of a positive covenant entered into with the latter, "his exors., administrators, & assigns," by the ground landlord in the original lease.—*SOUTH OF ENGLAND DAIRIES, LTD. v. BAKER*, [1906] 2 Ch. 631; 76 L. J. Ch. 78; 96 L. T. 48.

*Annotation*:—*Consd.* *Westhoughton U. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159.

## SUB-SECT. 2.—LIABILITY OF UNDERLESSEE.

### A. In General.

**1533. Breach of covenant contained in underlease—Proviso for re-entry by lessor & lessee.]**—In a lease from lessee to underlessee, it was provided, that if underlessee were guilty of a breach of covenant, lessee & lessor might enter:—*Held*: on breach of covenant in the lease to underlessee, ejectment might be maintained by lessee alone.—*DOE d. BEDFORD v. WHITE* (1827), 4 Bing. 276; 12 Moore, C. P. 526; 5 L. J. O. S. C. P. 173; 130 E. R. 778.

**1534. Similar covenant in head lease—Liability for costs of action against lessee.]**—A. leased premises to B. from Mar. 25, 1823, for

16 years wanting ten days, & B. covenanted with A. to keep the premises in repair, & to paint once in every five years of the term, & to leave the premises in repair. B. underleased the premises to C., from June 24, 1834, for four years & three quarters wanting eleven days, & C. covenanted with B. to keep the premises in repair, the covenant so far being in the same terms as in the original lease, & to paint once during the term, & to leave the premises in repair. A. sued B. for breaches of this covenant, & B. let judgment go by default, & upon the writ of inquiry the damages were assessed at £64 10s., being the amount of dilapidations proved by a surveyor, whose estimate had been laid before B. previous to the commencement of the action. B. afterwards sued C. for the amount of the dilapidations, & the costs of the action brought against him. The jury found the amount of the dilapidations to be £57 10s.:—*Held*: B. was not entitled to recover also the amount of the costs in the former action.—*PENLEY v. WATTS* (1841), 7 M. & W. 601; 10 L. J. Ex. 229; 151 E. R. 907.

*Annotations*:—*Folld.* *Walker v. Hatton* (1842), 10 M. & W. 249; 4 C. B. 598. *Consd.* *Hirning, Ham & District Land Co. v. L. & N. W. Ry.* (1886), 34 Ch. D. 261; *Bonner v. Tottenham & Edmonton Permanent Investment Building Soc.* [1899] 1 Q. B. 161. *Clare v. Dobson*, [1911] 1 K. B. 35. *Reid.* *Tindal v. Bell* (1843), 12 L. J. Ex. 160. *Mentd.* *Warwick v. Richardson* (1842), 10 M. & W. 284; *Blyth v. Smith* (1843), 6 Scott, N. R. 360.

**1535. Covenant to refund insurance premiums—Payment of unreasonable premiums by lessee—**

**Injunction.]**—Deft., P., a lessee of a factory, being under a covenant with his ground landlord to keep the premises insured in the Alliance Insurance Office, or such other office as the ground landlord should appoint, granted an underlease in Sept. 1855, which was assigned to ptfs. in Sept. 1857, in which the underlessees & their assigns reserved, by way of *reddendum*, to deft. B., the trustee of P., all sums which he, B., should pay for insurance. They also covenanted with B. & with P. to pay "any sum or sums of money expended for the insurance of the premises against fire as aforesaid": also that they would not do anything to the damage of B. & P. with proviso for re-entry by B. in default. There was also a cross-covenant by P. to keep the premises insured in the manner prescribed by the original lease. The premises were insured by P. in the Alliance down to Michaelmas, 1855, when, a fire having taken place, that co. declined to renew. P. then, with some difficulty, insured in another office in July, 1858; before this policy had expired the office gave notice that it had become invalidated, owing to alterations of a hazardous kind made by ptfs. From Feb. 1859, to Lady Day 1860, the premises were insured by P. in the State Insurance Office. The ground landlord had commenced an action of ejectment for non-observance by P. of his covenant, when another fire took place, & the action was compromised. In March, 1860, the State office refused to renew, except as P. alleged, on the terms of twenty-five guineas per cent., & deft., P., paid the office the sum of £528 for the renewal of the policy. Ptfs. immediately afterwards protested against the completion of the policy; & it appeared that, the premises being at the time unoccupied, the insurance might have been effected at a premium of £5 5s. 0d. & was afterwards effected by P. himself in the Alliance for £5 12s. 9d. P. commenced an action against ptfs. for repayment by them of the £528 under their covenant, & the bill was

mere fact that a lessee, in breach of covenant, sub-lets the demised premises to a third person without having

first obtained the consent of the lessor does not render the sub-lease void, nor prevent the lessee from recovering

agreed rent from the third person.—*MORISON v. HALL*, [1923] V. L. R. 93.—*AUS.*



**Sect. 11.—Relations between lessee and underlessee :  
Sub-sect. 2, A., B. & C. (a) & (b).]**

filed to restrain the action. P. alleged that at the time plffs. did not say that they would not use the premises for the same hazardous purpose as before; that the payment was justifiable, or at least made necessary by plffs. own acts; also, that the covenant by the underlessees was absolute; & that their remedy, if any, was at law. Injunction against defts. B. & P. restraining the action, made perpetual.—*LEATHER CLOTH CO. v. BRESSEY* (1862), 3 Giff. 474; 6 L. T. 63; 8 Jur. N. S. 425; 10 W. R. 370; 66 E. R. 496.

**B. For Non-Payment of Rent.**

**1536. Forfeiture of head lease—Underlease to mortgagee.]**—By indenture A. demised to B. a piece of land, with the messuage thereon erected. The lease contained a covenant by B. to pay the rent & to keep the premises in repair, & a proviso for re-entry on non-payment of rent, or in case the premises should be out of repair. B. mortgaged the premises by way of underlease to C. together with other property. The mtge. deed contained a power of sale, & it authorised C. out of the proceeds of sale to repay himself any sums he had disbursed in paying rent or in repairs; & it also contained a covenant by B. that until C. should take possession, B. would pay the rent, perform the covenants in the original lease, & indemnify C. in respect of those covenants. C. entered into possession of the premises. At the date of the lease & of the mtge., & at the time of C.'s entering into possession, the messuage was merely a carcase. C. did not pay any rent during his possession or complete the messuage, neither did he exercise his power of sale. A. thereupon recovered possession for non-performance of the covenants:—*Held*: C. was liable to B. in respect of the forfeiture of the lease.—*PERRY v. WALKER* (1855), 3 Eq. Rep. 721; 24 L. J. Ch. 319; 26 L. T. O. S. 36; 1 Jur. N. S. 746; 3 W. R. 314.

**Liability to distress.]**—See DISTRESS, Vol. XVIII., p. 270, Nos. 84, 85.

**C. For Breach of Covenant to Repair.**

**(a) In General.**

**1537. Forfeiture of lease—Caused by other breaches than that of underlessee—Extent of liability—For non-repair.]**—In Aug. 1783, S. granted to L. a lease for ninety-nine years of a piece of land for building, with a covenant to repair, & also a covenant not to unite or permit any part of the demised premises to be united to any of the adjoining lands or grounds of any other person, so as to render the metes & bounds thereof uncertain & difficult to be ascertained, nor to permit any encroachment. Plffs. who were possessed of a term of ninety-four years in a house that formed a small portion of the premises demised by the lease of Aug. 1783, in Nov. 1825, granted a lease thereof to defts. for twenty-one years, with the usual covenant to repair. In June, 1837, S. recovered judgment in an action of ejectment founded on a breach of the covenants in the lease of Aug. 1783, the breaches of covenant by the particulars relied on being, the non-repair of various houses on the estate including the house demised to defts., the annexation of divers parts of the premises demised to the adjoining lands & grounds of other persons so as to render the metes

& bounds uncertain & difficult to be ascertained, & also the permission of encroachments. Plffs. afterwards sued defts. for a breach of their covenant to repair, by means of which their term had been forfeited to the superior lord:—*Held*: plffs. were entitled to recover damages in respect of the non-repair, but not in respect of the value of the term, the forfeiture having been caused by other breaches of covenant than that committed by defts.—*CLOW v. BROGDEN* (1840), 2 Man. & G. 39; 2 Scott, N. R. 303; 133 E. R. 654.

**Annotation:—***Reid. Davis v. Underwood* (1857), 22 J. P. 8.

**1538. ————.]**—Defts., an underlessee, who had covenanted with plff., his lessor, to keep, & at the expiration or sooner determination of the term, to leave & deliver up the premises in repair, allowed them to become out of repair. While they remained in this condition, plff. having committed a forfeiture by non-payment of rent, the superior landlord brought ejectment, & evicted plff. & deft.:—*Held*: plff. was entitled to recover against deft. substantial damages for the non-repair of the premises.—*DAVIES v. UNDERWOOD* (1857), 2 H. & N. 570; 27 L. J. Ex. 113; 30 L. T. O. S. 154; 22 J. P. 8; 3 Jur. N. S. 1223; 6 W. R. 105; 157 E. R. 235.

**Annotations:—***Consd. Williams v. Williams* (1874), L. R. 9 C. P. 659; *Morgan v. Hardy* (1886), 17 Q. B. D. 770; *Joyner v. Weeks*, [1891] 2 Q. B. 31.

**1539. — Underlease to mortgagee.]**—*PERRY v. WALKER*, No. 1536, *ante*.

**1540. At suit of assignee of reversion.]**—*OXLEY v. JAMES*, No. 1313, *ante*.

**1541. Covenant to repair “in like manner as lessee bound to repair”.—Extent of liability.]**—

A declaration in *assumpsit* by sub-lessor against sub-lessee made profert of the original lease for twenty-one years, as being executed by plff. & the original landlord; it set out also a covenant to repair contained in the lease; & alleged that deft. had agreed to take the premises for two years, & to perform the covenants of the lease in like manner as plff. was bound to perform them. Breach: that deft. had not performed the covenants in like manner as plff. was bound to perform them, in this, that he had not, during the continuance of the several terms of two years & twenty-one years, sufficiently repaired, etc., but on the contrary had suffered them to become ruinous, etc. On special demurrer to that breach:—*Held*: whether deft.'s liability under the agreement was confined to keeping the premises in the same state of repair in which they were when his term commenced or not, the breach was sufficient, because it was so limited.

Deft.'s liability under the agreement was as extensive as plff.'s under the lease (*LORD DENMAN, C.J.*).—*WHITAKER v. RICHARDS* (1846), 7 L. T. O. S. 224.

**(b) Independent Covenant.**

**1542. What amounts to independent covenant—Covenants in same words.]**—Certain persons leased premises to plff. by lease, bearing date May 10, 1828, for twenty-five years, from Mar. 25, then last, containing covenants to paint & repair, & to do any repairs found wanting, on view of which notice should be given; & plff. leased to deft., for the residue of the term, wanting ten days, by a lease, dated June 15, 1830, containing, with the exception of a stipulation to paint outside woodwork every three instead of every seven years, covenants *totidem verbis* with those contained in the original

**PART IV. SECT. 11, SUB-SECT. 2.—B.**

**§ To superior landlord.]**—*GIRISH CHANDRA DAS v. KUNJA BHARI MALO* (1908), I. L. R. 35 Calc. 683, 12 C. W. N. 628.—*IND.*

lease :—*Held* : these covenants, though in language the same, were substantially different, *pltf.* could not recover the costs of an action brought against him, in consequence of a breach by *deft.* to repair in 1841 pursuant to notice, & his costs in defending it; the costs of defending the former action were not the necessary consequence of the breach of *deft.*'s covenants to repair; & that even had the covenants been identical, they could not have been recovered, *pltf.* being aware of the fact that breaches had been committed, though *deft.* refused to admit it, or to give any instructions as to the defence of the action, or suffering judgment by default.—*WALKER v. HATTON* (1842), 10 M. & W. 249; 2 Dowl. N. S. 263; 11 L. J. Ex. 361; 152 E. R. 462.

*Annotations* :—*Apud*. Logan v. Hall (1847), 4 C. B. 598. *Consd.* Smith v. Howell (1851), 6 Exch. 730. *Apud*. Williams v. Williams (1874), L. R. 9 C. P. 659. *Consd.* Clare v. Dobson, [1911] 1 K. B. 35. *Mentd.* Tindal v. Bell (1843), 12 L. J. Ex. 160; Broom v. Hall (1859), 7 C. B. N. S. 503.

1543. ———.]—A. being lessee of a messuage under the corp. of London, demised it, in 1829, to B., C., & D., for twenty-one years; the lessees covenanting to repair, & to insure "in the sum of £2,500 at the least, in the Protector Fire Insurance Office, or in such other respectable insurance office in London or Westminster, as B., C., & D. (the lessees), their exors., etc., should think fit"; with a proviso for re-entry for breach of any of the covenants. In 1835, C., by indenture, granted an underlease to E. & F., for the residue of the term, wanting one day; the underlease containing the like covenants to repair, & to insure, "in the sum of £2,500 at the least, in the Protector Fire Insurance Office, or in such other respectable fire insurance office in London or Westminster as E. & F., their exors., etc., should think fit"; & also, a proviso for re-entry for breach of any of the covenants. The messuage being out of repair, & uninsured, the exors. of A., in 1843, brought ejectment, & recovered possession :—*Held* : C. was not entitled to recover against E. & F. the value of his reversionary interest, the loss thereof not being the result of their breaches of covenant, but of the breaches of covenants by C., to which covenants they were no parties.—*LOGAN v. HALL*, (1847), 4 C. B. 598; 16 L. J. C. P. 252; 9 L. T. O. S. 224; 11 Jur. 804; 136 E. R. 642.

*Annotations* :—*Consd.* Pontifex v. Foord (1884), 12 Q. B. D. 152. *Refd.* Hooper v. Lane (1857), 6 H. L. Cas. 443; Catton v. Bennett (1884), 26 Ch. D. 161; Clare v. Dobson, [1911] 1 K. B. 35. *Mentd.* Duckworth v. Ewart (1863), 2 H. & C. 129.

1544. ———.]—*Pltf.* sued *deft.* for breach of a covenant to repair contained in a lease of a dwelling-house for a term of twenty-one years from Michaelmas, 1861. *Deft.* obtained leave to serve & served a third-party notice claiming contribution or indemnity from a sub-lessee to whom he had let the premises from Midsummer, 1869, for the remainder of the original term less ten days. The underlease contained a covenant to repair, which was in terms precisely similar to those of the covenant in the original lease, & for breach of which defendant claimed relief against the sub-lessee :—*Held* : inasmuch as the terms of the covenant to repair must in each case be construed with reference to the age & character of the premises at the time of the demise, the covenant in the underlease could not be construed as a covenant to indemnify *deft.* against or to perform the covenant in the original lease.—*PONTIFEX v. FOORD* (1884), 12 Q. B. D. 152; 53 L. J. Q. B. 321; 49 L. T. 808; 32 W. R. 316.

*Annotations* :—*Consd.* Catton v. Bennett (1884), 26 Ch. D. 161. *Refd.* Tritton v. Bankart (1897), 56 L. J. Ch. 629. *Mentd.* Speller v. Bristol Steam Navigation Co. (1884), 13 Q. B. D. 96.

1545. What may be recovered—Expenses of repairs—Incurred to avoid forfeiture.]—(1) Where A. held premises under a lease containing a clause of re-entry for want of repairs & afterwards underlet a part to B., who undertook to repair within three months after notice for that purpose; the premises underlet being out of repair, A.'s landlord threatened to insist upon the forfeiture if they were not repaired, & A. gave notice to B. to repair. The premises at the expiration of three months from that time remaining out of repair, A. entered & repaired :—*Held* : he might recover from B. the sum expended on that occasion.

(2) After the repairs were done by A., but before the commencement of the action, B. sold his interest in the premises to a person who pulled down & entirely rebuilt them :—*Held* : this did not deprive A. of his right to recover the whole sum expended by them.—*COLLEY v. STREETON* (1823), 2 B. & C. 273; 3 Dow. & Ry. K. B. 522; 2 L. J. O. S. K. B. 25; 107 E. R. 385.

*Annotations* :—*As to* (1) *Distd.* Williams v. Williams (1874), L. R. 9 C. P. 659. *Refd.* Joyner v. Weeks, [1891] 2 Q. B. 31. *Generally*, *Mentd.* Wright v. Trevoant (1828), 3 C. & P. 441; Warnan v. Faithful (1834), 3 Nev. & M. K. B. 137.

1546. ——— Damages & costs recovered against lessee.]—Where the tenant, under a lease containing a covenant to repair, underlet the premises to one who entered into a similar covenant, & the original lessor brought an action on this covenant in the first lease, & recovered :—*Held* : the damages & costs recovered in that action, & also the costs of defending it, might be recovered as special damages in an action against the undertenant for the breach of his covenant to repair.—*NEALE v. WYLLIE* (1824), 3 B. & C. 533; 5 Dow. & Ry. K. B. 442; 107 E. R. 831.

*Annotations* :—*Distd.* & *Dtd.* Penley v. Watts (1841), 7 M. & W. 601. *Dtd.* Walker v. Hatton (1842), 10 M. & W. 249; Logan v. Hall (1847), 4 C. B. 598. *N.F.* Clare v. Dobson, [1911] 1 K. B. 35. *Refd.* Smith v. Howell (1851), 6 Exch. 730. *Mentd.* Blyth v. Smith (1843), 6 Scott, N. R. 360.

1547. ——— Costs of defending action.]—*NEALE v. WYLLIE*, No. 1546, *ante*.

1548. ———.]—A. leased premises to B., from Mar. 25, 1823, for sixteen years wanting ten days, & B. covenanted with A. to keep the premises in repair, & to paint once in every five years of the term, & to leave the premises in repair. B. underleased the premises to C., from June 24, 1831, for four years, & three-quarters wanting eleven days, & C. covenanted with B. to keep the premises in repair, the covenant so far being in the same terms as in the original lease, & to paint once during the term, & to leave the premises in repair. A. sued B. for breaches of this covenant, & B. let judgment go by default, & upon the writ of inquiry the damages were assessed at £61 10s., being the amount of dilapidations proved by a surveyor, whose estimate had been laid before B. previous to the commencement of the action. B. afterwards sued C. for the amount of the dilapidations, & the costs of the action brought against him. The jury found the amount of the dilapidations to be £57 10s. :—*Held* : B. was not entitled to recover also the amount of the costs in the former action.—*PENLEY v. WATTS* (1841), 7 M. & W. 601; 10 L. J. Ex. 229; 151 E. R. 907.

*Annotations* :—*Fold.* Walker v. Hatton (1842), 10 M. & W. 249. *Apud*. Logan v. Hall (1847), 4 C. B. 598. *Consd.* Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc., [1899] 1 Q. B. 161. *Apud*. Clare v. Dobson, [1911] 1 K. B. 35. *Mentd.* Warwick v. Richardson (1842), 10 M. & W. 284; Blyth v. Smith (1843), 6 Scott, N. R. 360; Tindal v. Bell (1843), 12 L. J. Ex. 160; Nirmingham & District Land Co. v. L. & N. W. Ry. (1886), 34 Ch. D. 261.

*Sect. 11.—Relations between lessee and underlessee: Sub-sect. 2, C. (b), & D.; sub-sect. 3. Sect. 12. Part V. Sect. 1.]*

1549. — — — — —]—*WALKER v. HATTON*, No. 1542, *ante*.

1550. — — — — —]—*Value of reversionary interest.*—*LOGAN v. HALL*, No. 1543, *ante*.

1551. — — — — —]—*Liability of lessee under original lease to be considered.*—Where a lease contains covenants to keep the demised premises in repair & to deliver them up in good repair, & a sub-lease is granted containing similar covenants with notice to the sub-lessee of the original lease, & the lessee brings an action against the sub-lessee for breach of his covenant to keep in repair, it is right in assessing the damages to take into account the liability of the lessee upon the covenants in the original lease.—*CONQUEST v. EBBETTS*, [1896] A. C. 490; 65 L. J. Ch. 808; 75 L. T. 36; 45 W. R. 50; 12 T. L. R. 599; 40 Sol. Jo. 700, H. L.; *affg.* S. C. *sub nom.* *EBBETTS v. CONQUEST*, [1895] 2 Ch. 377, C. A.

*Annotations:—Consd.* *Clare v. Dobson*, [1911] 1 K. B. 35. *Ellis v. Torrington* (1919), 89 L. J. K. B. 369. *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516. *Mentd.* *Molynoux v. Richard* (1905), 75 L. J. Ch. 39.

1552. — — — — —]—*Costs of proceedings for relief against forfeiture.*—An underlease made in 1887 contained covenants by the underlessee to repair in general terms & to repair within three months after notice in writing, & a proviso for re-entry on breach of the underlessee's covenants. The underlease showed on its face that the reversion was a leasehold reversion. The head lease made in 1855 contained covenants to repair & a proviso for re-entry in substantially the same terms as those of the covenants & proviso in the underlease of 1887. The head landlord served on his lessee a notice in writing to repair; that lessee served a similar notice on his underlessee, who failed to do the repairs within three months. The head landlord thereupon brought an action for the recovery of the demised premises. The repairs were subsequently executed & the lessee applied for & obtained relief against forfeiture. In an action by the lessee against the underlessee for breach of covenant to repair in the underlease:—*Held*: *pltf.* could not recover the costs of the proceedings for relief.—*CLARE v. DOBSON*, [1911] 1 K. B. 35; 80 L. J. K. B. 158; 103 L. T. 506; 27 T. L. R. 22.

#### *D. Covenant of Indemnity.*

*See* R. S. C., Ord. 16, r. 48.

1553. *What amounts to covenant of indemnity.*—The contract of a sub-tenant to perform the covenants of the head lease is a contract of indemnity.

*Pltf.* let to *deft.* a house for twenty-one years, with the option to determine the lease at the end of seven or fourteen, by deed containing covenants by *deft.* to repair & paint & leave in repair. *Deft.*, after having occupied for five years, sublet the house to *H.* for the remainder of the first seven years by a writing, with a clause that "the letting should be subject in all respects to the term of the existing lease & the covenants & stipulations contained therein." At the end of the seven years, *deft.* having determined the lease in the exercise of his option, *pltf.* claimed from *deft.*, & *deft.* claimed from *H.*, the amount at which the dilapidations had been assessed by *pltf.*'s surveyor. *H.* declined to pay or give *deft.* an indemnity, or to take any responsibility in the matter. *Pltf.* sued *deft.*, who brought in *H.* as third party. The issues, as between *pltf.* &

*deft.*, & *deft.* & *H.*, were referred separately to an official referee, who reported that the sum claimed by *pltf.* was due from *deft.* to *pltf.*, & that a similar sum was due from *H.* to *deft.*:—*Held*: *H.*'s contract was a contract of indemnity under which *deft.* was entitled to recover from *H.* all the costs of an action by *pltf.* against *deft.* reasonably defended.—*HORNBY v. CARDWELL*, (1881), 8 Q. B. D. 329; 51 L. J. Q. B. 89; 45 L. T. 781; 30 W. R. 263, C. A.

*Annotations:—Distd.* *Pontifex v. Foord* (1884), 12 Q. B. D. 152. *Consd.* *Hammond v. Bussey* (1887), 20 Q. B. D. 79; *Clare v. Dobson*, [1911] 1 K. B. 35. *Reffd.* *Birmingham & District Land Co. v. L. & N. W. Ry.* (1886), 34 Ch. D. 261; *Morgan v. Hardy* (1886), 17 Q. B. D. 770; *Hooper v. Bromet* (1903), 89 L. T. 37. *Mentd.* *Piller v. Roberts* (1882), 21 Ch. D. 198.

1554. — — — — —]—*Whether implied from identical covenants to repair.—In head lease & underlease.*—*PONTIFEX v. FOORD*, No. 1544, *ante*.

1555. *What may be recovered.—Costs of defending action.*—*HORNBY v. CARDWELL*, No. 1553, *ante*.

#### SUB-SECT. 3.—LIABILITY OF LESSEE.

1556. *Underlease omitting covenant in head lease.*—A termor, who held under a lease, containing a covenant against a particular trade, with a proviso for re-entry upon breach agreed to grant *pltf.* a lease of the premises containing the covenants in the original lease, "so that the same in no way restrict" the carrying on of the trade in question:—*Held*: this agreement would be performed by the mesne tenant granting a lease to *pltf.* without a covenant against the trade in question; because, although the original lessor might re-enter for breach of the condition, the sub-lessee would not only not be liable to the mesne lessor, but would have a right of action against him on the implied covenant for quiet enjoyment.—*HAYWARD v. PARKE* (1855), 16 C. B. 295; 3 C. L. R. 1280; 24 L. J. C. P. 217; 25 L. T. O. S. 199; 1 Jur. N. S. 781; 139 E. R. 771.

1557. *Covenant of indemnity.—Against non-payment of rent.—Condition precedent to liability.—Payment of rent by underlessee.*—To a count upon an absolute contract by *deft.* to indemnify *pltf.*s, his tenants, against the consequences of the non-payment of his rent to the superior landlord, alleging for breach, that, the rent being in arrear, *pltf.*'s goods were seized by the superior landlord, *deft.* pleaded, that, at the time of the distress, more was due from *pltf.*s to *deft.* for rent than the amount distrained for as in the declaration alleged:—*Held*: no answer to the action, the payment of their rent by *pltf.*s not being a condition precedent.—*BRIANT v. PILCHER* (1855), 16 C. B. 354; 1 Jur. N. S. 1020; 139 E. R. 795; *sub nom.* *BRYANT v. PILCHER*, 25 L. T. O. S. 147; 3 W. R. 483.

1558. *Covenant to observe covenants in head lease.—Surrender of head lease.—New lease containing different covenants.*—*Deft.* held two plots of building land, B. & C., under a lease which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure to houses on plot B. a sea view over plot C. *H.* having entered into a treaty with *deft.* for an underlease of B., made inquiries of *deft.* as to what could be built on the land in front. *Deft.* replied that he, *deft.*, could not build on C. closer than thirty feet, as his lease did not allow it. *H.* after having inspected the original lease took an underlease of B., containing a covenant by *deft.* that he, his exors., administrators & assigns, would observe the lessee's covenants in the original lease. *Deft.* afterwards surrendered his lease to the ground landlord, took a new lease

not containing the old restrictions, & commenced building on C. in a way which would obstruct the sea view from houses on B. belonging to *pltf.*, who was the assignee of H.:—*Held*: the rights of H., under *deft.*'s covenant to observe the covenants in the original lease, were not affected by *deft.*'s surrender of that lease, & *pltf.* was on that ground entitled to an injunction to restrain *deft.* from building in contravention of those covenants.—*PIGGOTT v. STRATTON* (1859), 1 De G. F. & J. 33; 29 L. J. Ch. 1; 1 L. T. 111; 24 J. P. 69; 6 Jur. N. S. 129; 8 W. R. 13; 45 E. R. 271, L. C. & L. JJ.

*Annotations*:—*Consd.* *Spicer v. Martin* (1888), 14 App. Cas. 12. *Refd.* *Kendall v. Hill* (1860), 2 L. T. 717; *Martin v. Douglas* (1867), 16 W. R. 268; *Low v. Bouverie*, [1891] 3 Ch. 82; *Wheaton v. Maple*, [1893] 3 Ch. 48; *Kennard v. Ashman* (1894), 10 T. L. R. 213; *Wilkes v. Spooner*, [1911] 2 K. B. 473. *Mentd.* *Trall v. Baring* (1864), 3 New Rep. 362; *Brabant v. Wilson* (1865), 35 L. J. Q. B. 49; *Tulk v. Metropolitan Board of Works* (1867), 8 B. & S. 777; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Mackenzie v. Childers* (1889), 43 Ch. D. 265; *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614.

**1559. To pay rent to lessor—Express covenant to pay by underlessee.**—*Pltf.* took of *deft.* a house, at a yearly rent, under an agreement by the terms of which the latter undertook, that, up to the date of the agreement, he had paid or would pay or discharge "all arrears of rent, rates, taxes, or assessments"; & the former agreed, that, "from & after that day, the same should be kept paid by him for the period he might occupy the premises." At the expiration of the first quarter, the superior landlord distrained for rent:—*Held*: there was no implied duty in *deft.* to indemnify *pltf.* against this claim, although the agreement between them stipulated for a yearly rent: *deft.* having, by the subsequent clause, expressly undertaken to keep the reserved rent paid.—*UPTON v. FERGUSSON* (1833), 3 Moo. & S. 88.

## SECT. 12.—RELATIONS OF UNDERLESSEES INTER SE.

**1560. Right of contribution—Liability of under-lessee for rent—Original lease forfeited for non-**

**payment.**—One makes a lease & the lessee covenants to pay the rent & to repair. The lessee makes one hundred underlessees. The rent is behind, & the premises out of repair; the original lease is avoided for non-payment of rent. Some of the underlessees bring a bill to be relieved against the forfeiture. Equity will not apportion the rent; but *pltf.*s must pay the whole rent in arrear; & repair all the houses, & may compel all the other underlessees to contribute.—*WEBBER v. SMITH* (1889), 2 Vern. 103; 23 E. R. 676.

*Annotations*:—*Mentd.* *Hill v. Barclay* (1810), 16 Ves. 402; *Bracebridge v. Buckley* (1816), 2 Price, 200; *Hare v. Elms*, [1893] 1 Q. B. 604.

**1561. ——— Payment under threat of distress.**—*Pltf.* & *deft.* respectively were underlessees, at distinct rents, of separate portions of premises, the whole of which were held under one original lease, at an entire rent. *Pltf.*, having paid the whole rent under a threat of distress, brought an action against *deft.* to recover the proportion of rent due from him, as for money paid to his use:—*Held*: the action was not maintainable.—*HUNTER v. HUNT* (1845), 1 C. B. 300; 14 L. J. C. P. 113; 4 L. T. O. S. 374; 9 Jur. 375; 135 E. R. 555.

*Annotation*:—*Refd.* *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.*, [1899] 1 Q. B. 161.

**1562. ———**—*J.*—A lessee of land assigned part of the land to A. for the residue of the term, & other part to B. for the residue of the term, less ten days, at apportioned rents, covenanting in both cases to pay the rent due to the original lessor & to indemnify. The lessee having become bkpt., A., on the application of the lessor & on threat of distraint, paid the whole rent under the original lease:—*Held*: as A. & B. were not liable to a common demand & there being no one entitled to sue B. for his share of the rent A. had no right of contribution as against B.—*JOHNSON v. WILD* (1890), 44 Ch. D. 146; 59 L. J. Ch. 322; 62 L. T. 537; 38 W. R. 500; 6 T. L. R. 259.

**1563. ——— Liability of underlessee under covenant to repair—Original lease forfeited for breach.**—*WEBBER v. SMITH*, No. 1560, *ante*.

## Part V.—Agreements Collateral to Leases.

### SECT. 1.—IN GENERAL.

**Collateral covenants.**—*See* Part XI., Sect. 6, sub-sect. 5, *post*.

**1564. What amounts to—Parol agreement to let premises for particular purpose.**—*Pltf.*, in an action for damages for breach of warranty in connection with the letting to him of certain premises, alleged that, as a basis of negotiations which culminated in an agreement in writing whereby *defts.* agreed to let & *pltf.* agreed to take the premises in question, *defts.* verbally warranted to let the premises for dancing purposes. *Defts.* had no power to let the premises for such purposes without the consent of the superior landlord, & such consent was never in fact obtained. *Pltf.* took possession under the agreement & expended considerable sums in alterations, & now claimed to recover the amount of such expenses less the sums received by him during his possession of the premises. There was no fraudulent misrepresentation:—*Held*: the parol agreement had not been established, & even if it had been established, it was not a collateral agreement, but an

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agreement relating to the subject matter of the contract for letting, & must be found in it.—*CRAWFORD v. WHITE CITY RINK (NEWCASTLE-ON-TYNE), LTD.* (1913), 29 T. L. R. 318; 57 Sol. Jo. 357; 77 J. P. Jo. 111.

**1565. ——— Option to rent neighbouring premises.**—In 1853 a railway co., who were the predecessors of *defts.*, demised some land adjacent to one of their railway stations to a lessee for nine hundred & ninety-nine years upon the terms that he should erect & keep a hotel thereon. The lease contained a covenant by the railway co. that the tenant or occupier of the hotel should have the option of renting the refreshment rooms of the station at the rent & subject to the rules & regulations therein mentioned "in preference to any other party, it being the intention & wish of the parties hereto that the same person shall have the option of occupying the hotel & refreshment rooms." *Pltf.*s occupied the hotel as assignees of this lease. They also occupied the refreshment rooms as yearly tenants, until *defts.*, who had succeeded to all the rights & liabilities of the railway co.,

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**Sect. 1.—In general. Sect. 2.]**

gave notice to pltf. to quit, & determined their tenancy, purposing themselves to take over the management & control of the refreshment rooms. Pltf. having obtained an assignment of the original lessee's rights under the above covenant, claimed a declaration that defts. were under an obligation to put & keep the occupier of the hotel in occupation of the refreshment rooms:—*Held*: the true meaning & effect of the covenant was that if & when the railway co. were minded to offer the refreshment rooms at a rent to any one, the occupier of the hotel should have the option of taking them at that rent; but that if the railway co. themselves undertook the supply of refreshments the occupier of the hotel had no such option.—*COUNTY HOTEL & WINE CO. v. LONDON & NORTH WESTERN RY. CO.*, [1921] 1 A. C. 85; 89 L. J. K. B. 918; 124 L. T. 99; 36 T. L. R. 786; 64 Sol. Jo. 666; 18 L. G. R. 597, H. L.

**1566. How far binding.—Notwithstanding surrender of lease.**—A bond to pay an annuity to A. if he or his assigns shall or may occupy the lands let to him by B. is forfeited by non-payment to A. although the obligor has surrendered the lands to B.—*FORD v. HOLLINGBOROUGH* (1594), Cro. Eliz. 313; 78 E. R. 563; *sub nom.* *FORD v. HOLBORROW*, Owen, 104; *sub nom.* *FORTH v. HOLBOROUGH*, Poph. 39.

**1567. — Transfer of lease.**—A lease contained an option for the lessee, his exors., administrators & assigns to purchase the freehold reversion. By a memorandum of agreement addressed to the exor. of the lessor & signed by the lessee & resps., it was agreed that, in consideration of the exor. releasing the lessee & accepting resps. as lessees for the residue of the term, the lease should be surrendered & a new lease executed by resps. for the residue of the term "on the same terms & conditions in all respects" as those of the original lease. No new lease was ever executed by resps., who entered into possession & paid rent to the exor. for several years. Resps. duly gave notice to exercise their option to purchase, but the exor. disputed their right:—*Held*: the word "lease" in the memorandum meant the document & not the demise, & the option of purchase, although not a term of the demise, being included in the original lease, was in substance transferred by the lessee to resps.

It is quite true that when there is a collateral agreement, it is not necessarily transferred by a transfer of the lease, but it is perfectly competent to the contracting parties if they are so inclined to use language which will carry in a collateral agreement just as well as any stipulation springing from the relation of landlord & tenant (*LORD ATKINSON*).—*BATCHELOR v. MURPHY*, [1926] A. C. 63; 95 L. J. Ch. 89; 134 L. T. 161; 42 T. L. R. 112, H. L.; *affg.*, [1925] Ch. 220, C. A.; *revg.*, [1924] 2 Ch. 253.

*Annotation*:—*Reid*, *Sherwood v. Tucker*, [1924] 2 Ch. 440.

**1568. — Agreement collateral to intended lease.—Inoperative as demise.**—By articles of agreement not under seal pltf. agreed to grant to deft. a lease at a certain rent for ninety-nine years of a piece of land so soon as the latter should have erected upon it a messuage, & deft. undertook

until the execution of the lease to "hold the piece of land & other the premises at the rent & subject to the conditions to be contained" in the lease. Deft. never entered upon or took possession of the piece of land:—*Held*: although the articles of agreement did not operate as a demise, yet deft. by a collateral contract to the intended lease had undertaken to pay the amount of the rent, & it was immaterial that he had never entered upon possession of the land.—*ADAMS v. HAGGER* (1879), 4 Q. B. D. 480; 41 L. T. 224; 43 J. P. 796; 27 W. R. 402, C. A.

**1569. — Parol warranty as to state of repair.**—Pltf. & deft. negotiated for the lease of a house by the latter to the former. The terms were arranged, but pltf. refused to hand over the counterpart that he had signed unless he received an assurance that the drains were in order. Deft. verbally represented that they were in good order, & the counterpart was thereupon handed to him. The lease contained no reference to drains. The drains were not in good order, & an action was brought to recover damages for breach of warranty:—*Held*: the representation made by deft. as to the drains being in good order was a warranty which was collateral to the lease, & for breach of which an action was maintainable.—*DE LASSALLE v. GUILDFORD*, [1901] 2 K. B. 215; 70 L. J. K. B. 533; 84 L. T. 549; 49 W. R. 467; 17 T. L. R. 384, C. A.

*Annotations*:—*Reid*, *Milch v. Coburn* (1910), 27 T. L. R. 170; *Collins v. Hopkins*, [1923] 2 K. B. 617. *Mentd.* *Lloyd v. Sturgeon Falls Pulp Co.* (1901), 85 L. T. 162; *Hellbut*, *Symons v. Buckleton*, [1913] A. C. 30.

**1570. — Agreement to put premises into repair.**—In negotiations for a lease it was agreed that if pltf. put the drains of a house into sound & proper condition deft. would accept a lease of the premises. On this understanding deft. executed a lease & went into possession. The lease contained a covenant by deft. to pay outgoings & to keep in repair, but no covenant by pltf. to put the drains in repair. Pltf. in fact never performed her contract to put the drains into proper condition. Some years later diphtheria broke out in the house, & the local authority ordered that the drains should be repaired:—*Held*: the outgoings which deft. had covenanted to pay were outgoings in connection with the drains as properly repaired by pltf. in accordance with her contract, & therefore, deft. was not liable for the cost of the work which had been ordered by the local authority.—*HENMAN v. BERLINER*, [1918] 2 K. B. 236; 87 L. J. K. B. 984; 119 L. T. 312; 82 J. P. 300; 34 T. L. R. 456; 16 L. G. R. 707.

**1570a. — Warranty that premises well built.**

—*KENNARD v. ASHMAN* (1894), 10 T. L. R. 213; *affd.* 10 T. L. R. 447, C. A.

*Annotation*:—*Distd.* *De Lassalle v. Guildford*, [1901] 2 K. B. 215.

**1571. Admissibility of evidence.—Parol evidence.**

—Dft. agreed with pltf., by parol, that, if she would take a lease of certain premises belonging to him, he would pay her £20 towards putting them in repair. The lease was afterwards executed & accepted by pltf., who took possession & repaired the premises, & on payment of the first quarter's rent, demanded the sum of £20 from deft., who said he would pay it when the

*Held*: such agreement could be established by parol, & was binding on the estate of testator.—*Re Mason & Scott* (1874), 21 Gr. 166, 629.—*CAN.*

*h.* — *Parol agreement.*—*HOYT'S PROPRIETARY LTD. v. SPENCER* (1919), 27 C. L. R. 133; 19 S. R. N. S. W. 300.—*AUS.*

**PART V. SECT. 1.**

**1569 i. How far binding.—Agreement collateral to intended lease.—Parol warranty as to state of repair.**—*BYRMER v. THOMPSON* (1915), 34 O. L. R. 194; *affd.* 8 O. W. N. 527; 23 D. L. R. 840; 34 O. L. R. 543; 9 O. W. N. 114; 25 D. L. R. 831.—*CAN.*

**1570 i. — Agreement to put premises into repair.**—On a treaty for the lease of a mill property between the exors. & trustees of a deceased owner, & intending lessee, the exors. & trustees expressly agreed that they would rebuild the dam upon the premises, & without this agreement the lease would not have been taken:—



next quarter's rent became due:—*Held*: such acknowledgment of that sum being due, raised a moral obligation on deft. to pay; & pltf. was entitled to recover upon an account stated; although it was objected, that parol evidence, as to the terms on which the lease was to be granted, was inadmissible by Stat. Frauds.—*SEAGO v. DEANE* (1828), 4 Bing. 459; 1 Moo. & P. 227; 6 L. J. O. S. C. P. 66; 130 E. R. 844.

*Annotations*:—*Reid*. *Cooking v. Ward* (1845), 1 C. B. 858; *Kennedy v. Broun* (1863), 13 C. B. N. S. 677.

**1572.** ——— **Agreement inconsistent with terms of lease.**—A. agreed in writing to let a farm to B. The agreement reserved a rent payable at stated intervals, & provided that A. should put the premises in repair. B. alleged that, prior to the agreement being signed, A. promised, verbally, that if B. would take the farm the buildings should be put into a thorough state of repair, & that no rent should be demanded till this was done, & that on the faith of this promise, B. took the farm. A. afterwards mortgaged the premises to C. who gave to B. notice of the mtgee., & that the principal & interest were in arrear, & directed him to pay the rent to C. B. then set up the alleged collateral agreement, of which C. was previously unaware. C., after notice, distrained for the rent reserved by the written agreement, & due before & after the date of his mtgee. In an action by B. against C. for an injunction to restrain him from holding or selling the goods, & damages for improperly distraining, & against A. & C. for specific performance of the written agreement & the alleged parol agreement, the judge on the motion of pltf., & subject to certain terms, granted an interlocutory injunction restraining C. from remaining in possession & from selling for a certain time:—*Held*: the injunction ought not to have been granted, for, assuming that the parol agreement existed, the mtgee. of the reversion, without notice, was not bound by it.

*Qu.*: whether evidence of a prior agreement that no rent shall be paid till a certain act has been done by the landlord can be given when there is a written agreement of tenancy reserving a rent at stated intervals.—*CARTER v. SALMON* (1880), 43 L. T. 490.

**1573.** ——— **—A covenant in a lease that the lessee will "pay" the rent in advance is a covenant that he will pay it in cash in advance; & therefore an antecedent parol agreement that he will give bills at three months for the rent in advance is inconsistent with the covenant, & evidence of the agreement is accordingly inadmissible.**—*HENDERSON v. ARTHUR*, [1907] 1 K. B. 10; 76 L. J. K. B. 22; 95 L. T. 772; 23 T. L. R. 60; 51 Sol. Jo. 65, C. A.

*Annotations*:—*Reid*. *Re Defries, Elcholz v. Defries*, [1909] 2 Ch. 423; *Allen v. Royal Bank of Canada* (1925), 41 T. L. R. 625.

*See, also*, *GAME*, Vol. XXV., p. 361, Nos. 108-110.

**1574. On whom binding—Assignee—Of lessor.**—Part of an estate consisted of three farms in Hampshire, & in that county, valuations between outgoing & incoming tenants for hay, straw, & manure, are made at "fodder value," which is lower than what is called "market value." The three tenants of the farms held under verbal agreements, from year to year, according to the custom of Hampshire. Defts. were devisees of the estate in trust for sale, & in contemplation

of a sale, they gave notice to the tenants to quit at Michaelmas, 1869. The tenants alleged that they had been promised leases by the deviser, & although there was nothing to show that such promises were binding in law or equity, defts., thinking the claim binding in honour & conscience, entered into agreements with the tenants, by which, in consideration of their giving up possession of their farms according to the notices, defts. promised to remit the half-year's rent due at Michaelmas, 1868, to pay £100 to the tenant, & to pay for hay, etc., at the termination of the tenancy, at "market value." In June, 1868, the estate was put up for sale by auction. In the particulars & conditions of sale the three farms were described as in the occupation of the tenants respectively till Michaelmas, 1869, at certain rents, & certain incumbrances, subject to which the sale was made, were specified, viz. land tax & tithe rentcharge; but no express mention was made of the above-mentioned agreements with the tenants. The conditions stipulated that the property should be taken to be correctly described as to quantity & otherwise, & that if any error, misstatement, or omission should be discovered, the same should not annul the sale, nor should any compensation be allowed, & that the rent or possession should be received or retained & the outgoing discharged by the vendors up to Sept. 29 & from that day by the purchaser. The property was bought in at the sale by auction, & afterwards sold by private contract on July 18, 1868, to pltf. The contract described the property as in the foregoing particulars, & as being purchased subject to the foregoing conditions. At the time of the purchase pltf. had no knowledge of the above-mentioned agreements with the tenants. Upon his becoming aware of & objecting in respect of them it was agreed that he should complete without prejudice to his claim to be indemnified in respect of the agreements to pay market value for the hay, etc. Pltf. afterwards paid the tenants the amount of the valuations of hay, etc., at market value, & now sought to recover the difference between that & fodder value from defts.:—*Held*: the agreements with the tenants to pay market value were collateral agreements binding only on defts. personally, & did not amount to fresh demises; & by the agreement between the parties, pltf. having paid the tenants' claims, could recover the difference between market & fodder value from defts. as money paid for their use.—*PHILLIPS v. MILLER* (1875), L. R. 10 C. P. 420; 44 L. J. C. P. 205; 32 L. T. 638; 23 W. R. 834, Ex. Ch.

**1575.** ——— **Mortgagee of reversion.**—*CARTER v. SALMON*, No. 1572, *ante*.

## SECT. 2.—NECESSITY FOR WRITING.

*See, now*, Law of Property Act, 1925 (c. 20), s. 40.

**Contracts partly within Statute of Frauds.**—*See CONTRACT*, Vol. XII., pp. 125 *et seq.*

**1576. Agreement to pay percentage on cost of enlargement.**—A. granted a lease of premises to B., who afterwards took C. into partnership. B. & C. applied jointly to A. to enlarge the premises, agreeing to pay £10 per cent. *per annum* on the money laid out, which was accordingly done. B.

**15741. On whom binding—Assignee—Of lessor.**—*CLOME v. BELMONT* (1875), 23 Gr. 166, 317.—CAN.

*k. Whether registration necessary.*—

*SUBRAMANIAN CHETTIAR v. ARUNACHALAM CHETTIAR* (1902), 1 L. R. 25, Mad. 603; L. R. 29 Ind. App. 138; 6 C. W. N. 865.—IND.

## PART V. SECT. 2.

**1. Agreement to allow lessee to make alterations.**—*MCKENZIE v. MCGLAUGHLIN* (1888), 8 O. R. 111.—CAN.

**Sect. 2.—Necessity for writing. Part VI. Sects. 1 & 2: Sub-sect. 1, A. & B. (a).]**

& C. dissolved partnership:—**Held:** the agreement was only collateral to the lease, & not a new demise; & therefore it was not within Stat. Frauds, & A. was entitled to recover on it in an action against B. & C.—**HOBY v. ROEBUCK** (1816), 7 Taunt. 157; 2 Marsh. 433; 129 E. R. 63.

**Annotations:**—**Fold.** *Donellan v. Read* (1832), 3 B. & Ad. 899. **Refd.** *Maples v. Pepper* (1856), 20 J. P. 279.

**1577. Agreement to contribute to cost of putting into repair.]—SEAGO v. DEANE, No. 1571, ante.**

**1578. Agreement to pay increased rent.—In consideration of money spent by landlord on alterations.]—**A landlord who had demised premises for a term of years at £50 a year, agreed with his tenant to lay out £50 in making certain improvements upon them, the tenant undertaking to pay him an increased rent of £5 a year during the remainder of the term, of which several years were unexpired, to commence from the quarter preceding the completion of the work:—**Held:** the landlord, having done the work, might recover arrears of the £5 a year against the tenant, though the agreement had not been signed by either party; for it was not a contract for any interest in or concerning lands within Stat. Frauds; nor was it, according to that statute, an agreement “not to be performed within one year from the making thereof,” no time being fixed for the performance on the part of the landlord.—**DONFILLAN v. READ** (1832), 3 B. & Ad. 899; 1 L. J. K. B. 269; 110 E. R. 330.

**Annotations:**—**Consd.** *Reeve v. Jennings*, [1910] 2 K. B. 522. **Refd.** *Lambert v. Norris* (1837), 2 M. & W. 333; *Cherry v. Heming & Needham* (1849), 4 Exch. 631;

*Maples v. Pepper* (1856), 18 C. R. 177; *Smith v. Neale* (1857), 2 C. B. N. S. 67; *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266.

**1579. Agreement to pay for furniture, fixtures & alterations.]—VAUGHAN v. HANCOCK, No. 389, ante.**

**1580. Agreement to put premises in state fit for habitation.]—**Deft. demised to pltf. a messuage in an unfinished state by a written agreement. Before & at the time of pltf.’s signing the agreement, deft. verbally promised pltf. to put the messuage into a condition fit for habitation. Amongst the things which deft. undertook to do upon the messuage was the construction of a water-closet. In an action for the breach of deft.’s promise to put the messuage into a condition fit for habitation:—**Held:** deft.’s verbal promise to finish the messuage was collateral to the written lease; evidence of the promise was admissible at the trial; & deft.’s undertaking to build a water-closet in the messuage was not a contract for an interest in land within Stat. Frauds. s. 4, & therefore need not be in writing.—**MANN v. NUNN** (1874), 43 L. J. C. P. 241; 30 L. T. 526; 38 J. P. 776.

**Annotations:**—**Dtd.** *Angell v. Duke* (1875), 32 L. T. 320. **Refd.** *Burtsal v. Bianchi* (1891), 65 L. T. 678.

**1581. Agreement to provide further furniture.]—MECHELEN v. WALLACE, No. 388, ante.**

**1582. Agreement to execute certain repairs & supply additional furniture.]—ANGELL v. DUKE, No. 390, ante.**

**1583. Agreement to let premises for certain purpose.]—CRAWFORD v. WHITE CITY RINK (NEWCASTLE-ON-TYNE), LTD., No. 1564, ante.**

## Part VI.—Licence.

### SECT. 1.—NATURE OF LICENCE.

**1584. Passes no interest in property.]—HARE v. CELEY, No. 1620, post.**

**1585. —.]—THOMAS v. SORRELL, No. 1594, post.**

**1586. —.]—ANON. (1705), No. 1706, post.**

**1587. —.]—R. v. HORNDON-ON-THE-HILL (INHABITANTS), No. 1028, post.**

**1588. —.]—MUSKETT v. HILL, No. 1709, post.**

**1589. —.]—**Pltf. claimed an exclusive right to take ice from a canal under the terms of a lease granted by a co. to whom the canal belonged, in which lease, in consideration of the erection of certain ice houses, the lessee had liberty to take ice from the canal within certain limits. Defts. also claimed a right to take ice from the canal within the same limits, under a parol licence from one of the directors:—**Held:** the granting of the leases gave no exclusive right to pltf. to take the ice.

Pltf. had a limited right to fill his ice houses, & to carry on his business as a vendor of ice upon the premises demised, but the taking of ice by defts. was not in itself an infringement of that right.—**NEWBY v. HARRISON** (1861), 4 L. T. 424, L. C.

**Annotations:**—**Consd.** *Renard v. Levinstein* (1865), 2 Hem. & M. 628. **Dtd.** *Carr v. Benson* (1868), 3 Ch. App. 524. **Consd.** *Heap v. Hartley* (1889), 42 Ch. D. 461. **Refd.** *Sutherland v. Heathcote*, [1891] 3 Ch. 504; *Smelting Co. of Australia v. I. R. Comrs.*, [1896] 2 Q. B. 179; *British Actors Film Co. v. Glover*, [1918] 1 K. B. 299.

### PART VI. SECT. 1.

**m. Strict conformance by licensee necessary.]—**A party acting under a licence must conform to it, & if the act done be not fully covered by the

licence, the party committing it is responsible.—**DICKIE v. SPANKS** (1869), 7 N. S. R. 416.—**CAN.**

**n. Licence to let.—Whether assignment permitted.]—***Semle:*—A licence

to let, at the tenant’s convenience, any part of the premises included in a lease containing a non-alienation clause, does not authorise an assignment of them.—**CLARK v. ARMSTRONG**

Licence distinguished from easements, *see* EASEMENTS, Vol. XIX., pp. 21, 22, Nos. 80–85.

**1590. — No right of action.]—**A person using land as a garden for more than twenty years, under permission from the owner to do so, in order to keep it from trespassers, the owner from time to time coming on the land & giving directions as to cutting of trees, etc.:—**Held:** he had not got a title so as to enable him to sue a claimant under the owner for a forcible entry.—**ALLEN v. ENGLAND** (1862), 3 F. & F. 49.

**1591. —.]—**The B. Canal Co. having, in consideration of an annual rent, demised land adjoining the canal to pltf. for a term of years, “together with the sole & exclusive right to put or use boats on the said canal, & let the same for hire for the purposes of pleasure only,” deft. infringed that right by letting out a boat for hire on the same canal. In an action against him by pltf. for such infringement:—**Held:** the grant of the right, although valid as between the co. & pltf., their lessee, passed no such estate or property to him as would enable him to maintain an action against a third party for its infringement.

The grant of the right in question operated simply as a licence or covenant on the part of the lessors; & in suing a stranger for its infringement the lessee must use the name of his lessors.—**HILL v. TUPPER** (1863), 2 H. & C. 121; 2 New

Rep. 201; 32 L. J. Ex. 217; 8 L. T. 792; 9 Jur. N. S. 725; 11 W. R. 784; 159 E. R. 51.  
*Annotations*.—*Consd.* Stockport Waterworks v. Potter (1864), 3 H. & C. 300; Nuttall v. Bracewell (1866), L. R. 2 Exch. 1; Fitzgerald v. Firbank, [1897] 2 Ch. 96. *Reid*. Richards v. Harper (1865), 4 H. & C. 55; A.-G. v. Horner No. 2, [1913] 2 Ch. 140.

**1592.** ———.]—Prior to 1863 & down to 1881 the land in question which was about 100 yards from the railway station doors, & inside a line of fence dividing the co.'s land from the public road, was occupied as a coal wharf. In 1863 pltt. applied for permission to occupy the wharf in place of his predecessor. This was assented to, & pltt., without any lease or agreement continued to occupy it till 1881. In 1865 pltt. erected a brick building on the land in the place of a wooden shed theretofore used as an office:—*Held*: pltt.'s occupation was not an adverse one, & he gained no title to it under the Prescription Acts; but if his occupation had been adverse, he might have gained a title, to which the fact that the land was land acquired for the purposes of the railway, & not superfluous land, would have been no answer.—*BOBBETT v. SOUTH EASTERN RY. CO.* (1882), 9 Q. B. D. 424; 51 L. J. Q. B. 161; 46 L. T. 31; 46 J. P. 823.  
*Annotation*.—*Consd.* Mid. Ry. v. Wright, [1901] 1 Ch. 738.

**1593.** ———.]—An exclusive licence is a leave to do a thing, & a contract not to allow any one else to do the thing; but, unless coupled with a grant, it confers no more than any other licence any interest or property in the thing, & the licensee has no title to sue in his own name.—*HEAP v. HARTLEY* (1889), 42 Ch. D. 461; 58 L. J. Ch. 790; 61 L. T. 538; 38 W. R. 136; 5 T. L. R. 710; 6 R. P. C. 495, C. A.

*Annotations*.—*Apld.* London Printing & Publishing Alliance v. Cox, [1891] 3 Ch. 291. *Consd.* Fitzgerald v. Firbank, [1897] 2 Ch. 96. *Apld.* Neilson v. Horniman (1909), 26 T. L. R. 188. *Consd.* British Actors Film Co. v. Glover, [1918] 1 K. B. 299. *Reid*. *Re* Apollinaris Co.'s Trade Mks., Apollinaris, Friedrichshall & Hunyadi Janos (1890), 63 L. T. 162; Smelting Co. of Australia v. I. R. Comrs., [1896] 2 Q. B. 179; National Phonograph Co. of Australia v. Menck, [1911] A. C. 336; British Assocn. of Glass Bottle Manufacturers v. Forster (1917), 86 L. J. Ch. 489.

**1594. Legalises unlawful act.**—A dispensation or licence properly passes no interest nor alters or transfers property in anything but only makes an action lawful which without it would have been unlawful. . . . A licence to hunt in a man's park, & carry away the deer killed to his own use; to cut down a tree in a man's ground, & to carry it away the next day after to his own use, are licences as to the acts of hunting & cutting down the tree; but as to the carrying away of the deer killed, & tree cut down, they are grants (*VAUGHAN, C.J.*).—*THOMAS v. SORRELL* (1673), Vaugh. 330; 3 Keb. 264; Freem. K. B. 137; 124 E. R. 1098, Ex. Ch.

*Annotations*.—*Apld.* Muskett v. Hill (1839), 5 Bing. N. C. 694; Wood v. Leadbitter (1845), 13 M. & W. 838. *Consd.* *Warr v. L. C. C.* (1904) 1 K. B. 713. *Reid*. Washbourne v. Burrows (1847), 16 L. J. Ex. 266; Taplin v. Florence (1851), 10 C. B. 744; Congreve v. Everts (1854), 10 Exch. 298; Bailey v. Stephens (1862), 12 C. B. N. S. 91; Nuttall v. Bracewell (1866), 36 L. J. Ex. 1; L. C. C. v. Dundas, [1904] P. 1; Smith v. Colbourne, [1914] 2 Ch. 533; British Actors Film Co. v. Glover, [1918] 1 K. B. 299. *Mentd.* Jevesson v. Moor (1899), 12 Mod. Rep. 262; It. v. Papinian (1725), Sess. Cas. K. B. 135; *Ex p.* Armitage (1756), Amb. 294.

**1595.** ———.]—A grant or authority to come upon my lands & to hunt there is but a licence & no more; but if it is to take the profits it is a lease as

well, so if it is to take the profits for a year, it is a lease for a year, for this passes an interest; the other is only an authority to do particular acts (*per CUR.*).—*ANON.* (1705), 3 Salk. 223; 91 E. R. 789.

**1596.** ———.]—*MUSKETT v. HILL*, No. 1709, *post*.  
**1597.** ———.]—*NEWBY v. HARRISON*, No. 1589, *ante*.

## SECT. 2.—DISTINCTION BETWEEN LICENCE AND LEASE.

### SUB-SECT. 1.—HOW ASCERTAINED.

#### A. Intention of Parties.

**1598. General rule.**—An instrument is not a demise, although it contains the usual words of demise, if its contents show that such was not the intention of the parties.

The parties inaccurately call this a letting, & the money to be paid a rent, but the whole agreement is such as to show that defts. were to retain the possession of the hall & gardens, so that there was to be no demise of them, & that the contract was merely to give pltt. the use of them on those days (*BLACKBURN, J.*).—*TAYLOR v. CALDWELL* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L. J. Q. B. 164; 8 L. T. 356; 27 J. P. 710; 11 W. R. 726; 122 E. R. 309.

*Annotations*.—*Mentd.* Appleby v. Myers (1867), L. R. 2 C. P. 651; Board v. Firth (1868), L. R. 4 C. P. 1; Robinson v. Davison (1871), L. R. 6 Exch. 269; Castle v. Playford (1872), 26 L. T. 315; Jackson v. Union Marine Insco. (1874), L. R. 10 C. P. 125; Howell v. Coupland (1876), 1 Q. B. D. 258; *Re* Arthur, Arthur v. Wynne (1880), 14 Ch. D. 603; Marshall v. Schofield (1882), 52 L. J. Q. B. 58; Turner v. Goldsmith, [1891] 1 Q. B. 544; *Re* Jamieson & Newcastle S.S. Freight Insce. Assocn., [1895] 1 Q. B. 510; Blum v. Ansley (1900), 64 J. P. 184; Nickoll & Knight v. Ashton, Edridge, [1901] 2 K. B. 126; Lumsden v. Barton (1902), 19 T. L. R. 53; Blakeley v. Muller, Hobson v. Pattenden, [1903] 2 K. B. 700, n.; Civil Service Co-op. Soc. v. General Steam Navigation Co., [1903] 2 K. B. 750; Clark v. Lindsay (1903), 88 L. T. 198; Elliott v. Crutchley, [1903] 2 K. B. 478; Horne Bay Steam Boat Co. v. Hutton, [1903] 2 K. B. 683; Krell v. Henry, [1903] 2 K. B. 740; Scott v. Coulson, [1903] 2 Ch. 249; Chandler v. Webster, [1904] 1 K. B. 493; *Re* Hull & Moux, [1905] 1 K. B. 588; *Grimsdick v. Sweetman*, [1909] 2 K. B. 740; *The Salvador*, No. 2 (1909), 25 T. L. R. 727; Stephens v. Junior Army & Navy Stores, [1912] 2 Ch. 516; *Re* Worthington, *Ex p.* Pathe Frères, [1914] 2 K. B. 299; Associated Portland Cement Manufacturers, 1900, Ltd. v. Cory (1915), 31 T. L. R. 442; *Re* Shipton, Anderson & Harrison Arbitration, [1915] 3 K. B. 676; F. A. Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Horlock v. Beal, [1916] 1 A. C. 486; *Leiston Gas Co. v. Leiston-cum-Sizewell U. C.*, [1916] 2 K. B. 428; *Re* Newman, Raphaels Claim, [1916] 2 Ch. 309; Smith, Concy & Barrett v. Becker, Gray, [1916] 2 Ch. 86; Lloyd Royal Bldg Soc. Anon. v. Stathatos (1917), 33 T. L. R. 390; Metropolitan Water Board v. Dick Kerr, [1917] 2 K. B. 1; Scottish Navigation Co. v. Souter, Admiral Shipping Co. v. Weidner, Hopkins, [1917] 1 K. B. 222; Blackburn Bobbin Co. v. Allen, [1918] 2 K. B. 407; *Re* Blacklusion, *Ex p.* Abdy, [1919] 2 K. B. 735; *Re* Comptoir Commercial Anversois & Power, [1920] 1 K. B. 868; Labeaupin v. Crispin, [1920] 2 K. B. 714; Mertens v. Home Freehold Co., [1921] 2 K. B. 526; Larrinaga v. Soc. Franco Americana des Phosphates de Medulla (1923), 92 L. J. K. B. 455.

**1599.** ———.]—*ROCHDALE CANAL CO. v. BREWSTER*, No. 1043, *post*.

#### B. Right to Exclusive Possession.

##### (a) In General.

**1600. Basis of distinction.**—*TAYLOR v. CALDWELL*, No. 1598, *ante*.

(1859), 10 I. Ch. R. 263; 12 Ir. Jur. 89.—*IR.*

## PART VI. SECT. 2, SUB-SECT. 1.—B. (a).

### 1600 i. Basis of distinction.]—A

licence to cut timber on land whereby exclusive possession of the land is conferred upon the licensee amounts to a demise of land although there may be restrictions in respect of the purposes for which the land may be used.—*PHILLIPS v. GLENWOOD LUMBER CO.*

(1904), 8 Nfld. L. R. App. vii.—*NFLD.*

**1600 ii.** ———.]—*Held*: as no exclusive right of occupation was given by the instrument but only an exclusive right to cut timber, the instrument was not

**Sect. 1.—Distinction between licence and lease: Sub-sect. 1, B. (a) & (b); sub-sect. 2.]**

**1601.** —.]—**LONDON & NORTH WESTERN RY. CO. v. BUCKMASTER**, No. 1641, *post*.

**1602.** —.]—**WELLS v. KINGSTON-UPON-HULL CORPN.**, No. 1663, *post*.

**1603.** —.]—**TAYLOR v. PENDLETON OVERSEERS**, No. 1651, *post*.

**1604.** —.]—A licence granted by the Govt. to resp. under a colonial statute, giving an exclusive right of occupation of land, though subject to reservations or to a restriction as to its user, is in law a demise of land.

Prior to its grant, applts., expecting & believing that they would obtain the licence, commenced cutting timber on the land comprised therein; & continued to do so until three days after its grant notwithstanding a formal notice from resp., & after that date they removed the logs so cut:—*Held*: applts. were wrongdoers, & resp. as lessee had lawful possession of the logs so cut, which established a good title against applts. with a right to consequent relief.—**GLENWOOD LUMBER CO., LTD. v. PHILLIPS**, [1904] A. C. 405; 73 L. J. P. C. 62; 90 L. T. 741; *sub nom.* **GLENWOOD LUMBER CO., LTD. v. BISHOP**, 20 T. L. R. 531, P. C.

*Annotations*:—**Apld.** **Clarkson & Forgie v. Wishart & Myers**, [1913] A. C. 828; **McPherson v. Temiskaming Lumber Co.**, [1913] A. C. 145. *Mentd.* **Eastern Construction Co. v. National Trust Co. & Schmidt**, [1914] A. C. 197.

**(b) What amounts to Exclusive Possession.**

**1605. Licence to dig for minerals.**—**HUNTINGTON (EARL) & MOUNTJOYES (LORD) CASE** (1583), 4 Leon. 147; **Moore**, K. B. 174; 1 And. 307; 74 E. R. 786; *sub nom.* **MOUNTJOY (LORD) & HUNTINGTON'S (EARL) CASE**, Godb. 17.

*Annotations*:—**Consd.** **Chetham v. Williamson** (1804), 4 East, 489; **R. v. Trent & Mersey Canal Co.** (1825), 3 L. J. O. S. K. B. 140. **Expld.** **Low Moor Co. v. Stanley Coal Co.** (1875), 33 L. T. 436. **Consd.** **Sutherland v. Heathcote**, [1892] 1 Ch. 475. *Held*, **Goodright d. Fowler v. Forrester** (1807), 8 East, 552; **Doct. Hanley v. Wood** (1819), 2 B. & Ald. 724. *Mentd.* **Harvey v. Thomas** (1591), Cro. Eliz. 216; **Townshend v. Windham** (1750), 2 Ves. Sen. 1.

**1606. Licence to remove minerals.**—**ROADS v. TRUMPTON OVERSEERS**, No. 1640, *post*.

**1607. Licence to cut growing crops.**—One who has contracted with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown & made into hay by the vendee, has such an exclusive possession of the close though for a limited purpose that he may maintain trespass *quare clausum fregit* against any person entering the close & taking the grass even with the assent of the owner. But this being a contract or sale of an interest in or concerning land is voidable by Stat. Frauds, s. 4, if not reduced to writing & may be discharged by parol notice from the owner before any part execution of it. Stat. Frauds, s. 1, as construed by sect. 2 is meant to vacate parol leases, etc., conveying a greater interest in land than for 3 years & whereupon a rent is reserved.—**CROSBY v. WADSWORTH** (1805), 6 East, 602; 2 Smith, K. B. 559; 102 E. R. 1419.

*Annotations*:—**Expld.** **Evans v. Roberts** (1826), 5 B. & C. 829; **Carrington v. Roots** (1837), 2 M. & W. 248. **Consd.** **Washbourn v. Burrows** (1847), 1 Exch. 107; **Roads v. Trumpton Overseers** (1870), L. R. 6 Q. B. 56. *Held*, **Parker v. Staniland** (1809), 11 East, 362; **Warwick v. Bruce** (1813), 2 M. & S. 205; **Jones v. Flint** (1839), 10 Ad. & El. 753; **Coverdale v. Charlton** (1878), 26 W. R. 687; **Maddison v. Alderson** (1883), 8 App. Cas. 467; **Richards v. Davies**, [1921] 1 Ch. 90; **Back v. Daniels**,

[1925] 1 K. B. 526. *Mentd.* **Strickland v. Maxwell** (1834), 2 Cr. & M. 539; **Leroux v. Brown** (1852), 12 C. B. 801; **Hand v. Hall** (1877), 2 Ex. D. 318; **Mogg v. Yalton Overseers** (1880), 50 L. J. M. C. 17; **Morris v. Baron**, [1918] A. C. 1.

**1608.** — **Limited right of disposal by purchaser.**—Pltf. & deft. were the purchasers, pltf. of a crop of growing turnips, & deft. of a crop of grass, from the same tenant farmer, the turnips & the grass being in adjoining fields. A condition of the sale of the turnips was that pltf. should not remove more than half of them, the other half having to be consumed on the ground. A number of sheep which had been put by deft. into the pasture field escaped therefrom on to the turnip field & ate a quantity of the turnips. Pltf. claimed damages in respect of the trespass by deft.'s sheep:—*Held*: pltf. had an exclusive right of possession of the turnip crop notwithstanding the fact that his right to dispose of it when severed was limited, & he was entitled to maintain trespass.—**WELLAWAY v. COURTIER**, [1918] 1 K. B. 200; 87 L. J. K. B. 299; 118 L. T. 256; 34 T. L. R. 115; 62 Sol. Jo. 161, D. C.

*Annotation*:—*Held*. **Richards v. Davies**, [1921] 1 Ch. 90.

**1609. Licence to take game.**—By deed A. & B. conveyed to D. & his heirs certain lands, excepting & reserving to A., B. & C., their heirs & assigns liberty to come into & upon the lands, & there to hawk, hunt, fish, & fowl:—*Held*: this was not in law a reservation properly so called, but a new grant by D., who executed the deed, of the liberty therein mentioned; & therefore it might enure in favour of C. & his heirs, although he was not a party to the deed.

The grant to a person, his heirs & assigns, of "free liberty, with servants or otherwise, to come into & upon lands, & there to hawk, hunt, fish, & fowl" is a grant of a licence of profit, & not of a mere personal licence of pleasure; & therefore it authorises the grantee, his heirs & assigns, to hawk, hunt, etc., by his servants in his absence.—**WICKHAM v. HAWKER** (1840), 7 M. & W. 63; 10 L. J. Ex. 153; 151 E. R. 679.

*Annotations*:—**Consd.** **Pannell v. Mill** (1846), 3 C. B. 625; **Lonsdale v. Rigg** (1856), 11 Exch. 654; **Ewart v. Graham** (1859), 7 H. L. Cas. 331; **Owen v. Parsons** (1874), 38 J. P. 614. *Held*, **Race v. Ward** (1855), 4 E. & B. 702; **Denison v. Holliday** (1857), 1 H. & N. 631; **Kiddle v. Kayley** (1864), 28 J. P. 805; **Proud v. Bates** (1865), 6 New Rep. 92; **Corker v. Payne** (1870), 18 W. R. 436; **Musgrave v. Forster** (1871), L. R. 6 Q. B. 590; **Sowerby v. Smith** (1874), L. R. 9 C. P. 524; **Allgood v. Gibson** (1876), 25 W. R. 60; **Goodman v. Saltash Corpn.** (1882), 7 App. Cas. 633; **Sutherland v. Heathcote**, [1892] 1 Ch. 475; **Eccroyd v. Coulthard**, [1897] 2 Ch. 554; **Fitzhardinge v. Purcell**, [1908] 2 Ch. 139. *Mentd.* **Durham & Sunderland Ry. v. Walker** (1842), 2 Q. B. 940; **Walsh v. Southwell** (1851), 20 L. J. M. C. 165; **Doct. Croft v. Tidbury** (1854), 14 C. B. 304; **Gilbertson v. Richards** (1859), 4 H. & N. 277; **Williams v. Hayward** (1859), 1 E. & E. 1040; **Hill v. Tupper** (1863), 32 L. J. Ex. 217; **Dennett v. Atherton** (1872), 20 W. R. 442; **Thellusson v. Liddard**, [1900] 2 Ch. 635.

**1610.** —.]—C., granted & demised the exclusive right & licence to take & kill game on certain land, with the use of a cottage, to deft. for a term; & deft. covenanted to leave the land at the end of the term as well stocked with game as at the time of the demise. C. assigned his reversion in the land & hereditaments to pltf.; & they brought an action, at the end of the term, against deft. for a breach of his covenant:—*Held*: the demise was not a mere licence but the grant of an incorporeal hereditament; the covenant touched the hereditament demised, & by 32 Hen. 8, c. 34, the assignees of the reversion could sue upon it.—**HOOPER v. CLARK** (1867), L. R. 2 Q. B. 200;

a lease but a licence.—**HUTCHISON v. RIPEKA THE FREEH.** (1919) N. Z. L. R. 373.—N.Z.

**PART VI. SECT. 2, SUB-SECT. 1.—**  
B. (b).  
o. Sole right to erect advertisement

*Annotations*—*At annual rental.*—**KEMP v. PALMER** (1898), 19 N. S. W. Ex. 38; 14 N. S. W. W. N. 151.—AUS.



8 B. & S. 150; 36 L. J. Q. B. 79; 31 J. P. 228; 15 W. R. 347; *sub nom.* HOOPER v. LANE, 16 L. T. 152.

**1611. Licence to lay down moorings in river—Under statutory powers.]**—Thames Conservancy Act, 1857, vests in certain Conservators, all the interest of the Crown & of the Lord Mayor & Corp'n. of the City of London in the bed & soil of the river. It does so for the purposes stated in that Act, for the execution of which various powers are conferred upon the Conservators.

In execution of some of those powers the Conservators passed a resolution giving permission to applts. to lay down moorings, attached to which they might place a derrick hulk, 510 feet from the river wall; the work of laying down these moorings was to be done to the satisfaction of the Conservators, & was to remain "on condition that the accommodation be assessed & the rent paid thereon; & that the hulk be not used for storing coals." The purpose of so mooring the hulk was that of fastening & holding coal vessels, while they were unloading their coals, & transferring their cargoes to barges & lighters. The derrick hulk was held in its position by chains & anchors set in large stones, & ballast placed in holes dug in the bed of the river, & the work of so placing the stones & the ballast was performed by the workmen of the Conservators, the payment for the work being furnished by applts. The Conservators reserved to themselves power to remove the hulk at a week's notice. The derrick hulk could only be removed from the moorings by being itself loosened from the chains attached to the stones & ballast in the bed of the river; these holdings in the river continuing fixed as before:—*Held*: applts. were liable to be rated to the relief of the poor of the parish, within which lay that part of the river where the derrick hulk was moored, in respect of the profit derived by them from its employment, as they must be treated as persons in occupation of a part of the soil & bed of the river. They were as much occupiers of the land as if they had put a stage upon piles driven into the bed of the river, or had erected a house there. The grant of the right to lay down these moorings, & then to occupy them through the instrumentality of this hulk, was an exercise of the parliamentary powers given to the Conservators under their Act. On the facts of this case the moorings, must be taken to be the property of applts., subject only to the power of removal reserved by the Conservators.

An illustration has been given in the course of the argument, which is commonly given in cases of this character, that of a landlord of an hotel, or the landlord of a lodging-house, in which case although a person sleeping at the hotel may have the exclusive use of his bedroom for the night, or the exclusive use of a sitting-room during the day, or a lodger the exclusive use of the chambers he occupies, still there is a concurrent right reserved by the landlord of the hotel or the person who lets the lodgings, of using the hotel or lodging house for whatever purposes he may think fit for managing the establishment & all purposes connected with it. That is not such an occupation on the part of the lodger or the guest at the hotel as would make him liable to be rated (LORD HATHERLEY).—CORY v. BRISTOW (1877), 2 App. Cas. 262; 46 L. J. M. C. 273; 36 L. T. 594; 41

J. P. 709; 25 W. R. 383, H. L.; *affg.* (1875), 1 C. P. D. 54, C. A.

*Annotations*:—*Distd.* R. v. St. Pancras Assmt. Com. (1877), 2 Q. B. D. 581; *Willing v. St. Pancras Assmt. Com.* (1877), 37 L. T. 126; *Smith v. Lambeth Assmt. Com.* (1882), 10 Q. B. D. 327. *Appld.* Lancashire & Cheshire Telephone Exchange Co. v. Manchester Overseers (1884), 14 Q. B. D. 287; *Reynolds v. Sealecoates Assmt. Com.* (1886), 51 J. P. 87. *Consd.* Thames Conservators v. I. R. Comrs. (1886), 18 Q. B. D. 279. *Distd.* M. S. & L. Ry. v. Kingston-upon-Hull Governor & Grdms. (1896), 75 L. T. 127. *Refd.* L. & N. W. Ry. v. Buckmaster (1875), 24 W. R. 16; *River Thames Conservators v. I. R. Comrs.* (1886), 56 L. T. 198; *Taylor v. Pendleton Overseers* (1887), 19 Q. B. D. 288; *Rochdale Canal Co. v. Brewster* (1894), 71 L. T. 243; *Holywell Union v. Halkyn District Mines Drainage Co.*, [1895] A. C. 117.

**1612. Licence of exclusive pasturage—Sale of grass.]**—Where an owner of grass land upon the determination of a previous tenancy advertised for sale by auction & sold the grass thereupon for ten months to purchasers, on the condition of their feeding it with certain stock, dressing the dung, cutting the thistles, & leaving the fences in good repair, & announced at the time of the sale that it was made free from all rates, tithes, & taxes:—*Held*: that he was rightly inserted in the rate-book as occupier, the transaction with the purchasers of the grass only amounting to a licence by him to them to turn in their cattle, & not constituting them tenant occupiers.—*MOGG v. YATTON OVERSEERS* (1880), 6 Q. B. D. 10; 50 L. J. M. C. 17; 45 J. P. 324; 29 W. R. 74, D. C. *Annotation*:—*Refd.* *Smith v. New Forest Union* (1889), 53 J. P. 661.

**1613. Licence to erect bookstalls on railway platform.]**—*SMITH v. LAMBETH ASSESSMENT COMMITTEE*, No. 1647, *post*.

**1614. Licence to use land as golf course.]**—*EDWARDS v. SUMMERTON*, [1899] W. N. 120.

**1615. Occupation of berth at quay side.]**—*ALLAN v. LIVERPOOL OVERSEERS, INMAN v. WEST DERBY UNION ASSESSMENT COMMITTEE & KIRKDALE OVERSEERS*, No. 1642, *post*.

**1616.** —,]—*ROCHDALE CANAL CO. v. BREWSTER*, No. 1643, *post*.

**1617. Occupation of coal depot—In railway yard.]**—Applts., a firm of coal merchants, had, under a parol agreement, the use of land, sidings & stables, the property of a railway co., for which they paid a sum, called in the monthly accounts "rent of depot."

No definite term was mentioned in the agreement, & the railway co. claimed the right to turn out applts. without notice. A gate between the depot & the road was locked at night by applts., the railway co. having no key of this gate. There was another gate, which was never locked, between the depot & the line communicating with those of the railway co.:—*Held*: the railway co., & not applts., were the ratable occupiers.—*RICKETT, SMITH & Co. v. POPLAR UNION ASSESSMENT COMMITTEE* (1880), Ryde, Rat. App. (1880-90), 150.

**1618. Occupation for purpose of & in connection with easement—Right of drainage through land.]**—*HOLYWELL UNION & HALKYN PARISH v. HALKYN DRAINAGE CO.*, No. 1717, *post*.

**1619. Occupation of bonded warehouse.]**—*YOUNG & Co. v. LIVERPOOL ASSESSMENT COMMITTEE*, No. 1655, *post*.

#### SUB-SECT. 2.—PARTICULAR INSTANCES.

**1620. To plough & sow.]**—"Exposing to half" is no lease; it is only a liberty to plough & sow,

#### PART VI. SECT. 2, SUB-SECT. 2.

**1620 L. To plough & sow.]**—*STUBBS v. BRODDY* (1877), 27 C. P. 234.—CAN.

**B. Licence to dig for minerals—**

*At yearly rental.*—*LYNCH v. SEYMOUR* (1888), 15 S. C. R. 341.—CAN.

*q. — Rent returnable on failure of operations.*—*BURNSIDE v. MARCUS* (1867), 17 C. P. 430.—CAN.

**F. Licence to cut timber.]**—*SINNOTT v. HOUBLE* (1884), 11 S. C. R. 571.—CAN.

**G. —.]**—*LAKEFIELD LUMBER &*



**Sect. 2.—Distinction between licence and lease: Subsect. 2.]**

but passes no interest; nor can the party have trespass for breaking the soil; but if the tenant in fee had exposed it to halves for several crops, it had been a lease.—*HARE v. CELEY* (1589), Cro. Eliz. 143; 78 E. R. 400.

**1621. Standing place.—In factory.]**—A contract for a standing place in another's mill for a carding machine, the party's own property, which was fastened to the floor & the roof, for the purpose of being worked by the steam engine of the mill, for which the party was to give £20 a year with liberty to quit on three months' notice, is not a taking of a tenement, but a mere licence to use the machinery of the mill; & therefore no settlement can be derived under it.—*R. v. MELLOR (INHABITANTS)* (1802), 2 East, 189; 102 E. R. 341.

*Annotations:—***Reid.** *Re Ogden & Walmsley, Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *Wright v. Stockport Town Clerk* (1843), 1 Lut. Reg. Cas. 32.

**1622. ———.]—****BEAUMONT v. CROWTHER** (1843), 2 L. T. O. S. 97.

**1623. ———.]**—The owner of a factory consisting of several rooms was in the habit of letting "standings" therein for lace machines, himself supplying the power for working them, there being no demise of the room:—*Held*: the weekly payments could not be distrained for as "rent." An entry for the purpose of making a distress through a window which is fastened by means of a hasp is not lawful.—*HANCOCK v. AUSTIN* (1863), 14 C. B. N. S. 634; 8 L. T. 429; 10 Jur. N. S. 77; 11 W. R. 833; 143 E. R. 593; *sub nom.* *HANCOCK v. MARTIN*, 2 New Rep. 243; *sub nom.* *HANCOCK v. AUSTIN*, 32 L. J. C. P. 252.

*Annotations:—***Reid.** *Marshall v. Schofield* (1882), 52 L. J. Q. B. 58. **Mentd.** *Nash v. Lucas* (1867), L. R. 2 Q. B. 590; *Selby v. Greaves* (1868), L. R. 3 C. P. 594.

**1624. ———.]—****Agreement to let "all room & power."—***Pltfs.* by an agreement in writing, let to *defts.* "all the room & power" in a certain mill, together with the warehouse room in connection therewith, in consideration of which *defts.* agreed to pay £500, subsequently increased by parol agreement to £700 *per annum*, by quarterly instalments after the first year:—*Held*: the agreement amounted to a demise of a tenement; the consideration to be paid by *deft.* was rent issuing out of the land; & *defts.* were liable in respect of three quarters' rent, which had become due after the mill had been destroyed by fire.—*MARSHALL v. SCHOFIELD & Co.* (1882), 52 L. J. Q. B. 58; 47 L. T. 406; 31 W. R. 134, C. A.

*Annotation:—***Mentd.** *Matthey v. Curling*, [1922] 2 A. C. 180.

**1625. ———.]—****In exhibition.]**—By agreement between the Royal Comrs. for the Exhibition of 1862 & M., the former agreed, in consideration of certain money, that M. should have the right of selling refreshments while the Exhibition was open, on a space of 40,000 square feet at the least of the portion of ground occupied by the Exhibition. He was to fit up the space allotted to him with counters & fittings, to provide cellars, & to lay on gas & water. He was to be subject to the bye-laws & regulations made by the Comrs. for the orderly conduct of the Exhibition, & the persons employed therein. Provisions were only to be brought in at specified times. M. was to

keep the space clean, & to remove the rubbish, etc., every night. All fittings & erections made by M. were to become the property of the Comrs. on the erection thereof. M. went into occupation under this agreement, & erected fixtures, counters, pipes, etc., & made cellars & drains. He continued to sell refreshments through the whole time the Exhibition was open. The keys of the doors opening from the refreshment rooms into the Exhibition buildings were always kept by the police employed by the Comrs., & the said police usually locked M. & his servants out every evening, & admitted them again in the morning, but during part of the time M. had an entrance from the outside:—*Held*: M. was not liable to be rated to the relief of the poor, inasmuch as he had no exclusive occupation of the space so allotted to him.—*MORRISH v. HALL* (1863), 2 New Rep. 448; 8 L. T. 697; *sub nom.* *R. v. MORRISH*, 32 L. J. M. C. 245; 10 Jur. N. S. 71; 11 W. R. 960; *sub nom.* *MORRISH v. ST. MARY ABBOTTS (CHURCHWARDENS, ETC.)*, 27 J. P. 470.

*Annotations:—***Consd.** *Smith v. Lambeth Assmt. Com.* (1882), 9 Q. B. D. 585. **Reid.** *R. v. St. Martin's, Leicester* (1867), L. R. 2 Q. B. 493; *Rochdale Canal Co. v. Brewster* (1894), Hyde & K. Rat. App. 143.

**1626. ———.]**—*Defts.* let to one W. a stall at an exhibition at a weekly rent, but W. was not to use it before 10 a.m. nor after 11 p.m.:—*Held*: this was a mere licence which gave no right of distraint to *deft.*—*RENDELL v. ROMAN* (1893), 9 T. L. R. 192, D. C.

**1627. ———.]**—*Pltf.* applied to *defts.* for three specified spaces at a fair to be held from Dec. 17, 1920, to Jan. 25, 1921, which dates might be altered by *defts.* The consideration, described in regulations sometimes as "rent," *pltf.*'s interest being referred to as a "tenancy," was in part paid by *pltf.*, his exhibits were to be subject to a "lien" for amounts due to the directors, *pltf.* was not to sub-let or divide any space without their sanction, stand fronts were to be erected by their contractor at *pltf.*'s expense, *defts.* might, without assigning reason, remove unsuitable or not officially sanctioned exhibits, & no exhibitor or servant was to sleep on the premises. The use to be made of the spaces, & the erections put thereon were regulated in the agreement. *Defts.* signed an acceptance of *pltf.*'s application, but disputes having arisen as to the exhibit on one of *pltf.*'s allotted spaces, *defts.* refused the balance of the consideration & claimed the right to let the space to parties other than *pltf.* *Pltf.* commenced an action, & moved for an interlocutory injunction restraining the *defts.* from letting or disposing of the spaces in breach of the contract:—*Held*: on the construction of the whole contract there was nothing in it inconsistent with *pltf.*'s interest being a tenancy, with the right to the sole & exclusive use & occupation during the exhibition of the spaces, such use being regulated by the agreement, & not that of a mere conditional licensee under a parol revocable licence. *Pltf.* was held entitled to the injunction by way of specific performance.—*JOEL v. INTERNATIONAL CIRCUS & CHRISTMAS FAIR* (1920), 124 L. T. 459; 65 Sol. Jo. 293, C. A.

**1628. Erection of cottage—& Inclosure of adjoining land.]**—The taking a grant of a licence from the lord of a manor to erect a cottage on a piece of land, rendering an annual rent of 10s. 6d.

*MANUFACTURING CO. v. SHARP* (1891), 19 S. C. R. 657.—**CAN.**

**a. ———.]—***BULNER v. R.* (1894), 23 S. C. R. 438.—**CAN.**

**b. ———.]—***WAINIHA SAWMILLING*

*Co. v. HOWE*, [1920] N. Z. L. R. 681.—**N.Z.**

**c. Grant of privilege of light.]—***Deft.* made & delivered to *pltf.* a memorandum, not under seal, in the follow-

ing terms: "I do hereby agree to lease to you the privilege of light in the west side of your building, etc., for the term of ten years from this date, at a yearly rent of 25 cents *per annum*":—*Held*: the memorandum

as a quit rent, & also a grant of a licence to inclose a piece of ground for a garden to the said cottage, both being parts of the waste, & building a cottage thereon, & residing in it a year & a half:—*Held*: not to confer a settlement; this being a licence only, & not a grant of any interest in land.—*R. v. HORNDON-ON-THE-HILL (INHABITANTS)*, (1816), 4 M. & S. 562; 105 E. R. 942.

*Annotations*.—*Refd.* *R. v. Hagworthingham* (1823), B. & C. 634; *R. v. Cuddington* (1845), 14 L. J. M. C. 182. *Wood v. Leadbitter* (1845), 13 M. & W. 838. *Mentd.* *R. v. Geddington* (1823), 2 B. & C. 129.

**1629. Admission to theatre.**—A., in 1792, granted a lease of a theatre to B. covenanting not to grant rights of admission, except two hundred & fifty free admissions, without the consent of A.; & in case of any of the covenants being broken, the lease was to be void. B. then assigned his interest to trustees, to receive the profits & pay the debts, etc., who left B. in the management & direction of the concern, in the course of which, in 1799, B. granted a ticket of admission to C. for twenty-one years. In 1800, the trustees took possession of the theatre, but suffered C. to exercise his privilege of admission till 1814, when the ticket was stopped, on the ground that B. had no right to make such a grant:—*Held*: (1) the covenant by B. with A., not to grant rights of admission, supposing it to have been broken, did not avoid the grant to C.; (2) as the trustees had left B. in the management of the theatre, they must be taken to have authorised the grant, & could not afterwards disavow it; (3) this was not an interest in land, but a licence to C. to enjoy the privilege of admission, & therefore it was not necessary that it should pass by deed, or that B. should have been authorised by the trustees in writing to make such a grant.—*TAYLER v. WATERS* (1816), 7 Taunt. 374; 2 Marsh. 551; 129 E. R. 150.

*Annotations*.—*As to* (3) *Expld.* *Wood v. Manley* (1839), 11 Ad. & El. 34. *Consd.* *Williams v. Morris* (1841), 8 M. & W. 488; *Wood v. Leadbitter* (1845), 13 M. & W. 838. *Distd.* *Webber v. Lee* (1882), 9 Q. B. D. 315. *Consd.* *McManus v. Cooke* (1887), 35 Ch. D. 681. *Refd.* *Howlins v. Shippam* (1826), 5 B. & C. 221; *Liggins v. Inge* (1831), 7 Bing. 682; *Wells v. Kingston-upon-Hull Corpn.* (1875), 44 L. J. C. P. 257; *Met. Ry. v. Fowler*, [1892] 1 Q. B. 165; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1.

**1630. Occupation of premises—For specified period.**—If one doth licence another to enjoy his house till such a time, it is a lease (TWISDEN, J.).—*HALL v. SEABRIGHT* (1669), 2 Keb. 561; 1 Mod. Rep. 14; 1 Sid. 428; 84 E. R. 352.

*Annotation*.—*Consd.* *Kavanagh v. Gudge* (1814), 1 Dow. & L. 928.

**1631. — On certain specified days.**—*TAYLOR v. CALDWELL*, No. 1598, *ante*.

**1632. — For particular purpose.**—*Deft.* bought some boards from *pltf.*, & at *deft.*'s request *pltf.* gave him permission to use his shed for the purpose of making a signboard. *Deft.* employed D., a carpenter, to make the signboard at a fixed price, & D. used the shed for that purpose, with *pltf.*'s knowledge. D., while so working, lighted a pipe from a match with a shaving, which he accidentally dropped, & the shed was burned down:—*Held*: (1) there had been no demise of the shed by *pltf.* to *deft.*, nor anything in the nature of a bailment; (2) there was no contract between *pltf.* & *deft.*, but a mere revocable licence to use the shed; (3) the act of D., not being a

negligent act within the scope of his employment, *deft.* was not liable.—*WILLIAMS v. JONES* (1865), 3 H. & C. 602; 13 L. T. 300; 29 J. P. 644; 11 Jur. N. S. 843; 13 W. R. 1023; 159 E. R. 668, Ex. Ch.

*Annotations*.—*As to* (3) *Consd.* *Jefferson v. Derbyshire* (1865), 11 Q. B. 369. *Refd.* *Whitmore v. Pearson* (1861), 10 Q. B. 369.

**1633. Licence to erect limekiln on land—& work quarry.**—Where A. orally agreed to allow B. to enter on his land, & erect a limekiln & work a quarry on it, on consideration of B. paying for the damage caused by passing & repassing:—*Held*: this was a mere licence, not an interest in land, & therefore not within Stat. Frauds.—*GRIFFITHS v. JENKINS* (1861), 3 New Rep. 480; 9 L. T. 732; 10 Jur. N. S. 207; 12 W. R. 533.

**1634. Licence to depasture stock.**—A grant of 160 acres of land in fee in a colony was made by the Crown to *appls.*, with a proviso securing to the Crown the right of re-entering on the land for the purpose of making roads, canals, & other works of public utility, the right to cut timber, & to search for & carry away stones or other materials which might be required for making or keeping such works in repair, & also reserving to the Crown all mines of gold, silver, precious metals & coal, with full liberty to search for & carry away the same. There was no other reservation. Incidental to such grant, a licence or lease was also granted by the Crown to depasture the live stock of *appls.* on 10,000 acres, the limits of which were strictly defined in the instrument, for a term of twenty years, in consideration of an annual rent of £10, subject to the same reservations as the grant of land in fee. At the time those grants were made, it was agreed between the Crown & *appls.* that wild cattle should be considered *feræ naturæ*:—*Held*: (1) the licence to depasture stock was, in law, a demise of the land to which the ordinary rights of a lessee would attach; (2) the grant of land in fee, & the demise of the 10,000 acres for the term, conferred on *appls.* the exclusive right of killing & taking game, beasts of the chase, & animals which are properly *feræ naturæ*, which might at any time be upon the land during the time such land was granted; (3) as wild cattle were agreed to be *feræ naturæ*, *appls.* might lawfully kill or hunt them.—*FALKLAND ISLANDS CO. v. R.* (1861), 2 Moo. P. C. C. N. S. 266; 11 L. T. 9; 10 Jur. N. S. 807; 13 W. R. 57; 15 E. R. 902, P. C.

**1635. Licence to fix moorings—In bed of river.**—The conservators of the Thames were owners of the soil & bed of the river, & of moorings fixed to the soil of the river. W. used the moorings to moor his hulk, as a floating coal depot, under the following document: "we, the conservators of the Thames, do grant to W. liberty & licence to fasten, & thenceforth keep fastened, his coal hulk to the moorings placed by the conservators in the river, until either party shall have given to the other one calendar month's notice in writing, in consideration whereof W. agrees to pay towards the expenses of placing & maintaining & repairing the moorings the annual sum of £30." W. was assessed to the poor rate as occupier of part of the bed of the river:—*Held*: the above document was not a demise, but only granted to W. a licence

constituted a mere licence, revocable at *deft.*'s pleasure.—*HENDRY v. SCOTT* (1873), 9 N. S. R. 215.—*CAN.*

*d. Licence to erect boundary wall.*—*Deft.* built a stone wall between his land & that of *pltf.*, of which a part

was on *pltf.*'s property. When the wall was erected *pltf.* said to *deft.*'s builder: "You're building on my land;" he said further, that he had no objections, but "I caution you that in the case of my selling, the purchaser

may put you to trouble":—*Held*: this was a qualified licence justifying the erection of the wall but going no further.—*PETER v. FLECKER* (1872), 9 N. S. R. 67.—*CAN.*

*e. Licence to use race track.*—*AN*

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to use the moorings, & he was therefore not the occupier, & not liable to be rated.—**WATKINS v. MILTON-NEXT-GRAVESEND OVERSEERS** (1868), L. R. 3 Q. B. 350; 18 L. T. 601; 32 J. P. 294; 16 W. R. 1059.

**Annotations**—**Consd.** Wells v. Kingston-upon-Hull Corpn. (1875), L. R. 10 C. P. 402. **Distd.** Cory v. Bristow (1877), 2 App. Cas. 982. **Consd.** M. S. & L. Ry. v. Kingston-upon-Hull Governor & Grdms. (1898), 75 L. T. 127. **Refd.** Cory v. Greenwich Churchwardens (1872), L. R. 7 C. P. 499; R. v. St. Pancras Assmt. Com. (1877), 3 Q. B. D. 581; Lancashire & Cheshire Telephone Exchange Co. v. Manchester Overseers (1884), 13 Q. B. D. 700.

**1636.** ———.]—**CORY v. BRISTOW**, No. 1611, ante.

**1637. Licence to dig for minerals.]—HUNTINGTON (EARL) & MOUNTJOYES (LORD) CASE** (1583), 4 Leon. 147; 1 And. 307; Moore, K. B. 174; 74 E. R. 786; *sub nom.* MOUNTJOY (LORD) & HUNTINGTON'S (EARL) CASE, Godb. 17.

**Annotations**—**Apld.** Chetham v. Williamson (1804), 4 East, 469. **Consd.** Sutherland v. Heathcote, [1892] 1 Ch. 475. **Refd.** Doe d. Hanley v. Wood (1819), 2 B. & Ald. 724; R. v. Trent & Mersey Canal Co. (1825), 3 L. J. O. S. K. B. 140; Low Moor Co. v. Stanley Coal Co. (1875), 33 L. T. 436. **Mentd.** Townshend v. Windham (1750), 2 Ves. Sen. 1; Goodright d. Fowler v. Forrester (1807), 8 East, 552.

**1638.** ———.]—**DOE d. HANLEY v. WOOD**, No. 1707, post.

**1639.** ——— **Yearly rental—Proviso for re-entry on non-payment.]—**By deed made Sept. 4, 1848, B. granted to A. licence to get all the copperas stone which might be found in a certain part of the manor of M. for twenty-one years, at the yearly rent of £25, payable half yearly on June 24 & Dec. 25, with a proviso that if any part of the rent should be in arrear for twenty-one days, it should be lawful for B., his heirs & assigns, by notice in writing delivered to A., his exors., administrators or assigns, to determine the grant. On Jan. 31, 1856, J. H., who had become assignee of the licence, assigned the licence to defts. by way of mtge., & on Aug. 5, 1857, it was absolutely assigned to defts. by arrangement under 12 & 13 Vict. c. 106, who by oral agreement granted to J. the enjoyment of all the rights under it on his paying the rent thereby reserved. On Mar. 27, 1858, pltf., who had purchased the manor in Aug. 1854, distrained goods of J. & E., his son, lying on the part of the manor mentioned in the licence, for arrears of rent due at Christmas, 1857. J. & E., thereupon brought actions against pltf. for the illegal distress, in which he suffered judgment by default; & in 1858, negotiations for a settlement of the actions & for granting a new licence to E. for a further term of twenty-one years, commencing on June 24, 1864, the day on which the grant of Sept. 4, 1843, would expire, were carried on between the attorneys of J. & pltf., & it was verbally arranged between the pltf.'s attorney & the attorney for J. & E. that the actions should be settled on certain terms, one of which was, that such a licence should be granted to E. These terms pltf. refused to carry out. On July 3, 1858, pltf. gave a written notice to defts. & J., pursuant to the proviso, to determine the licence. On Jan. 11, 1859, defts. tendered to pltf., £50 for two years' rent due at Christmas, 1858, which pltf. refused to accept. In trespass for breaking & entering pltf.'s close & taking away copperas stone, the ct. having power on a special

case to draw inferences of fact:—**Held**: pltf., after the cause of forfeiture had occurred, sufficiently expressed & communicated to defts. his determination to treat the licence as existing, & was bound by that election, & therefore the subsequent notice was inoperative. **Qu.**: whether the distress being within six months after the cause of forfeiture, the period within which, by 8 Ann. c. 14, ss. 6, 7, a lessor may distrain after the determination of a lease, would by itself amount to an election to treat the licence as existing.—**WARD v. DAY** (1864), 5 B. & S. 359; 4 New Rep. 171; 33 L. J. Q. B. 254; 10 L. T. 578; 12 W. R. 829; 122 E. R. 865, Ex. Ch.

**Annotation**—**Refd.** Walrond v. Hawkins (1875), 44 L. J. C. P. 116.

**1640.** ——— **Power of owner to inspect.]—**It was agreed between A. & B. that A. should "forthwith enter upon" B.'s land, & there dig for coprolites in a specified manner, & should effectually fence the excavations & complete them by a given time, & should reinstate the land, & then "yield & deliver up" the land to B. There were no express words giving a right to the exclusive occupation of the land; but the excavations & works contemplated by the agreement required a constant occupation of the land by A. until the coprolites were raised, & the land could not be used for any other purpose from the commencement of the excavations until it had been reinstated, which could not be done for a year or more after the coprolites were raised. B. reserved to himself the right of going upon the land where the excavations were for the purpose of inspecting the works, but he was not required by the agreement to do anything upon the land:—**Held**: A. had the right of exclusive occupation of the land, & he was therefore liable to be rated to the relief of the poor in respect of such occupation.

It is sometimes difficult to say whether a given use of land amounts to an occupation, or only to an easement. A familiar case is that of furnished lodgings where the lodger has the exclusive use & enjoyment of one or more rooms. By the agreement between the owner of the house & the lodger the servants of the owner clean the rooms, light the fires, etc. The servants have constantly to go into the rooms to perform these duties, & the occupation of the rooms is by the person who thus employs servants to look after them (**BLACKBURN, J.**).—**ROADS v. TRUMPINGTON OVERSEERS** (1870), L. R. 0 Q. B. 56; 40 L. J. M. C. 35; 23 L. T. 821; 35 J. P. 72.

**Annotations**—**Expld.** R. v. St. George's Union (1871), L. R. 7 Q. B. 90. **Distd.** Smith v. Lambeth Assmt. Com. (1882), 9 Q. B. D. 585. **Consd.** Back v. Daniels, [1925] 1 K. B. 526. **Refd.** Cory v. Bristow (1875), 1 C. P. D. 54; R. v. Whaddon (1875), L. R. 10 Q. B. 230.

**1641. Use of stables—At monthly rental.]—**Pltfs., a railway co., were the owners of some stables situate within the gates shutting in their station premises from the public roads. By the permission of pltfs., the stables were used by coal owners under agreements, by which the coal owners, "in consideration of the railway co. permitting us to occupy & use a stable for four horses, do hereby agree to pay the monthly rent or sum of £1 5s.; & so long as we shall occupy & use the stables we agree to observe & be bound by the bye-laws which shall for the time being be issued by the co. for the government of their

agreement under seal between pltf. & defts. providing for the use of defts.' race track by pltf. under certain conditions & in consideration of certain payments:—**Held**: upon its true con-

struction, not to be a lease, but a mere licence.—**LYLES v. WINDSOR FAIR GROUNDS & DRIVING PARK ASSOCN.**, 20 C. L. T. 363.—**CAN.**

1. Licence to use adjoining railway

siding.]—**CURRY v. FARRELL**, [1925] 4 D. L. R. 145; 57 O. L. R. 451.—**CAN.**

2. Licence to erect pier.—In municipal harbour.]—The magistrates of E., authorised A., for certain purposes, to

railway stations, etc.; & we undertake to deliver up possession of the stable at the expiration of one month after a notice in writing from the agent of the co., to be given at any time." Pltfs. had not in fact exercised any control over or used any of the stables during the currency of the agreements; & none of the bye-laws had any application to the stables. Pltfs. having been rated to the poor rate in respect of the stables:—*Held*: pltfs. were rightly rated as occupiers; for, on the true construction of the agreement, looking at the situation of the stables, it was the intention of pltfs. to retain control over the stables, & not to part with the exclusive occupation to the coal owners.

The general rule of law is that the occupier of any property is the person who has the sole & exclusive possession of it, & he is the person who ought to be rated. Whenever the owner of property demises it to another giving him the exclusive possession & occupation, so as to make him tenant of it, it is the tenant who should be rated & not the landlord. In this case, however, I do not think what was done did amount to a demise of any portion of this property, but merely to a giving of a licence to have the easement & use of it, analogous to the case of a lodger (*BLACKBURN, J.*).—*LONDON & NORTH WESTERN RY. CO. v. BUCKMASTER* (1874), L. R. 10 Q. B. 70; 44 L. J. M. C. 29; 31 L. T. 835; 39 J. P. 149; 23 W. R. 160; *affd.* (1875), L. R. 10 Q. B. 444, Ex. Ch.

*Annotations*:—*Consd.* *Bobbett v. S. E. Ry.* (1882), 9 Q. B. D. 424. *Appld.* *Rochdale Canal Co. v. Brewster*, [1894] 2 Q. B. 852. *Expld.* *Young v. Liverpool Assmt. Com.*, [1911] 2 K. B. 195. *Reid.* *Cory v. Bristol* (1876), L. R. 10 C. P. 504; *Martin v. West Derby Union Assmt. Com.* (1883), 52 L. J. M. C. 66; *Holywell Union & Halkyn Parish v. Halkyn Drainage Co.*, [1895] A. C. 117; *M. S. & L. Ry. v. Kingston-upon-Hull Governor & Grdms.* (1896), 60 J. P. 504; *Percy v. Hall* (1903), 88 L. T. 830; *Mitchell v. Workop Union* (1904), *Konst. Rat. App.* 181; *Langford v. Cole* (1910), *Konst. & W. Rat. App.* 192; *Cleveland Bridge & Engineering Co. v. Darlington Union Assmt. Com.* (1923), 21 L. G. R. 511. *Mentd.* *Smith v. Lambeth Assmt. Com.* (1882), 10 Q. B. D. 327; *Manchester Overseers v. Headlam* (1888), 21 Q. B. D. 96; *R. v. Bagshawe* (1896), 75 L. T. 513; *Vernon v. Castle* (1922), 127 L. T. 748.

#### 1642. Berth in docks—Sheds & coal depot.]

—By the Mersey Docks Act, 1858, the board, under whose control the docks are, may, from time to time, upon such terms & on payment of such rates or other sums of money, & subject to such restrictions & regulations as they think proper, set apart & appropriate any particular portion of any dock, quay, warehouses, or sheds, for the exclusive accommodation & use of any co., firm, or individual engaged in carrying on any particular trade, who shall be desirous of having such exclusive occupation for the reception of their vessels; & the board have power of imposing a quay rent by way of penalty on goods remaining beyond a certain time on any quay. In consequence of an application from applts., a steamship co., the board by letter, "appropriated for the use of their steamers certain berths, with the sheds attached, affording a lineal quay space of about 680 feet, & fixed a charge of 2s. 6d. per square yard *per annum* for the use of the shed space from the date of the occupation. It is to be understood that this is a provisional agreement only, & made during the pleasure of the board." Applts. entered under the above letter, & used for several years the quay space & sheds for loading & discharging their steamers. The sheds

were in one range, under a continuous roof, & subdivided by partitions into a store shed, a transit shed, & two open sheds. In the centre was the transit shed, being generally open, but having doors, each with two locks, & when goods subject to duty were placed there the doors were kept locked at night, the key of one lock being kept at the custom house, the key of the other kept by applts. Occasionally, when an appropriated berth was not occupied by any of applts.' steamers, it was used, under the direction of the dock master, by other vessels, which vessels then also used the quay space & sheds attached to the berth, without the consent of applts. being asked. The board also exercised their right of enforcing payment of the penal quay rent on goods not applts., allowed to lie too long on the quay space appropriated to applts.; & the board retained this rent, & did not account to applts. for it. The board also appropriated to applts. a further space as a coal depot, by a resolution, "That it was to be used for no other purpose & on sufferance only, upon their agreeing to pay one penny per square yard per week, & engaging to remove the coal at any time upon one week's notice." Afterwards the manager of the board having reported that applts. had occupied more space than the land "rented" by them, & suggested that the "rent" for the whole space should be charged from a past day named & applts. having written a letter agreeing to pay the "rent" from that date, the board approved the report & letter, "the rate of rent & terms & conditions of tenancy being the same as heretofore."

Applts. having been rated to the poor rate in respect of their alleged occupation of the above premises:—*Held*: the board had not parted with the exclusive possession to applts., & the board therefore, & not applts., were ratable.

A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, & though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house & the furniture, & has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger (*BLACKBURN, J.*).—*ALLAN v. LIVERPOOL OVERSEERS, INMAN v. WEST DERBY UNION ASSESSMENT COMMITTEE & KIRKDALE OVERSEERS* (1874), L. R. 9 Q. B. 180; 43 L. J. M. C. 69; 30 L. T. 93; 38 J. P. 261, D. C.

*Annotations*:—*Expld.* *Cory v. Bristol* (1876), 45 L. J. M. C. 145. *Consd.* *Morton v. Palmer* (1881), 45 L. T. 426. *Folld.* *Rochdale Canal Co. v. Brewster*, [1894] 2 Q. B. 852. *Consd.* *Young v. Liverpool Assmt. Com.*, [1911] 2 K. B. 195. *Reid.* *Kittow v. Liskeard Union Assmt. Com.* (1874), 31 L. T. 601; *Smith v. Lambeth Assmt. Com.* (1882), 10 Q. B. D. 327; *R. v. Melladew*, [1907] 1 K. B. 192; *Liverpool Corp'n. v. Chorley Union Assmt. Com. & Withnell Overseers*, [1912] 1 K. B. 279; *Cleveland Bridge & Engineering Co. v. Darlington Union Assmt. Com.* (1923), 21 L. G. R. 511; *Hackney B. C. v. Metropolitan Asylums Board* (1925), 131 L. T. 136. *Mentd.* *Southport Corp'n. v. Ormskirk Union* (1893), *Ryde, Rat. App.* (1891-93) 355.

1643. — & quay.]—The Mersey Docks & Harbour Board were empowered by their special Act, upon such terms & on payment of such rates or other sums of money & subject to such restrictions & regulations as they might think proper, to set apart & appropriate any particular portion of any dock, etc., for the exclusive accommodation

erect a pier within the harbour of L., then their property. A. assigned the permission to B., who erected the pier:—*Held*: the permission granted to A.

was personal, & could not be assigned without consent of the magistrates, & therefore B. had no right to use the site of the pier, & was bound to re-

move it.—*LEITH DOCK COMRS. v. COLONIAL LIFE ASSURANCE CO.* (1881), 24 *Dunl. (Ct. of Sess.)* 64; 34 *Sc. Jur.* 48.—*SCOT.*



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& use of any co., etc., engaged in carrying on any particular trade; such co. to be subject to the general rules & regulations of the board. They had also power to construct depots, sheds, cranes, & other machinery, & make charges for the same, & to let such sheds & any portions of the quays & berths at such rents & on such terms as they might deem expedient. The board agreed to set apart & appropriate to pltf.s., who were a canal co., & pltf.s. agreed to occupy, a berth 200 feet in length with the quay opposite thereto, the appropriation to be determinable at six months' notice, at a fixed yearly rent, which was to include the interest of the cost of two cranes erected on the premises; pltf.s. were to pay all rates & taxes assessed on the premises, except such as were legally chargeable to the landlords; pltf.s. were to keep the premises in repair, & conform to the rules & regulations of the board, & to allow the board at all times to have free access to the premises. The board reserved a right of re-entry on non-payment of rent or non-performance of the conditions of the agreement. Pltf.s. having been rated to the poor rate in respect of their alleged occupation of the premises:—*Held*: having regard to the intention of the parties, as expressed in the agreement, the board had not parted with the exclusive possession of the premises, & pltf.s. were not ratable in respect of their occupation.—*ROCHDALE CANAL CO. v. BREWSTER*, [1894] 2 Q. B. 852; 64 L. J. Q. B. 37; 71 L. T. 243; 59 J. P. 132; 10 T. L. R. 595; 9 R. 680; Ryde & K. Rat. App. 143, C. A.

*Annotations*:—*Consol. Young v. Liverpool Assmt. Com.*, [1911] 2 K. B. 195. *Reid, Holywell Union & Halkyn Parish v. Halkyn Drainage Co.*, [1896] A. C. 117; *Oxford University v. Oxford Corp.*, (No. 1) (1902), Ryde & K. Rat. App. 87; *Percy v. Hall* (1903), Ryde & K. Rat. App. 319; *Re Nott & Cardiff Corp.*, [1918] 2 K. B. 146; *Cleveland Bridge Engineering Co. v. Darlington Union Assmt. Com.* (1923), 21 L. G. R. 511.

**1644. Exhibition of specific class of goods—Exhibition of same class by other persons.**—Where defts., owners of a public building, have contracted with pltf., that he, renting a stall from them, shall have the exclusive right to exhibit & sell certain specified classes of goods, an injunction will lie against defts. for permitting the exhibit on & sale by other renters of stalls within the building of goods so specified.—*ALTMAN v. ROYAL AQUARIUM SOCIETY* (1876), 3 Ch. D. 228.

**1645. Room in hotel or lodging house.**—*CORY v. BRISTOW*, No. 1611, *ante*.

As to position of lodger, generally, see Sect. 7, sub-sect. 3, *post*.

**1646. Railway bookstalls.**—A railway co. granted to two lessees the sole & exclusive licence & privilege, for ten years, of selling books & other publications at such of the co.'s stations as the lessees should think fit, & of using the bookstalls thereat respectively; covenanted that all books, etc., sent by the lessees to be sold pursuant to such licence should be conveyed by the co.'s trains to any such station without any charge; & warranted quiet & peaceable enjoyment:—*Held*: (1) as to stations where bookstalls were in existence at the date of the grant, the co. must be taken to have granted the user of those specific stalls; & if not, still it was incumbent on the co. to show that stalls to which they attempted to remove the lessees would be equally convenient; (2) as to other stations, if the lessees could be entitled in any case to erect stalls thereat, the ct. would not make a declaration to that effect, because the ct.

could not judge whether sales from stalls or by colportage should be adopted, & because such a declaration would lead to continual applications with reference to the gradual increase in size of the stalls; (3) the privilege of selling books, etc., authorised a *bond fide* sale to passengers, & such other persons as ordinarily attended at the co.'s stations on business connected with the railway, & not a general agency, consequently, the lessees were not entitled to free carriage except in respect of books to be so sold.

On a bill filed by the lessees, an injunction was granted, restraining the co. from evicting pltf.s. from bookstalls existing at the date of the agreement, notwithstanding pltf.s. failed in their contention as to the second & third points, & notwithstanding misconduct on pltf.'s part in not strictly & honourably performing their part of the agreement, the ct. being of opinion that it would be impossible, under the circumstances, to estimate the damages to which pltf.s. would be exposed if an injunction were not granted. The ct. will not direct an account as to a part of an agreement where it cannot decree specific performance of the whole; nor will the ct. make any declaration of right upon a contract except as to so much of it as has been, or is about to be, broken.—*HOLMES v. EASTERN COUNTIES RY. CO.* (1857), 3 K. & J. 675; 29 L. T. O. S. 311; 3 Jur. N. S. 737; 5 W. R. 870; 69 E. R. 1280.

*Annotations*:—As to (1) *Consol. County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251. *Reid, Catt v. Tourle* (1869), 4 Ch. App. 654. *Generally, Montd. Greenhill v. Isle of Wight Newport Junction Ry.* (1871), 23 L. T. 885.

**1647.**—*By indenture the S. W. Ry. Co. granted to S. & S. (therein called "the tenants") for seven years "the sole & exclusive licence & privilege to sell, lend, & exhibit for sale & loan, newspapers, books, etc., & such other like articles required for the convenience of passengers by railway as should be approved by the co., at all their stations," etc.; & also the full liberty for the tenants, subject to the approval of the engineer of the co., to erect & place bookstands, etc., on the platforms for exhibiting & keeping their books, etc., & to post & exhibit advertisements & placards on the station walls; & also full & free ingress & egress at all reasonable times for the "tenants," their servants & agents, to & from the several stations for the purposes of the grant. The persons employed by S. & S. were to be under the control of the stationmaster & liable to immediate removal from the station in case of insobriety or misconduct. S. & S. were to pay the co. certain fixed monthly rents, & also a percentage on the gross amounts received by S. & S. for the posting of the advertisements, etc., with a proviso that, in case the rent on the quarterly payments should be in arrear for fourteen days after notice, the same should be recoverable by the co., in addition to any other remedies "by distress as in the case of rent in arrear." It was provided that the "tenants should not offer for sale, or exhibit or publish, any books or advertisements or placards . . . which should be forbidden by the co.; & should abide by the regulations from time to time made by the co., touching the placing on the platforms of any of the necessary bookstands; & the co. warranted to the 'tenants' the quiet & peaceable enjoyment & benefit thereby granted for the period & upon terms & stipulations & in manner aforesaid." S. & S. erected bookstands upon the platforms at W. station, & had the exclusive use of them; & these bookstands were closed at night with shutters, & were locked*



up, the keys being kept by their servants. No rights of ingress & egress to & from the station, or of access to the bookstands were exercised by S. & S. or their agents or servants, except under the provisions & for the purposes of the indenture. The co. were assessed to the poor rate for the station generally:—*Held*: S. & S. had no "exclusive occupation" of any portion of the platforms, so as to render them liable to be rated in respect of these bookstands.—*SMITH v. LAMBETH ASSESSMENT COMMITTEE* (1882), 10 Q. B. D. 327; 52 L. J. M. C. 1; 48 L. T. 57; 47 J. P. 244, C. A.

*Annotations*:—*Expld.* Southport Corp. v. Ormskirk Union Assmt. Com., [1893] 2 Q. B. 468. *Distd.* Margate Corp. v. Pettman (1912), 106 L. T. 104. *Refd.* *Re* Holburne, Coates v. Mackillop (1885), 53 L. T. 212; Jones v. I. R. Comrs., Sweetmeat Automatic Delivery Co. v. I. R. Comrs., [1895] 1 Q. B. 484; M. S. & L. Ry. v. Kingston-upon-Hull Governor & Grdms. (1896), 60 J. P. 504; Percy v. Hall (1903), 88 L. T. 830; Cleveland Bridge & Engineering Co. v. Darlington Union Assmt. Com. (1923), 21 L. G. R. 511. *Mentd.* Lancashire & Cheshire Telephone Exchange Co. v. Manchester Overseers (1884), 14 Q. B. D. 267.

**1648. Licence to company directors.—To use boardroom of another company.**—A right for directors to use a boardroom for certain purposes, at certain times, & for a clerk to use a desk in an office for certain purposes, does not constitute a tenancy.—*MUNICIPAL FREEHOLD LAND CO. v. METROPOLITAN & DISTRICT RYS. JOINT COMMITTEE* (1883), Cab. & El. 184.

*Annotation*:—*Refd.* Warr v. L. C. C. (1903), 88 L. T. 689.

**1649. Refreshment-rooms at theatre.**—The lessee of a theatre covenanted "not to assign, demise, or otherwise part with the indenture" of lease "or any estate or interest therein" without the licence of the lessor. Subsequently, the lessee granted to a third person the free & exclusive licence & right to use the refreshment-rooms & bars in the theatre:—*Held*: his so doing was not any breach of the covenant.—*EDWARDES v. BARRINGTON* (1901), 85 L. T. 650; 50 W. R. 358; 18 T. L. R. 169, H. L.; *affg.*, S. C. *sub nom.* DALY v. EDWARDES (1900), 83 L. T. 548, C. A.

*Annotations*:—*Consd.* Warr v. L. C. C., [1904] 1 K. B. 713. *Refd.* Bevan v. Webb, [1905] 1 Ch. 620; Joel v. International Circus & Christmas Fair (1920), 124 L. T. 459; Jackson v. Simons, [1923] 1 Ch. 373.

**1650.**—By an agreement in writing the lessee of a theatre granted & let to plffs. the free & exclusive right to sell refreshments at the theatre, with the necessary use of the refreshment rooms & bars, cloak rooms & wine cellars, together with the right of free access for plffs. & their servants to & from all parts of the premises as might be necessary & usual for exercising the rights thereby granted, & also the free & exclusive right to supply to the visitors wines, spirits, cigars, programmes, & other articles, & of providing cloakrooms & other accommodation, & also the sole & exclusive privilege of advertising & letting spaces for advertisements in the refreshment & cloakrooms & on all programmes. The theatre having been compulsorily purchased by the local authority for a public improvement plffs. claimed compensation under Lands Clauses Act, 1845 (c. 18), s. 68:—*Held*: the agreement created merely a licence & not an interest in land within sect. 68, & the claim for compensation failed.—*WARR (FRANK) & CO., LTD. v. LONDON COUNTY COUNCIL*, [1904] 1 K. B. 713; 73 L. J. K. B. 362; 90 L. T. 368; 68 J. P. 335; 52 W. R. 405; 20 T. L. R. 346; 2 L. G. R. 723, C. A.

*Annotations*:—*Refd.* Joel v. International Circus & Christmas Fair (1920), 124 L. T. 459; Jackson v. Simons, [1923] 1 Ch. 373.

**1651. Use of premises for advertisements.**—By an agreement between an owner of land & an advertising agent the owner agreed to let & the agent to take an advertising station at a yearly rent, the tenancy to commence from completion of erection, & continue seven years, & the agent agreed to pay rates & taxes. By another agreement an owner agreed to allow the advertising agent the privilege of erecting an advertising hoarding, the agent to pay a yearly rent, & the owner agreed to allow the agent the further privilege of removing a wall, the agreement to remain in force for three years, & be afterwards terminable by twelve months' notice, but if the owner should be obliged to give less than twelve months' notice he agreed to refund £20. In both agreements the dimensions of the hoardings to be erected were specified. Advertising hoardings supported on posts fixed into the ground were erected. In the first case the structure was used partly by the owner as a shed, & partly by the advertising agent as a hoarding; in the second case, exclusively by the agent as a hoarding:—*Held*: each of the agreements created a tenancy, & conferred an exclusive occupation, & not merely a licence.—*TAYLOR v. PENDLETON OVERSEERS* (1887), 19 Q. B. D. 288; 51 J. P. 613; 35 W. R. 762, D. C.

*Annotations*:—*Refd.* Provincial Bill Posting Co. v. Low Moor Iron Co., [1900] 2 K. B. 344. *Mentd.* Jones v. I. R. Comrs., Sweetmeat Automatic Delivery Co. v. I. R. Comrs., [1895] 1 Q. B. 484; National Telephone Co. v. I. R. Comrs., [1899] 1 Q. B. 250.

**1652.**—T., owner of a house & garden in London, by an agreement, which was expressed not to be a lease, allowed P., in return for monthly payments, to display for a term advertisements upon her boundary wall. P. was to have "free & uninterrupted use" of the wall for this purpose. P. accordingly erected a hoarding upon the wall. The London County Council afterwards served on P. a notice alleging that the hoarding projected beyond the general line of buildings; in consequence of which notice P. removed the hoarding. T. sued to recover the sums stipulated for in the agreement:—*Held*: the words quoted amounted only to a personal covenant that T. & persons holding under her would not interfere with P.'s enjoyment, & T. was therefore entitled to recover.—*TUNMER v. PARTINGTON ADVERTISING CO.* (1901), 68 J. P. 318, N. P.

**1653.**—By an agreement in writing defts. agreed to let & plffs. to take the exclusive right of putting up advertisement hoardings & posting bills thereon upon specified land of defts. for seven years, plffs. paying defts. a fixed annual sum, payable quarterly; rates & taxes to be paid by "the tenants." Plffs. erected hoardings, which were affixed in a very substantial manner to the land, & exhibited advertisements upon them. Plffs. fell into arrear in their payments under the agreement, & defts. levied a distress upon the hoardings & ultimately carried them away & sold them. Plffs. brought an action to recover damages for wrongful distress, & defts. counterclaimed for the amount of the arrears due under the agreement:—*Held*: even assuming the agreement created the relation of landlord & tenant between the parties, the advertisement hoardings, although removable by plffs. at the end of the tenancy, were fixtures & not mere chattels, & were therefore not distrainable, & plffs. were entitled to recover damages for the wrongful distress. *Seem*: the agreement did not constitute a demise creating a tenancy, but amounted only to a licence to enter on the land & do certain specified things

**Sect. 2.—Distinction between licence and lease: Subsect. 2. Sects. 3 & 4.]**

upon it.—PROVINCIAL BILL POSTING CO. v. LOW MOOR IRON CO., [1909] 2 K. B. 344; 78 L. J. K. B. 702; 100 L. T. 726; 16 Mans. 157, C. A.

**1654.** —.]—KING v. DAVID ALLEN & SONS, BILLPOSTING, LTD., No. 1700, *post*.

— **Revocation of licences.**—See Nos. 1675, 1693, 1700, *post*.

**1655. Occupation of bonded warehouse.**—The Mersey Docks & Harbour Board have power to part with the exclusive possession of their premises for purposes not inconsistent with their special Acts so as to create a ratable occupation in the grantee.

By an indenture of lease the Dock Board demised to resps. certain sections of the vault at Wapping Dock warehouses together with a portion of the quay floor of the warehouses for a term of seven years for use only as a bonded warehouse. The lease provided that resps. were to pay all rates & taxes; to keep the inside of the premises & all erections, fixtures & fittings thereon other than certain hydraulic & other plant & machinery belonging to the Board in good & tenantable repair; that they were not to assign or sub-let or part with the possession of the premises without the consent of the Board in writing: & that they were to permit the Board at all reasonable times to enter the premises to view the condition thereof or to repair the Board's plant & machinery. It also provided that resps. might make alterations in the premises for the purposes of their business, in accordance with plans approved by the Board's engineers, but prohibited them from storing any goods at any time over certain pipe trenches or machinery pits.

It was also provided that resps. would not store any goods or do anything in or about the demised premises which should in the judgment of the Board be likely to cause danger or injury to the premises or other property or which might in its judgment be offensive or a nuisance & that they would not use fires & lights on the premises except in accordance with the Board's bye-laws under such arrangements as might be made by the Board's chief warehouse manager, & would pay a tonnage rate to the Board on goods lifted by the cranes at the demised premises, & that they would pay for the attendance of the Board's officers & any other expenses which might be incurred for any period during which the demised premises might be kept open before or after ordinary business hours, & further that the use of the premises "shall be so worked by the co. as not to cause any interference with or obstruction to the general working of the dock estate & that the servants of the Board shall at all reasonable times have free access thereto for the purpose of such general working."

The premises comprised in the lease were wholly within the dock walls, & access to them could only be obtained by passing through gates & over land under the absolute control of the Board. They were separated from the remaining portion of the warehouses & quay floor by solid brick walls. The entrance to & egress from the premises was by a door on which there were two locks, the key of one being kept by the Customs & that of the other by resps. For the door to be opened it was necessary that both keys should be used, & without the co-operation of the Customs & resps. the door could not be opened, but the Board had the right of access to the premises through the door

at all reasonable times. The door opened on to the quay floor, & from there access to the vault floor was obtained by means of a circular iron staircase leading downwards from the centre of the quay floor. A hydraulic main ran down the centre of the vaults, & on each side of the vaults were twelve machinery pits. The machinery in the pits worked a number of cranes & lifts belonging to the Board, of which one crane & one lift only were in the premises demised to resps., who paid for their use a tonnage rate to the Board on goods lifted. The working of these cranes & lifts made it necessary that one or more of the employees of the Board should go down into the vaults several times a day & stay there for periods ranging from ten minutes to the whole day according to the amount of work to be done. Resps. had to leave for the use of the Board & persons authorised by them free access to the hydraulic mains & machinery, & to secure such access an alleyway had to be always kept clear of goods. Resps. having been rated to the poor rate in respect of the premises:—*Held*: they were rightly rated as occupiers inasmuch as a grant by the Board of exclusive occupation of the premises to resps. for the purposes of a bonded warehouse was not inconsistent with the purposes for which the Board was constituted or with the performance of its statutory powers & duties. The word "demise," used in the lease *prima facie* imported a grant of exclusive occupation. The nature of resps.' business was not consistent with anything but exclusive occupation subject to the control of the Customs authorities, & the privileges given to the Board were only occasioned by the fact that there was upon the demised property machinery which the Board wished to utilise during the term.—YOUNG & CO. v. LIVERPOOL ASSESSMENT COMMITTEE, [1911] 2 K. B. 195; 80 L. J. K. B. 778; 104 L. T. 676; 75 J. P. 233; 9 L. G. R. 386; Konst. & W. Rat. App. 276, D. C.

*Annotation*.—Apld. Margate Corpn. v. Pettman (1912), 106 L. T. 104.

**1656. Use of field—For rabbit-coursing.**—An owner let his field for the holding of rabbit-coursing matches on Sundays & Wednesdays. The holding of the meetings was a nuisance to the adjoining owner:—*Held*: the agreement for the use of the field amounted to a letting & not a mere licence, & the landlord was only liable for the nuisance if it was the inevitable result of the purpose for which the land was let.—AYERS v. HANSON, STANLEY & PRINCE (1912), 56 Sol. Jo. 735.

**1657. Licence to adjoining owner to enter premises—To build up windows erected by owner—Under licence from adjoining owner.**—A contract to sell buildings described by a plan which shows windows does not imply any warranty of a legal right to the access of light to those windows. The existence of an agreement which prevents the statutory period of prescription beginning to run does not create an incumbrance on the property, & the non-disclosure of such an agreement does not invalidate the contract. A clause in such an agreement that the adjoining owner may enter & build up the windows in default of the owner of the buildings doing so is a mere revocable licence & does not give the adjoining owner any interest in the land, & if it did give such an interest it would be void for perpetuity.—SMITH v. COLBOURNE, [1914] 2 Ch. 533; 84 L. J. Ch. 112; 111 L. T. 927; 58 Sol. Jo. 783, C. A.

## SECT. 3.—HOW CREATED.

*See, now, Law of Property Act, 1925 (c. 20), s. 40.*

**1658. Whether writing or deed necessary—Pasturage on common.**—*RUMSEY v. RAWSON* (1869), 1 Vent. 25; 2 Keb. 504; 86 F. R. 18.

*Annotation:—Consd. Hewlins v. Shippam* (1826), 5 B. & C. 221.

**1659. — Licence to stack coal.**—A parol agreement for the liberty to stack coals upon the land is good for seven years.—*WOOD v. LAKE* (1751), Say. 3; 96 E. R. 783.

*Annotations:—Apld. Tayler v. Waters* (1816), 2 Marsh. 551. *Consd. Hewlins v. Shippam* (1826), 5 B. & C. 221; *Wood v. Leadbitter* (1845), 13 M. & W. 838. *Apld. Wells v. Kingston-upon-Hull Corpn.* (1875), L. R. 10 C. P. 402. *Refd. McManus v. Cooke* (1887), 35 Ch. D. 681; *Mot. Ry. v. Fowler*, [1892] 1 Q. B. 165.

**1660. — Growing crops.**—*CROSBY v. WADSWORTH*, No. 1607, *ante*.

**1661. — Agreement for admission to theatre.**—*TAYLER v. WATERS*, No. 1629, *ante*.

**1662. — Licence to take cinders.**—A. agreed with B., that B. might dig & carry away cinders from a certain cinder-tip, the property of A., B. paying A. a certain price per ton:—*Held*: this agreement need not be by deed.

Pltfs.' case is founded on a contract & the breach of it, not alleging any fixed interest in an incorporeal hereditament but alleging that the vendee has not had that which he bargained for, & that by reason of a breach of contract on the part of the seller. For that breach an action may well lie (*WILLES, J.*).

In the case of a parol lease, he who lets agrees to give possession, & if he fails to do so, the lessee may recover damages against him & is not driven to bring an ejectment (*WILLIAMS, J.*).—*SMART v. JONES* (1864), 15 C. B. N. S. 717; 3 New Rep. 648; 33 L. J. C. P. 154; 10 L. T. 271; 10 Jur. N. S. 678; 12 W. R. 430; 143 E. R. 906.

**1663. — Licence to use dock for ships.**—Defts., a municipal corp., were possessed of a dock of which they allowed the use to ships needing repairs, under certain printed regulations. Pltf. entered into a parol agreement with defts. for the use of the dock, upon the terms of such regulations. By these regulations it was provided that the dock should be "let" to parties requiring the same for the repair of vessels at such rates as the council of the borough should from time to time sanction, & that vessels entered in a book kept by the borough treasurer should be allowed to enter the dock as far as possible, according to the order of entry in the book. The regulations contained provisions that defts. should be entitled to detain the vessel in the dock until the dockage was paid, that the corp. foreman should open & shut the dock gates, & various other provisions tending to show that defts. intended to retain possession of & control over the dock while in use by vessels. Defts. did not admit pltf.'s vessel into the dock in her turn:—*Held*: the contract was not for an interest in land within Stat. Frauds, s. 4, & therefore need not be in writing.

Deft. plainly never meant to part with the possession or control over the dock, the contract is merely for the use of the dock in a certain way & on certain terms while remaining in their possession & under their control (*COLERIDGE, C.J.*).

On the first question was it intended to create the relationship of landlord & tenant by this

contract, & give the exclusive possession of the dock to pltf.? It is to me quite clear that there was no intention that the graving dock should be exclusively handed over to the occupation of pltf. as tenant (*HADDLESTON, J.*).

It is not anything amounting to a demise of the land to a shipowner when he pays the entrance fee . . . What he acquires is his right to have his vessel repaired there, but not of taking the dock for a moment out of the possession of the corp. (*DENMAN, J.*).—*WELLS v. KINGSTON-UPON-HULL CORPN.* (1875), L. R. 10 C. P. 402; 44 L. J. C. P. 257; 32 L. T. 615; 23 W. R. 562.

*Annotations:—Consd. Kerrison v. Smith*, [1897] 2 Q. B. 445. *Refd. Webber v. Lee* (1882), 9 Q. B. D. 315; *Bourne & Hollingsworth v. Marylebone R. C.* (1908), 72 J. P. 129.

**Distinction between easements & licences.]—See EASEMENTS, Vol. XIV., p. 22, Nos. 83, 85.**

**1664. Parol contract for sale of interest in land—May operate as licence.**—A contract for the sale of an interest in land, without a note in writing, may operate as a licence, so as to excuse the entry of the purchaser of the land, but it cannot be available in any way as a contract.—(*CARRINGTON v. ROOTS* (1837), 2 M. & W. 248; *Murp. & H.* 14; 6 L. J. Ex. 95; 1 Jur. 85; 150 E. R. 748.

*Annotations:—Refd. Britain v. Rossiter* (1879), 11 Q. B. D. 123. *Mentd. Reade v. Lamb* (1851), 6 Exch. 130; *Leroux v. Brown* (1852), 12 C. B. 801; *Williams v. Lake* (1859), 6 Jur. N. S. 45; *Williams v. Wheeler* (1860), 8 C. B. N. S.

## SECT. 4.—RIGHTS OF GRANTOR.

**1665. To deal with property—Not inconsistently with grant.]—A.** being mtgee. in fee of certain lands & B., the mortgor. entitled to the equity of redemption by lease & release, A. conveyed & B. released the lands to C. in fee who by the same instrument covenanted with & granted to B., that it should be lawful for B., his heirs & assigns at all times to enter upon the lands to search & dig for coal & to take & carry away the same to his & their own use:—*Held*: this was only a licence & conveyed no interest in the soil so as to exclude C. & those claiming under him from getting coal there; nor could it operate as an exception or reservation out of the grant in respect to B., who had not the legal title in him at the time.—*CHETHAM v. WILLIAMSON* (1804), 4 East, 469; 102 E. R. 910; *sub nom. CHEETHAM v. WILLIAMSON*, 1 Smith, K. B. 278.

*Annotations:—Apld. R. v. Trant & Mersey Canal* (1825), 6 Dow. & Ry. K. B. 47. *Refd. Doe v. Wood* (1819), 2 B. & Ald. 724; *Denison v. Holliday* (1867), 1 H. & N. 631; *Lee v. Stevenson* (1858), 5 B. & F. 512; *Sutherland v. Heathcote*, [1892] 1 Ch. 475. *Mentd. Gilbertson v. Richards* (1859), 5 H. & N. 277.

**1666. —**—*By a deed dated Sept. 29, 1854, E. demised to C. a certain firebrick manufactory, & by the same deed he granted to C. power to dig fireclay from under certain lands therein described, the terms of the demise & licence being twenty-one years from Apr. 6, 1854. By a deed dated Aug. 31, 1862, R. demised to B. all the coal mines & seams of coal, " & also all the mines, seams, veins, or beds of ironstone & fireclay found in connection with such coal seams as are workable as coal seams," under the same lands as those to which C.'s licence applied, for the term of forty-two years from Nov. 22, 1858:—Held: as C.'s licence was not an exclusive licence, the*

**PART VI. SECT. 4.**  
**1665 i. To deal with property—Not**  
**inconsistently with grant.]—A licence is**

not exclusive, but is subject to the implied reservation that the landowner shall be able to use his land to the best advantage, provided he does

not improperly disturb the work which the licensee is carrying on.—*QUINLAN v. GRAY* (1907), 27 N. Z. L. R. 650.—*N.Z.*

**Sect. 4.—Rights of grantor. Sect. 5: Sub-sects. 1 & 2.]**

licencor had still a right to deal with the property comprised in that licence in any matter not inconsistent therewith.—*CARR v. BENSON* (1868), 3 Ch. App. 524; 18 L. T. 696; 16 W. R. 744, L. J.J.

**Annotation:—***Reid. Sutherland v. Heathcote*, [1892] 1 Ch. 475.

**1667.** ———.]—*G. & T. pltf.'s predecessors* in title, having general power of revocation & new appointment over lands of which they were respectively tenant for life in possession & tenant for life in remainder, by a deed of exchange in 1783 appointed & granted the lands to deft.'s predecessor in title in fee, saving & reserving nevertheless to G. & T., their heirs & assigns, full & free liberty to get the coal & minerals which should be found within the lands. The minerals were never worked under this reservation by pltf. or his predecessors in title. In 1865 the then owner of the lands demised the coal under part of them to persons whose interest became vested in defts. A. & B.; & in 1877 deft. H., who had succeeded to the ownership of the lands, demised the coal under another part to pltf. Some years after this pltf. first became aware of the reservation in the deed of 1783, & brought his action to establish his right to the minerals, to restrain defts. from working them, & to have the lease of 1877 rectified or set aside:—*Held*: the reservation in the deed of 1783 did not operate as an exception of the minerals, but only as a grant by defts.' predecessor in title of a right to work them; there was nothing to show that this right was to be exclusive; & therefore, it did not prevent the landowner from working them, provided he did not disturb the grantee in any working which the grantee was carrying on; & defts., therefore, had not infringed pltf.'s rights.—*SUTHERLAND (DUKE) v. HEATHCOTE*, [1892] 1 Ch. 475; 61 L. J. Ch. 248; 66 L. T. 210; 8 T. L. R. 272; 36 Sol. Jo. 231, C. A.

**Annotation:—***Mentd. Fitzhardinge v. Purcell*, [1908] 2 Ch. 139.

**1668.** ———.]—Where by mutual agreement between applt. railway co. & resp. telegraph co. the latter was exclusively entitled to erect & work lines on the property of the former for the purposes of its own business & bound to furnish for the use of the former a special wire for the purposes of the railway as it existed at the date of the contract:—*Held*: resps.' exclusive right for the purposes of its own business did not exclude the railway co. from erecting & working telegraph lines on its own property for the purposes of its railway business.—*REID-NEWFOUNDLAND CO. v. ANGLO-AMERICAN TELEGRAPH CO.*, [1910] A. C. 560; 80 L. J. P. C. 20; 103 L. T. 145; 26 T. L. R. 614, P. C.

**SECT. 5.—REVOCATION.**

**SUB-SECT. 1.—IN GENERAL.**

**1669. General rule—Licence revocable.]—***WEBB v. PATERNOSTER* (1619), 2 Roll. Rep. 143, 152; Palm. 71; Poph. 151; 81 E. R. 713, 719.

**Annotations:—***Consd. Wood v. Lake* (1751), Say. 3; *Winter v. Brockwell* (1807), 8 East, 308; *Taylor v. Waters* (1816), 7 Taunt. 374; *Liggins v. Inge* (1831), 7 Bing. 682; *Wallis v. Harrison* (1838), 4 M. & W. 538; *Williams v. Morris* (1841), 8 M. & W. 488; *Wood v. Leadbitter* (1845), 13

*M. & W. 838; Taplin v. Florence* (1851), 20 L. J. C. P. 137. *Reid. Hewlins v. Shippam* (1826), 5 B. & C. 221; *Welsh v. Rose* (1830), 6 Bing. 638; *Jones v. Tankerville*, [1909] 2 Ch. 440. *Mentd. Pomfret v. Ricroft* (1669), 2 Keb. 569; *Craven v. Hanley* (1736), 2 Com. 548; *R. v. Cotton* (1751), Park. 112.

**1670.** ———.]—*LIGGINS v. INGE*, No. 1680, post.

**1671.** ———.]—A person who was working mines under a licence to do so which gave him no interest in the land, on being served with a declaration in ejectment, applied to the ct. to stay the proceedings, but was refused.—*DOE d. JOHNS v. ROE* (1837), Will. Woll. & Dav. 66; 1 Jur. 151.

**1672.** ———.]—*WOOD v. LEADBITTER*, No. 1708, post.

**1672a.** ———.]—A parol agreement by which a person is authorised to enter on premises, cannot make the licence to enter irrevocable.—*TAPLIN v. FLORENCE* (1851), 10 C. B. 744; 20 L. J. C. P. 137; 17 L. T. O. S. 63; 15 Jur. 402; 138 E. R. 294.

**Annotations:—***Reid. Campanari v. Woodburn* (1854), 15 C. B. 400; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1.

**1673.** ———.]—*WILLIAMS v. JONES*, No. 1632, ante.

**1674.** ———.]—*MELLOR v. WATKINS*, No. 1686, post.

**1675.** ———.]—Pltf. & deft. agreed orally that deft. should let his wall to pltf., for bill-posting, at £2 10s. a year, pltf. to erect a hoarding, on which the bills were to be posted. Pltf. erected the hoarding, posted bills, & made several payments. Dft. gave notice to pltf. that the hoarding must be removed, & nearly a month later deft. took it down. In an action to recover damages for breach of contract:—*Held*: although the permission to post bills was a licence, & therefore, not being by deed, was revocable, the action was maintainable for breach of contract, & therefore pltf. was wrongly nonsuited.—*KERRISON v. SMITH*, [1897] 2 Q. B. 445; 66 L. J. Q. B. 762; 77 L. T. 344.

**Annotation:—***Consd. Hurst v. Picture Theatres*, [1915] 1 K. B. 1.

**1676.** ———.]—*EDWARDS v. SUMMERTON*, [1899] W. N. 120.

**1677.** ———.]—*WILSON v. TAVENER*, No. 1693, post.

*See, also*, No. 1657, ante.

**1678. Exception to rule—Licence executed.]—***WEBB v. PATERNOSTER* (1619), 2 Roll. Rep. 143, 152; Palm. 71; 81 E. R. 713, 719.

**Annotations:—***Consd. Winter v. Brockwell* (1807), 8 East, 308. *Fold. Liggins v. Inge* (1831), 7 Bing. 682. *Distd. Wallis v. Harrison* (1838), 4 M. & W. 538. *Reid. Wood v. Lake* (1751), Say. 3; *Taylor v. Waters* (1816), 7 Taunt. 374; *Hewlins v. Shippam* (1826), 5 B. & C. 221; *Williams v. Morris* (1841), 8 M. & W. 488; *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Taplin v. Florence* (1851), 20 L. J. C. P. 137. *Mentd. Pomfret v. Ricroft* (1669), 2 Keb. 569; *Craven v. Hanley* (1736), 2 Com. 548; *R. v. Cotton* (1751), Park. 112; *Welsh v. Rose* (1830), 6 Bing. 638; *Jones v. Tankerville*, [1909] 2 Ch. 440.

**1679. ———. Expenses incurred by licensee.]**—A parol licence to put a skylight over deft.'s area, which impeded the light & air from coming to pltf.'s dwelling-house through a window, cannot be recalled at pleasure, after it has been executed at deft.'s expense; at least, not without tendering the expenses he had been put to; & therefore no action lies as for a private nuisance, in stopping the light & air, etc., & communicating a stretch from deft.'s premises to pltf.'s house by means of such skylight.—*WINTER v. BROCKWELL* (1807), 8 East, 308; 103 E. R. 359.

**Annotations:—***Consd. Taylor v. Waters* (1817), 7 Taunt. 374; *Hewlins v. Shippam* (1826), 5 B. & C. 221. *Appld.*

**PART VI. SECT. 5, SUB-SECT. 1.**

**1669 i. General rule—Licence revocable.]—***RIPLEY v. BAKER* (1861), 1

*Old. 23.—CAN.*

**1669 ii. ———.]—***MUCKLESTON v. SMITH* (1867), 17 C. P. 401.—*CAN.*

**1669 iii. ———.]—***SMITH v. HOWTH (EARL)* (1859), 10 I. C. L. R. 135.—*IR.*



*Liggins v. Inge* (1831), 7 Bing. 682. **Consd.** *Plimmer v. Wellington Corpn.* (1884), 9 App. Cas. 699; *Aldin v. Latimer Clark, Muirhead*, [1894] 2 Ch. 437. **Refd.** *Harvey v. Reynolds* (1828), 1 C. & P. 141; *Cooker v. Cowper* (1834), 1 Cr. M. & R. 418; *Wallis v. Harrison* (1838), 4 M. & W. 538; *Wood v. Leadbitter* (1845), 13 M. & W. 338; *Perry v. Fitzhove* (1846), 8 Q. B. 757; *Davies v. Marshall* (1861), 10 C. B. N. S. 697. **Mentd.** *Richardson v. Langridge* (1811), 4 Taunt. 128; *Wood v. Manley* (1839), 3 Jur. 1028.

**1680.** ———. ———.]—Pltf.'s father, by oral licence, permitted defts. to lower the bank of a river, & make a weir above pltf.'s mill, whereby less water then before flowed to pltf.'s mill:—**Held:** pltf. could not sue defts. for continuing the weir.

Suppose A. authorises B. by express licence to build a house on B.'s own land, close adjoining to some of the windows of A.'s house, so as to intercept part of the light; could he afterwards compel B. to pull the house down again, simply by giving notice that he countermanded the licence? Still further this is not a licence to do acts which consist in repetition, as to walk in a park, to use a carriage way, to fish in the waters of another, or the like: which licence if countermanded the party is but in the same situation as he was before it was granted; but this is a licence to construct a work, which is attended with expense to the party using the licence; so that after the same is countermanded the party to whom it was granted may sustain a heavy loss. It is a licence to do something that, in its own nature, seems intended to be permanent & continuing (*TINDAL, C.J.*).—*LIGGINS v. INGE* (1831), 7 Bing. 682; 5 Moo. & P. 712; 9 L. J. O. S. C. P. 202; 131 E. R. 263.

**Annotations:**—**Consd.** *Plimmer v. Wellington Corpn.* (1884), 9 App. Cas. 699. **Refd.** *Bridges v. Blanchard* (1834), 1 Ad. & El. 536; *Cooker v. Cowper* (1834), 5 Tyr. 103; *Wood v. Leadbitter* (1845), 13 M. & W. 338; *Davies v. Marshall* (1861), 10 C. B. N. S. 697; *Mellor v. Watkins* (1874), L. R. 9 Q. B. 400. **Mentd.** *Mason v. Hill* (1833), 5 B. & Ad. 1; 2 Q. B. 400; *Chorley* (1848), 12 Q. B. 515; *Whaley v. Laing* (1857), 26 L. J. Ex. 327; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *Jones v. Tapling* (1862), 11 C. B. N. S. 283; *Kay v. Orley* (1875), L. R. 10 Q. B. 360; *Ormerod v. Todmorden Mill Co.* (1883), 11 Q. B. D. 155.

**1681.** ———. ———.]—Upon the whole I think the plea does allege that pltf. so conducted himself as to induce deft. to believe that he had given his consent to the alterations she was making, & to induce her to lay out money upon the faith of such consent. If so, pltf. clearly has no right afterwards to withdraw his consent & bring an action. I think the plea is a good equitable plea (*ERLE, C.J.*).—*DAVIES v. MARSHALL* (1861), 10 C. B. N. S. 697; 31 L. J. C. P. 61; 4 L. T. 581; 7 Jur. N. S. 1247; 9 W. R. 866; 142 E. R. 627.

**Annotations:**—**Refd.** *Jones v. Tapling* (1862), 11 C. B. N. S. 283. **Mentd.** *Allen v. Seckham* (1879), 11 Ch. D. 790; *Osborne v. Bradley*, [1903] 2 Ch. 446.

See, also, *EASEMENTS*, Vol. XIX., p. 28, Nos. 126 et seq.

**1682.** ———. ———.]—Licence granted by sale of ticket—**Arbitrary revocation during performance.**—The purchaser of a ticket for a seat at a theatre or other similar entertainment has a right to stay & witness the whole of the performance, provided that he behaves properly & complies with the rules of the management. The licence granted by the sale of the ticket includes a contract not to revoke the licence arbitrarily during the performance. Where therefore pltf., who had purchased a ticket for a seat at a cinema show, was forcibly turned out of his seat by the direction of the manager, who was acting under a mistaken belief that pltf. had not paid for his seat:—**Held:** in an action for assault & false imprisonment pltf. was entitled to recover substantial damages.—*HURST v. PICTURE THEATRES, LTD.*, [1915] 1 K. B. 1; 83 L. J. K. B.

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1837; 111 L. T. 972; 30 T. L. R. 642; 58 Sol. Jo. 739, O. A.

**Annotations:**—**Consd.** *Joel v. International Circus & Christmas Fair* (1920), 124 L. T. 459. **Refd.** *Cox v. Coulson*, [1916] 2 K. B. 177; *British Actors Film Co. v. Glover*, [1918] 1 K. B. 299; *Said v. Butt*, [1920] 3 K. B. 497.

**1683.** ———. ———.]—Payment in return for licence.]—*JOEL v. INTERNATIONAL CIRCUS & CHRISTMAS FAIR*, No. 1627, ante.

Compare No. 1708, post.

— Licence coupled with grant of interest.]—See Sub-sect. 3, post.

**1684.** Licence to place goods on land—For reasonable time—What is reasonable time.]—*WEBB v. PATERNOSTER* (1619), 2 Roll. Rep. 143, 152; *Godb. 282*; *Palm. 71*; *Poph. 151*; 81 E. R. 713, 719; *sub nom. PLUMMER v. WEBB*, Noy, 98.

**Annotations:**—**Consd.** *Craven v. Hanley* (1736), 2 Com. 548; *Taylor v. Waters* (1816), 7 Taunt. 374; *Wood v. Leadbitter* (1845), 13 M. & W. 338. **Refd.** *Pomfret v. Ricroft* (1669), 2 Keb. 569; *Wood v. Lake* (1751), *Say. 3*; *Hewlins v. Shippam* (1826), 5 B. & C. 221; *Welsh v. Rowe* (1830), 6 Bing. 638. **Mentd.** *R. v. Cotton* (1751), *Park. 112*; *Winter v. Brookwell* (1807), 8 East, 308; *Liggins v. Inge* (1831), 7 Bing. 682; *Wallis v. Harrison* (1838), 4 M. & W. 538; *Williams v. Morris* (1841), 8 M. & W. 488; *Taplin v. Florence* (1851), 20 L. J. C. P. 137; *Jones v. Tankerville*, [1909] 2 Ch. 440.

**1685.** ———. ———.]—Reasonable time for removal.]—Where it is part of the terms of a tenancy created by parol that the tenant shall be allowed to place goods on land not comprised within the letting, the tenant, who has acted upon such licence, though the same was not by deed, & was afterwards revoked by the determination of the tenancy, has a right to go & remove the goods he has so placed there, & is entitled to have a reasonable time to do so.—*CORNISH v. STUBBS* (1870), L. R. 5 C. P. 334; 39 L. J. C. P. 202; 22 L. T. 21; 18 W. R. 547.

**Annotations:**—**Apud.** *Mellor v. Watkins* (1874), L. R. 9 Q. B. 400. **Refd.** *Hurst v. Picture Theatres*, [1915] 1 K. B. 1. **Mentd.** *Smith v. Egginton* (1874), 30 L. T. 521; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; *Wedd v. Porter* (1915), 113 L. T. 819.

**1686.** ———. ———.]—Although a licence to place articles on the property of another may be revocable at any moment, the licencee is entitled to notice of the revocation & to a reasonable time for the removal of the articles.—*MELLOR v. WATKINS* (1874), L. R. 9 Q. B. 400; 23 W. R. 55.

**Annotations:**—**Consd.** *Aldin v. Latimer Clark, Muirhead*, [1894] 2 Ch. 437. **Mentd.** *David v. Sablin*, [1893] 1 Ch. 523; *Parker v. Jones*, [1910] 2 K. B. 32; *Wilkes v. Spooner*, [1911] 2 K. B. 473.

#### SUB-SECT. 2.—HOW EFFECTED.

**1687.** Transfer of interest in subject-matter.]—*WEBB v. PATERNOSTER* (1619), *Poph. 151*; *Godb. 282*; *Palm. 71*; 2 Roll. Rep. 143, 152; 79 E. R. 1250; *sub nom. PLUMMER v. WEBB*, Noy, 98.

**Annotations:**—**Refd.** *Pomfret v. Ricroft* (1669), 2 Keb. 569; *Craven v. Hanley* (1736), 2 Com. 548; *Wood v. Lake* (1751), *Say. 3*; *Winter v. Brookwell* (1807), 8 East, 308; *Taylor v. Waters* (1816), 7 Taunt. 374; *Hewlins v. Shippam* (1826), 5 B. & C. 221; *Liggins v. Inge* (1831), 7 Bing. 682; *Wallis v. Harrison* (1838), 4 M. & W. 538; *Wood v. Leadbitter* (1845), 13 M. & W. 338; *Florence v. Taplin*, [1909] 2 Ch. 440. **Mentd.** *R. v. Cotton* (1751), *Park. 112*; *Welsh v. Rowe* (1830), 6 Bing. 638; *Williams v. Morris* (1841), 8 M. & W. 488.

**1688.** ———. ———.]—If A. grants a licence to B. to erect a shed, but before it is erected leases the land to C. The licence is revoked.—*AYLET v. HUTCHINS* (1672), 3 Keb. 40; 84 E. R. 583.

**1689.** ———. ———.]—DOE d. HANLEY v. WOOD, No. 1707, post.

**1690.** ———. ———.]—Pltf. having been allowed to form a watercourse on P.'s land, P. subsequently

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**Sect. 5.—Revocation: Sub-sects. 2, 3 & 4. Sect. 6.]**

leased part of the land to deft., who thereupon gave notice to plffs. to discontinue the water-course over the land leased to him. The flow of water being wrongfully continued, & it being necessary to enter upon the land of L. to stop it, deft. entered L.'s land, & there dammed up the water, so that it was penned back & flooded plffs.' land:—*Held*: the lease was a revocation of the licence, & the fact that deft. might have stopped the water at another point on L.'s land, so that less damage would have been done to plffs., did not give them any cause of action, as the nuisance could not have been abated at the latter point without doing damage to the land of L.—*ROBERTS v. ROSE* (1865), L. R. 1 Exch. 82; 4 H. & C. 103; 35 L. J. Ex. 62; 13 L. T. 471; 30 J. P. 5; 12 Jur. N. S. 78; 14 W. R. 225, Ex. Ch.

**1691.** —.]—A licence is determined by an assignment of the subject matter in respect of which the privilege is to be enjoyed.

By lease not under seal, R. & C., trustees on behalf of themselves & the other proprietors of a theatre, demised it to S. for three years, reserving to themselves & the other proprietors free liberty of admission to the theatre. S., by lease not under seal, let the theatre to plff. for two nights, subject to the terms on which he held the theatre:—*Held*: the licence was determined, & an action of trespass might be maintained by plff. against deft., a proprietor, who entered the theatre during his tenancy.—*COLEMAN v. FOSTER* (1856), 1 H. & N. 37; 4 W. R. 489; 156 E. R. 1108.

**Notice.**—*See* Sub-sect. 3, *post*.

**SUB-SECT. 3.—NOTICE OF REVOCATION.**

**1692. Necessity for—Licence to place goods on land.**—*MELLOR v. WATKINS*, No. 1686, *ante*.

**1693.** — **Licence to use premises for advertising purposes.**—By an agreement in writing deft. agreed to let plff. erect a hoarding upon the forecourt of a cottage & to allow him the use of a gable end for a bill-posting station at a yearly rent payable on the usual quarter-days from the then ensuing quarter-day:—*Held*: this was not a tenancy from year to year, but a licence revocable at will on reasonable notice, & a quarter's notice terminating at the end of a year of the currency of the agreement was a reasonable notice.—*WILSON v. TAVENER*, [1901] 1 Ch. 578, 70 L. J. Ch. 263; 84 L. T. 48.

*Annotation.*—*Distd. King v. David Allen, Billposting*, [1916] 2 A. C. 54.

**1694.** — **Licence to erect ventilators on demised premises—Ventilators obstructed without notice.**—The lessee, after the date of the lease, with the lessor's permission, but at his own cost, constructed certain ventilators in the walls of a building demised by the lessee. The lessee gave no consideration for such permission & no deed was executed giving him the right to use the ventilators. The ventilators were obstructed by buildings erected upon adjoining property by assigns of the lessor:—*Held*: the licence being revocable, the lessee was not entitled to an injunction; but, in the absence of reasonable notice of revocation, he was entitled to an inquiry as to damages in respect of the ventilators having been

obstructed without such notice.—*ALDIN v. LATIMER CLARK, MUIRHEAD & Co.*, [1894] 2 Ch. 437; 63 L. J. Ch. 601; 71 L. T. 119; 42 W. R. 553; 10 T. L. R. 452; 38 Sol. Jo. 458; 8 R. 552.

*Annotations.*—*Mentd. Tebb v. Cave*, [1900] 1 Ch. 642; *Betts v. Pickfords*, [1906] 2 Ch. 87; *Cable v. Bryant*, [1908] 1 Ch. 259; *Browne v. Flower*, [1911] 1 Ch. 219; *Harmer v. Jumbil (Nigeria) Tin Areas*, [1921] 1 Ch. 200.

**1695. What amounts to reasonable notice.**—*WILSON v. TAVENER*, No. 1693, *ante*.

**1696.** —.]—A verbal notice to determine a right to shoot pheasants, enjoyed from year to year at an annual payment, was given early in Mar. for Mar. 25, being the end of the current year:—*Held*: the notice was reasonable.—*LOWE v. ADAMS*, [1901] 2 Ch. 598; 70 L. J. Ch. 783; 85 L. T. 195; 50 W. R. 37; 17 T. L. R. 763.

*Annotations.*—*Reid. Jones v. Tankerville*, [1909] 2 Ch. 440; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1.

**SUB-SECT. 4.—REVOCATION INVOLVING BREACH OF CONTRACT.**

**1697. Licencor liable in damages.**—*SMART v. JONES*, No. 1662, *ante*.

**1698.** —.]—*ALDIN v. LATIMER CLARK, MUIRHEAD & Co.*, No. 1694, *ante*.

**1699.** —.]—*KERRISON v. SMITH*, No. 1675, *ante*.

**1700.** —.]—Applt. agreed with resps. to allow them to affix bills, advertisements, & posters to the flank wall of a building to be erected on property of which he was the owner for a period of four years, at an agreed rent. He afterwards let the property to a third person. The agreement was not referred to in the lease, & no assignment of the interest of applt. in it was made to the lessee. The lessee refused to allow resps. to post their bills & advertisements upon the building:—*Held*: the agreement created no estate or interest in the land, nor an easement to which the land was subject, but was only a licence for a certain time, creating a personal obligation on the part of the licencor, & that he was liable in damages for the breach of it.—*KING v. DAVID ALLEN & SONS, BILLPOSTING, LTD.*, [1916] 2 A. C. 54; 85 L. J. P. C. 229; 114 L. T. 762, II. 1.

*Compare* No. 1693, *ante*.

**SECT. 6.—LICENCE COUPLED WITH GRANT OF INTEREST.**

**1701. What amounts to grant of interest—Licence to use premises.**—*ANON.* (1705), No. 1595, *ante*.

**1702.** — **Licence to search & get minerals.**—*DOE d. HANLEY v. WOOD*, No. 1707, *post*.

**1703.** — —.]—*MUSKETT v. HILL*, No. 1709, *post*.

*Compare* No. 1671, *ante*.

**1704.** — **Pretended grant of something incapable of being granted.**—*WOOD v. LEADBITTER*, No. 1708, *post*.

**1705.** — **Licence to adjoining owner to enter premises—To build up windows erected by owner—Under licence from adjoining owner.**—*SMITH v. COLBOURNE*, [1914] 2 Ch. 533; 84 L. J. Ch. 112; 111 L. T. 927; 58 Sol. Jo. 783, C. A.

**PART VI. SECT. 5, SUB-SECT. 3.**

**h. Necessity for—Licence to encroach on property.**—*KEYS v. GUY*

(1875), 36 U. C. R. 356.—CAN.

**PART VI. SECT. 6.**

**k. Licence to farm & harvest**

*crops.*—*GARDNER v. STAPLES* (1915), 30 W. L. R. 850; 8 W. W. R. 397; 8 Sask. L. R. 149.—CAN.

**1706. Whether revocable.]—Qu.** : whether, if a licence is granted to a man to use my ground or my yard, he thereby has an interest in it ; so that the licence is not revocable, but it amounts to a lease at will.—**ANON.** (1705), 11 Mod. Rep. 42 ; 88 E. R. 871.

**1707. —.]—(1)** The owner of the fee granted to A., his partners, fellow-adventurers, etc., free liberty to dig for tin & all other metals, throughout certain lands therein described, & to raise, make merchantable, & dispose of the same to their own use ; & to make adits, etc., necessary for the exercise of that liberty, together with the use of all waters & watercourses, excepting to the grantor liberty for driving any new adit within the lands thereby granted & to convey any watercourse over the premises granted, *habendum* for twenty-one years ; covenant by the grantee to pay one-eighth share of all ore to the grantor, & all rates, taxes, etc., & to work effectually the mines during the term ; & then, in failure of the performance of any of the covenants, a right to re-entry was reserved to the grantor :—**Held** : this deed did not amount to a lease, but contained a mere licence to dig & search for minerals, & the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee.

Instead, therefore, of parting with, or granting, or demising all the several ores, metals, or minerals, that were then existing within the land, its words import a grant of such parts thereof only as should, upon the licence & power given to search & get, be found within the described limits, which is nothing more than the grant of a licence, to search & get (irrevocable, indeed, on account of its carrying an interest) with a grant of such of the ore only as should be found & got, the grantor parting with no estate or interest in the rest (**ABBOTT, C.J.**).

(2) The grantee commenced working the mines, but after some time discontinued, not being prevented by the want of water, or any other inevitable accident. The grantor, after some lapse of time, verbally authorised other persons to dig for ore throughout part of the land described in the deed, & met those persons on part of the land, & pointed out the boundaries within which they were to exercise the liberty ; & himself subsequently entered into a mining adventure with other persons, which was carried on within the limits described in the indenture & afterwards, in consideration of the surrender of the first grant, & of certain payments, demised the premises to a lessee for twenty-one years ; & upon the execution of this lease, the original deed was delivered up, but there was no surrender in writing :—**Held** : these acts amounted to a re-entry by the grantor, as unless referred to the exercise of that right, they would be acts of trespass by him.—**DOE v. HANLEY v. WOOD** (1819), 2 B. & Ald. 724 ; 100 E. R. 529.

**Annotations :—As to (1)** **Distd.** Jones v. Reynolds (1836), 4 Ad. & El. 805. **Consd.** Musket v. Hill (1839), 5 Bing. N. C. 694 ; **Martyn v. Williams** (1857), 1 H. & N. 817. **Distd.** Low Moor Co. v. Stanley Coal Co. (1878), 34 L. T. 186. **Reid.** R. v. Trent & Mersey Canal Co. (1825), 3 L. J. O. S. K. B. 140 ; **Vice v. Thomas** (1842), 4 Y. & C. Ex. 538 ; **Rogers v. Brenton** (1847), 10 Q. B. 26 ; **Re Stroud** (1849), 8 C. B. 502 ; **Watson v. Spratley** (1854), 10 Exch. 222 ; **Lee v. Stevenson** (1858), E. B. & E. 512 ; **Griffiths v. Jenkins** (1864), 3 New Rep. 489 ; **Roads v. Trumpington Overseers** (1870), L. R. 6 Q. B. 56 ; **Sutherland v. Heathcote**, [1892] 1 Ch. 475. **Generally.** **Mentd.** **Pendergast v. Turton** (1841), 11 L. J. Ch. 22 ; **Holmes v. Powell** (1856), 8 De G. M. & G. 572.

**1708. — Parol licence.]—A** right to come & remain for a certain time on the land of another can be granted only by deed ; & a parol licence

to do so, though money be paid for it, is revocable at any time, & without paying back the money.

To an action of trespass for assault & false imprisonment, **deft.** pleaded, that, at the time of the supposed trespass, **pltf.** was in a close of E., & that **deft.**, as the servant of E., & by his command, *molliter manus impositus* on **pltf.** to remove him from the close, which was the trespass complained of. **Pltf.** replied, that he was in the close by the leave & licence of E. ; which was traversed by the rejoinder. The evidence was, that E. was steward of the Doncaster races ; that tickets of admission to the grand stand were issued, with his sanction, & sold for a guinea each, entitling the holders to come into the stand, & the inclosure round it, during the races ; that **pltf.** bought one of the tickets, & was in the inclosure during the races ; that **deft.** by the order of E., desired him to leave it, & on his refusing to do so, **deft.**, after a reasonable time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea :—**Held** : on this evidence the jury were properly directed to find the issue for the **deft.**

A licence under seal is as revocable as if it had been only made by parol ; & a licence by parol, coupled with a grant, is as irrevocable as if it had been made by deed, provided the grant is one which can be made by deed. But a licence by parol, coupled with something incapable of being granted, is a mere licence, for it is not incident to a valid grant (**ALDERSON, B.**).—**WOOD v. LEADBITTER** (1845), 13 M. & W. 838 ; 14 L. J. Ex. 161 ; 4 L. T. O. S. 433 ; 9 J. P. 312 ; 9 Jur. 187 ; 153 E. R. 351.

**Annotations :—Apld.** Adams v. Andrews (1830), 15 Q. B. 284. **Consd.** **Roffey v. Henderson**, [1851], 17 Q. B. 574 ; **Taplin v. Florence** (1851), 10 C. B. 744 ; **Frogley v. Lovelace** (1859), John. 333 ; **Cornish v. Stubbs** (1870), L. R. 5 C. P. 334. **Distd.** **Vaughan v. Hampson** (1875), 33 L. T. 515. **Consd.** **McManus v. Cooke** (1887), 35 Ch. D. 681 ; **Ward v. Lacey** (1887), 5 L. P. C. 102 ; **Aldin v. Lutimer Clark, Muirhead**, [1894] 2 Ch. 437. **Distd.** **Kerrison v. Smith**, [1897] 2 Q. B. 445. **Reid.** **Low v. Adams**, [1901] 2 Ch. 598 ; **Whether Wood v. Leadbitter is still good law, having regard to Walsh v. Lonsdale is very doubtful** (**COZENS HARTY, J.**). **Consd.** **Jones v. Tankerville**, [1909] 2 Ch. 440. **Reid.** **Langford v. Brighton, Lewes & Hastings Ry.** (1845), 4 Ry. & Can. Cas. 69 ; **Hewitt v. Isham** (1851), 7 Exch. 77 ; **Wright v. Staver** (1860), 2 E. & E. 721 ; **Davies v. Marshall** (1861), 10 C. B. N. S. 697 ; **Evans v. Robins** (1862), 1 H. & C. 302 ; **Hill v. Tupper** (1863), 32 L. J. Ex. 217 ; **Smith v. Lambeth Assmt. Com.** (1882), 52 L. J. M. C. 1 ; **Butler v. M. S. & L. Ry.** (1888), 21 Q. B. D. 207 ; **Thomas v. Jennings** (1896), 66 L. J. Q. B. 5 ; **Warr v. L. C. C.** (1904), 73 L. J. K. B. 362 ; **Said v. Butt**, [1920] 3 K. B. 497. **Mentd.** **Mayfield v. Robinson** (1845), 7 Q. B. 486 ; **Thomas v. Fredericks** (1847), 11 Jur. 942 ; **Washbourne v. Burrows** (1847), 16 L. J. Ex. 266 ; **Electric Telegraph Co. v. Salford Overseers** (1855), 11 Exch. 181 ; **Wakley v. Froggatt** (1863), 2 H. & C. 669 ; **Francis v. Cockrell** (1870), 22 L. T. 203 ; **H. R. 10 C. P. 402** ; **Hall v. Metcalfe, Hull Corpn.** (1875), L. R. 10 C. P. 402 ; **Hall v. Metcalfe**, [1892] 1 Q. B. 208 ; **L. C. C. v. Dundas**, [1904] P. 1.

**1709. Whether assignable.]—A** licence to search for & raise metals, & also to carry them away & convert them to the licensee's own use, passes an interest which is capable of being assigned.

A dispensation or licence properly passes no interest but only makes an action lawful which without it had been unlawful (**TINDAL, C.J.**).—**MUSKETT v. HILL** (1839), 5 Bing. N. C. 694 ; 7 Scott, 855 ; 9 L. J. C. P. 201 ; 132 E. R. 1267.

**Annotations :—Consd.** **Martyn v. Williams** (1857), 1 H. & N. 817 ; **Newby v. Harrison** (1861), 1 John & H. 393. **Reid.** **Watson v. Spratley** (1854), 10 Exch. 222 ; **Bailey v. Stephens** (1862), 12 C. B. N. S. 91 ; **Heap v. Hartley** (1869), 42 Ch. D. 461 ; **Smelting Co. of Australia v. I. R. Comrs.**, [1896] 2 Q. B. 179 ; **British Actors Film Co. v. Comrs.**, [1916] 1 K. B. 299. **Mentd.** **Weeton v. Woodcock Glover**, [1839], 5 M. & W. 687 ; **Marker v. Kenrick** (1853), 13 C. B. 188 ; **McMahon v. Lennard** (1858), 6 H. L. Cas. 970 ; **Ahearn v. Bellman, Sedgwick v. Ahearn** (1879), 48 L. J. Q. B. 681.

*Sect. 6.—Licence coupled with grant of interest.*  
*Sect. 7: Sub-sects. 1 & 2, A. & B.]*

**1710. Covenant running with subject-matter of grant.—Whether passing on assignment.]—**A mining licence was granted by deed to three persons as joint tenants, & the licences covenanted jointly & severally to pay compensation in respect of damage to the surface. Two out of the three licencees assigned over. Damage having been done:—*Held*: the covenant was one running with the subject-matter of the grant, & the assignee from the two licencees was liable under the covenant for the whole compensation due to the grantor.—*NORVAL v. PASCOE* (1864), 4 New Rep. 390; 34 L. J. Ch. 82; 10 L. T. 809; 28 J. P. 548; 10 Jur. N. S. 792; 12 W. R. 973.

*Annotations:—Apld.* United Dairies v. Public Trustee, [1923] 1 K. B. 469. *Reid.* Hastings v. N. E. Ry., [1898] 2 Ch. 674; *Hubbard v. Weldon* (1909), 25 T. L. R. 356.

## SECT. 7.—LODGINGS, FURNISHED HOUSES, ETC.

### SUB-SECT. 1.—IN GENERAL.

**1711. Lodger.—How relationship created.—Occupation of separate portion of house.—Landlord retaining control of outer door.]—**The question is, whether the occupiers of each of these tenements or the lessors are ratable in respect of the whole of any one of these blocks. The question in these cases of course always is whether there is an occupation of a distinct & separate tenement by a person who inhabits a portion of a house or building, or whether he is merely an inmate under the landlord. It is necessary to establish some criterion, & it is not always, perhaps, very easy to find one; but the one which has been adopted in such cases, & which is, perhaps, the most convenient & the only one, is, whether the landlord retains the control of the outer door, & has shown by his retaining the control of the outer door that he has the control of the whole of the premises; so that, although he may be liable to an action upon the breach of his contract to allow the tenant to occupy a portion of the premises so let to the tenant, yet the tenant could not maintain trespass against the landlord, because the landlord has retained in himself the dominion & control over the whole of the house. I think the possession of the street door may be taken as a criterion, because it is only by the landlord opening & shutting the street door, or allowing it to be opened & shut for the ingress & egress of the tenant, that the tenant can have the enjoyment of the premises (*COCKBURN, C.J.*).—*R. v. ST. GEORGE'S UNION* (1871), L. R. 7 Q. B. 90; 41 L. J. M. C. 30; 36 J. P. 550; 20 W. R. 179; *sub nom.* *MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCN., LTD. v. ST. GEORGE'S UNION ASSESSMENT COMRS.*, 25 L. T. 696.

*Annotations:—Mentl. L. & N. W. Ry. v. Buckmaster* (1875), L. R. 10 Q. B. 444; *A.-G. v. Mutual Tontine Westminster Chambers Asscn.* (1876), 1 Ex. D. 469; *Smith v. Lambeth Assmt. Com.* (1882), 9 Q. B. D. 585; *Saunders v. St. Mary, Lambeth* (1891), Ryde, Rat. App. (1891–1893) 1.

**1712. ——— Agreement for rent to include "attendance."]**—The tenant of a set of chambers in the Temple, let to each of two sub-tenants a room unfurnished, of which the sub-tenant had the exclusive use, with the joint use of the vestibule, & a key of the outer door, the tenant himself retaining one room for his own exclusive use & providing attendance, light, & firing for the whole set.

The position of the occupant very much resembles an occupation by a man as a licensee or as a guest

in an inn (*WILLES, J.*).—*SMITH v. LANCASTER* (1869), L. R. 5 C. P. 246; 1 Hop. & Colt. 287; 39 L. J. C. P. 33; 21 L. T. 492; 34 J. P. 22; 18 W. R. 170.

*Annotation:—Reid.* Thompson v. Ward, Ellis v. Burch (1871), L. R. 6 C. P. 327.

**1713. ———.]—ROADS v. TRUMP-INGTON OVERSEERS, No. 1640, ante.**

**1714. ———.]—ALLAN v. LIVERPOOL OVERSEERS, INMAN v. WEST DERBY UNION ASSESSMENT COMMITTEE & KIRKDALE OVERSEERS, No. 1642, ante.**

**1715. ——— Landlord retaining control of whole premises.]—**Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, & the uncontrolled right of ingress & egress, yet, if the owner retains his character of master of the house, the individual so occupying a part of it, occupies it as a lodger only. . . . The question depends upon whether or not the owner of the house resides upon the premises, retaining his quality of master, & reserving to himself the general control & dominion over the whole. If he does, the inmate is a mere lodger (*MAULE, J.*).—*TOMS v. LUCKETT* (1847), 5 C. B. 23; 2 Lut. Reg. Cas. 19; 17 L. J. C. P. 27; 10 L. T. O. S. 264; 12 J. P. 6; 11 Jur. 993; 136 E. R. 781.

*Annotations:—Reid.* Cook v. Humber (1862), 11 C. B. N. S. 33; *Stamper v. Sunderland Overseers* (1868), L. R. 3 C. P. 388; *Smith v. Lancaster* (1869), L. R. 6 C. P. 246; *Bradley v. Baylis, Morfee v. Novis, Kirby v. Biffen* (1881), 8 Q. B. D. 195; *Morton v. Palmer* (1881), 51 L. J. Q. B. 7; *Ness v. Stephenson* (1882), 5 Q. B. D. 245; *Kent v. Fittall*, [1906] 1 K. B. 60; *Douglas v. Smith*, [1907] 1 K. B. 126. *Mentl.* Pownall v. Dawson (1851), 21 L. J. C. P. 14; *Cuthbertson v. Butterworth* (1868), L. R. 4 C. P. 523; *Piercy v. Maclean* (1870), L. R. 5 C. P. 252; *Thompson v. Ward, Ellis v. Burch* (1871), L. R. 6 C. P. 327.

**1716. ———.]—R. v. ST. GEORGE'S UNION, No. 1711, ante.**

**1717. ——— Occupation not exclusive.]—**There are many cases where two persons may, without impropriety, be said to occupy the same land, & the question has sometimes arisen which of them is ratable. Where a person already in possession has given to another possession of a part of his premises, if that possession be not exclusive he does not cease to be liable to the rate, nor does the other become so. A familiar illustration of this occurs in the case of a landlord & his lodger. Both are, in a sense, in occupation, but the occupation of the landlord is paramount, that of the lodger subordinate (*LORD HERSCHELL, C.*).—*HOLYWELL UNION & HALKYN PARISH v. HALKYN DRAINAGE CO.*, [1895] A. C. 117; 64 L. J. M. C. 113; 71 L. T. 818; 59 J. P. 566; 11 T. L. R. 132; 11 R. 98, H. L.; *revisg. S. C. sub nom.* *HALKYN DISTRICT MINES DRAINAGE CO. v. HOLYWELL UNION ASSESSMENT COMMITTEE & HALKYN PARISH OVERSEERS, SAME v. SAME ASSESSMENT COMMITTEE & NORTHOPE PARISH OVERSEERS* (1893), 69 L. T. 705, C. A.

*Annotations:—Mentl.* M. S. & L. Ry. v. Kingston-upon-Hull Governor & Grdns. (1896), 75 L. T. 127; *Bootle Overseers v. Liverpool Warehousing Co., Bootle Overseers v. Webster* (1901), 85 L. T. 45; *Ystradyfodwg & Pontypridd Main Sewerage Board v. Newport (Mon.) Assmt. Com.* (1901), 70 L. J. K. B. 318; *Percy v. Hall* (1903), 88 L. T. 830; *Mitchell v. Workop Union Assmt. Com.* (1904), 92 L. T. 62; *Swansea Union Assmt. Com. v. Swansea Harbour Trustees* (1907), 97 L. T. 585; *Winstanley v. North Manchester Overseers*, [1910] A. C. 7; *Young v. Liverpool Assmt. Com.*, [1911] 3 K. B. 195; *Margate Corp. v. Pettman* (1912), 106 L. T. 104; *Liverpool Corp. v. Chorley Union Assmt. Com.*, [1913] A. C. 197; *Re Nott & Cardiff Corp.*, [1918] 2 K. B. 146; *Cleveland Bridge & Engineering Co. v. Darlington Union Assmt. Com.* (1923), 91 L. G. R. 511; *Hackney B. C. v. Metropolitan Asylum Board* (1924), 131 L. T. 136; *Back v. Daniels*, [1925] 1 K. B. 526.

**1718.** ——— **Occupation of rooms in residential club—By club members.]**—A. granted by deed to B. his heirs, exors., administrators, & assigns, & his & their lessees & sub-lessees or tenants, being occupiers of certain houses, & their families & friends, the right to enter & use an adjacent ornamental garden. A limited co., which was the owner of some & the lessee of another of these houses, established in them a proprietary residential club for ladies. Under the rules of the club bedrooms might be allotted to the members at a weekly rent, payable in advance, but subject to many restrictions as to user:—*Held*: the resident members, though occupiers of the houses, were occupiers as licencees of the co., & not as lessees, sub-lessees, or tenants, & they were not, therefore, entitled as of right to enter into & use the garden. —*KEITH v. TWENTIETH CENTURY CLUB, LTD.* (1904), 73 L. J. Ch. 545; 90 L. T. 775; 52 W. R. 554; 20 T. L. R. 462; 48 Sol. Jo. 458.

*See, also, ELECTIONS, Vol. XX., pp. 20–22, Nos. 120–127.*

**1719.** ——— **Who may create relationship—Tenant at will or on sufferance.]**—A tenant at will or on sufferance can create between himself & a third party the relationship of landlord & lodger by letting part of the premises to such third party on a weekly tenancy so as to entitle his lodger to the benefit of Lodgers' Goods Protection Act, 1871 (c. 79).—*BENSING v. RAMSAY* (1898), 62 J. P. 613; 14 T. L. R. 345, D. C.

**1720. Agreement to take lodgings—Whether agreement relating to interest in land.]**—An agreement to occupy lodgings at a yearly rent, payable in quarterly portions, the occupation to commence on a future day, is an agreement relating to an interest in land, within Stat. Frauds, s. 4.—*INMAN v. STAMP* (1815), 1 Stark. 12, N. P.

*Annotations:—Folld. Edge v. Stafrford* (1831), 1 Cr. & J. 391. *Distd. Wright v. Stavert* (1860), 2 E. & E. 721. *Reid. Bolton v. Tomlin* (1836), 5 Ad. & El. 856.

**1721.** ——— **—(1) A contract to let furnished lodgings is a contract for an interest in land within Stat. Frauds, s. 4.**

(2) The effect of Stat. Frauds, ss. 1, 2, 4, so far as they apply to parol leases not exceeding three years, is, that the leases are valid & that whatever remedy can be had upon them in their character of leases may be resorted to, but they do not confer the right to sue the lessee for damages for not taking possession.—*EDGE v. STRAFFORD* (1831), 1 Cr. & J. 391; 1 Tyr. 295; 9 L. J. O. S. Ex. 101; 148 E. R. 1474.

*Annotations:—As to (1) Distd. Wright v. Stavert* (1860), 2 E. & E. 721. *As to (2) Reid. Bolton v. Tomlin* (1836), 5 Ad. & El. 856; *Bray v. Chandler* (1856), 18 C. B. 718. *Generally, Mendt. Nation v. Tozer* (1834), 1 Cr. M. & R. 172; *Lowe v. Ross* (1850), 5 Exch. 553; *Harris v. Phillips* (1851), 2 L. M. & P. 164; *Sidebotham v. Holland* (1894), 73 L. T. 62.

**1722.** ——— **—[By a parol agreement between pltf., a boarding house keeper, & deft., deft. agreed to pay pltf., for the board & lodging of himself & man, & accommodation for his horse, at the boarding house, £200 a year from a fixed day; the agreement to be terminable by a quarter's notice on either side. Pltf. having sued deft. for a breach by him of this agreement, in refusing to become an inmate of the boarding house:—Held: though the agreement was unwritten, the action was maintainable; for the contract was not one for any interest in or concerning land within Stat. Frauds, s. 4.]**—*WRIGHT v. STAVERT* (1860), 2 E. & E. 721; 29 L. J. Q. B. 161; 2 L. T. 175; 24 J. P. 405; 6 Jur. N. S. 867; 8 W. R. 413; 121 E. R. 270.

*Annotations:—Reid. Horsey v. Graham* (1869), L. R. 5 C. P. 8; *Wells v. Kingston-upon-Hull Corp.* (1875), L. R. 10 C. P. 402; *Webber v. Lee* (1882), 9 Q. B. D. 315. *Mendt. Baird v. Wells* (1890), 44 Ch. D. 661.

**1723.** ——— **—[ANSTRUTHER v. SLADE (1887), 3 T. L. R. 331, C. A.]**

**1724.** ——— **Stamp on agreement.]**—A demise, in writing, of apartments for a period of three months, certain, comes within 1 Geo. 4, c. 87. If such an instrument of demise requires either an agreement or lease stamp, within 53 Geo. 3, c. 184, it is not necessary that it should be stamped before the rule is granted under 1 Geo. 4, c. 87, it being time enough at any time before the trial of the ejectment.—*DOE d. PHILLIPS v. ROE* (1822), 5 B. & Ald. 768; 1 Dow. & Ry. K. B. 433; 100 E. R. 1371.

#### SUB-SECT. 2.—RIGHTS AND LIABILITIES OF LANDLORD.

##### A. Rights.

**Payment for board & lodging.]**—*See Nos. 1733–1738, post.*

**In respect of dilapidation.]**—*See Nos. 1739–1744, post.*

**Tenant suffering from infectious disease.]**—*See No. 1745, post.*

##### B. Liabilities.

**Liability of innkeepers, see INNS & INNKEEPERS, Vol. XXIX., pp. 5 et seq.**

**1725. Liability in respect of lodger's goods.]**—*DANSEY v. RICHARDSON*, No. 1728, *post*.

**1726.** ——— **—[There is no duty on the keeper of a lodging house, arising out of the relation of lodging-house keeper & lodger, to take care of his lodger's goods, as in the case of an innkeeper. Nor, assuming it to be an usage in lodging-houses that the keeper, when the lodger is about to quit his apartments, has licence to enter & show them to strangers who are inquiring for lodgings, is there, arising out of that usage, any liability on the keeper, if the goods are then stolen, for not using due & proper care to prevent such persons from carrying away the lodger's goods then in the apartments. Lodgers are bound to take care of their own goods.]**—*HOLDER v. SOULBY* (1860), 8 C. B. N. S. 254; 29 L. J. C. P. 246; 2 L. T. 219; 25 J. P. 311; 6 Jur. N. S. 1031; 8 W. R. 438; 141 E. R. 1163.

*Annotations:—Consd. Scarborough v. Cosgrove*, [1905] 2 K. B. 805. *Reid. Hollingsworth v. Nicholson* (1904), 68 J. P. Jo. 534. *Mendt. Saron v. Roberts* (1895), 43 W. R. 690.

**1727.** ——— **—[Pltfs. became boarders in a boarding-house kept by deft. They informed deft.'s manager that they had property which they wished to keep under lock & key, & asked for a key of their bedroom door. They were told by the manager that a second key could not be supplied, that they must not remove the key from the lock, as it was required for the purpose of giving the servants access to the room, & that the room would be quite safe as the people in the house were all known. On a subsequent occasion pltfs. again became boarders in deft.'s boarding-house, & occupied the same bedroom, in which a chest of drawers had in the meantime been placed. They asked the manager for a key of the chest of drawers, but none was supplied. The female pltf. having left some jewellery in a locked handbag in one of the drawers, it was stolen by another inmate of the house, who had been admitted as a boarder without references, or introduction, or inquiry concerning him, & who turned out to have been previously convicted of theft. In an action by pltfs. against deft. for loss of the jewellery:—Held: there was a duty on the part of a boarding-house**



*Sect. 7.—Lodgings, furnished houses, etc.: Sub-sect. 2, B.; sub-sect. 3, A. & B. Sect. 8: Sub-sect. 1.]*

keeper to take reasonable care for the safety of property brought by a guest into his house, & evidence for the jury of a breach of that duty.—*SCARBOROUGH v. COSGROVE*, [1905] 2 K. B. 805; 74 L. J. K. B. 892; 93 L. T. 530; 54 W. R. 100; 21 T. L. R. 754, C. A.

**1728. Liability for negligence of servants.]—**Declaration, that pltf. had become a guest in the boarding-house of deft., upon the terms, amongst others, that deft. would take due & reasonable care of the goods of pltf. whilst they were in the house of deft., for hire & reward, & it then became the duty of deft., by herself & servants, to take such care of pltf.'s goods whilst a guest in deft.'s house. Breach of the alleged duty, & a loss of pltf.'s goods, by the neglect of deft. & her servants. On the trial it appeared that pltf. had been received as a guest in deft.'s boarding-house, at a weekly payment, upon the terms of being provided with board & lodging & attendance. Pltf. being about to leave the house, sent one of deft.'s servants to purchase some biscuits, & he left the front door ajar, & whilst he was absent on the errand a thief entered the house & stole a box of pltf.'s from the hall. The judge directed the jury that deft. was not bound to take more care of the house & the things in it than a prudent owner would take, & that she was not liable if there were no negligence on her part in hiring & keeping the servant; & he left it to the jury to say whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of deft. in hiring or keeping the servant:—*Held*: (1) at least it was the duty of deft. to take such care of her house & the things of her guests in it as every prudent householder would take; (2) *LORD CAMPBELL, C.J.* & *COLERIDGE, J.*, she was bound not merely to be careful in the choice of her servants, but absolutely to supply pltf. with certain things, & to take due & reasonable care of her goods; & if there had been a want of such care as regarded pltf.'s box, it was immaterial whether the negligent act was that of deft. or her servant though every care had been taken by deft. in employing such servant; & consequently, the direction of the judge was not correct; (3) *WIGHTMAN, J.* & *ERLE, J.*, the duty of deft. did not require that she should do more than take all requisite care to employ & keep none but trustworthy servants; & if that had been done, deft. was not liable for the single act of negligence on the part of the servant in leaving the door open; & therefore, the direction at the trial was right. *DANSEY v. RICHARDSON* (1854), 3 E. & B. 144; 23 L. J. Q. B. 217; 118 E. R. 1095; *sub nom.* *DANCY v. RICHARDSON*, 18 Jur. 721.

*Annotations:—As to (1) Consd. Holder v. Souby* (1860), 8 C. B. N. S. 354. *Appl. Scarborough v. Cosgrove*, [1905] 2 K. B. 806. *Reid. Hollingsworth v. Nicholson* (1904), 68 J. P. Jo. 534. *As to (2) Consd. Scarborough v. Cosgrove*, [1905] 2 K. B. 805.

**1729. —.]—**To render a lodging-house keeper liable for the wrongful acts of a servant, the lodging-house keeper must have been guilty of such a misfeasance, or such gross misconduct, as

an ordinary & reasonable person would not have been guilty of.—*CLENOCH v. D'ARENBURG* (1883), Cab. & El. 42.

**1730. Duty to keep door shut.]—**It is the duty of a boarding-house keeper to take reasonable care that the door of the premises should be kept shut, in order to prevent the entry of thieves, but such duty does not amount to a guarantee that the door will be kept shut.—*PATERSON v. NORRIS* (1914), 30 T. L. R. 393.

#### SUB-SECT. 3.—RIGHTS AND LIABILITIES OF LODGER OR OCCUPANT.

##### A. Rights.

**1731. Right to quit without notice—Apprehension of seizure of goods—For landlord's rent.]—**A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent.—*RICKETT v. TULLICK* (1883), 6 C. & P. 66, N. P.

**1732. Right to general conveniences of house.]—**If a person take lodgings on the first & second floors of a house, he has a right to the use of the door-bell, the knocker, the skylight of the staircase, & the water-closet, unless it be otherwise stipulated at the time of the taking of the lodgings; therefore if the landlord deprive the lodger of the use of either, an action lies. If deft. in such a case merely pleads the general issue, he cannot show that the water-closet was useless before he removed it; but, in mitigation of damages, he may go into evidence to show that pltf. & his family were bad lodgers & that he did the acts complained of to cause them to quit the house.—*UNDERWOOD v. BURROWS* (1835), 7 C. & P. 26, N. P.

**Protection of goods from seizure as distress.]—***See DISTRESS*, Vol. XVIII., pp. 304, 305, Nos. 413-419.

##### B. Liabilities.

**1733. Payment for board & lodging—Rent—Conduct of landlord justifying departure of tenant—What amount recoverable.]—**If a landlord of furnished lodgings by his misconduct justifies a tenant in an abrupt departure during a tenancy limited to a specific period, he cannot recover rent for the whole time agreed on, but is entitled to rent for the time during which there has been an actual occupation.—*KIRKMAN v. JERVIS* (1839), 7 Dowl. 678; 3 Jur. 605.

**1734. —.]—**A party actually occupied premises [apartments] which had been let to him under a written agreement, in the course of his tenancy a nuisance occurred, which put an end to the comfortable occupation of the premises; this nuisance was not remedied by the landlord, & the tenant quitted as soon as he could obtain other premises:—*Held*: he was not liable to rent for the period between the time of the occurrence of the nuisance & that at which he quitted the premises.—*COWIE v. GOODWIN* (1840), 9 C. & P. 378; *subsequent proceedings*, 4 Jur. 506. *Annotation:—Reid. Surplice v. Farnsworth* (1844), 7 Man. & G. 576.

**Fitness of premises.]—See Part XIII., post.**

#### PART VI. SECT. 7, SUB-SECT. 3.—A.

**1. Right to remove pictures from wall—Tenant of furnished house.]—***Held*: the tenant of a furnished house was entitled to remove a large number of pictures from the walls & to store them in one of the rooms during the currency of the lease, notwithstanding the objections of the lessor.—*MILLER*

*v. STEWART* (1899), 2 F. (Ct. of Sess.) 309.—*SCOTT*.

**1732 i. Right to general conveniences of house.]—**Where a house is let as furnished & for use as a dwelling-house, the lessee is entitled to expect it to be reasonably equipped, on his entry, with furniture & effects for that purpose, notwithstanding inspection prior

to the contract being made.—*SANDESS v. CHAPRON* (1919), 40 N. L. R. 1.—*S. AF.*

#### PART VI. SECT. 7, SUB-SECT. 3.—B.

**m. Payment for board & lodging—Lien on lodger's goods.]—**Save by express agreement a lodging-house keeper has no lien for board on his lodger's



**1735.** — **Refusal by landlord to permit removal of goods — Whether trespass.]**—Deft. claiming rent in arrear from pltf., his lodger, locked the door of the room in which pltf.'s goods were deposited, & refused to allow pltf. to enter & remove them, saying that he should not have them until he had paid his rent:—*Held*: the acts of deft. did not amount to a taking, & trespass was not maintainable.—*HARTLEY v. MOXHAM* (1842), 3 Q. B. 701; 3 Gal. & Dav. 1; 12 L. J. Q. B. 41; 6 J. P. 717; 6 Jur. 946; 114 E. R. 675.

*Annotations*:—*Distd. Lane v. Dixon* (1847), 3 C. B. 776. *Reid, White v. Bayley* (1861), 10 C. B. N. S. 227.

**1736.** — **Reference to official referee—Jurisdiction of judge at chambers.]**—*KNIGHT v. COALES*, No. 1742, *post*.

**1737.** — **Services by lodger in landlord's business—Set-off.]**—A. & his wife boarded & lodged in the house of B., the brother of A., & both A. & his wife assisted B. in carrying on his business. A. brought an action for the services, to which B. pleaded a set-off for board & lodging:—*Held*: neither the services on the one hand, nor the board & lodging on the other, could be charged for unless the jury were satisfied that the parties came together on the terms that they were to pay & to be paid: but, if that were not so, no *ex post facto* charge could be made on either side.—*DAVIES v. DAVIES* (1839), 9 C. & P. 87.

**1738.** — **Landlord to take lodger's furniture—Seizure of furniture in execution—Action by landlord for debt.]**—Deft. entered into an agreement, in writing, with pltf., by which he was to board & lodge with pltf. at a certain weekly sum, & pltf. agreed to take, in payment for the board & lodging, certain furniture of deft., then in pltf.'s house. The furniture having afterwards, & before pltf. had appropriated it, been taken in execution for a debt of deft. to another party:—*Held*: pltf. was entitled to recover, in the ordinary action of debt, for board & lodging, as if the special contract had never existed.—*KEYS v. HARWOOD* (1846), 2 C. B. 905; 15 L. J. O. P. 207; 7 L. T. O. S. 161; 135 E. R. 1201.

**1739.** **Dilapidations to contents of house.]**—The declaration stated, that, in consideration that pltf. would let to deft. a certain messuage, together with certain household furniture, linen, etc., deft. promised pltf. to use the messuage in a tenantlike manner, & take due care of the furniture, linen, etc., & at the expiration of the term to leave the household furniture, linen, etc. cleaned:—*Held*: the declaration was supported by proof that the furniture was clean at the time deft. took possession of it, & he agreed to leave it as he found it.—*STANLEY v. AGNEW* (1844), 12 M. & W. 827; 13 L. J. Ex. 197; 152 E. R. 1434.

**1740.** — **]**—The custom of the country applies only to farm & agricultural premises, & not to a mere residence with garden & meadow attached, let furnished, & occupied for one year. Where the declaration alleged that deft. so conducted himself in the occupation of a furnished house, that the same became "foul & miry," the landlord may recover damages arising from the injury inflicted on the furniture by the unconstrained admission of poultry into the house.—*JOHNSTONE v. SYMONS* (1847), 9 L. T. O. S. 535; 11 J. P. 618, N. P.

**1741.** — **Ascertainment by valuers—Condition precedent to action.]**—Where by a written

agreement a tenant of a furnished house agrees at the expiration of the tenancy to deliver up possession of the house & the furniture in good order, & in the event of loss, damage, or breakage, to make good or pay for the same, the amount of such payment if disputed to be settled by two valuers, the settlement of the amount of the payment by the valuers is a condition precedent to the right of the landlord to bring an action in respect of the dilapidations.—*BABBAGE v. COULBURN* (1882), 9 Q. B. D. 235; 46 L. T. 794, O. A.

**1742.** — **Reference to official referee—Jurisdiction of judge at chambers.]**—In an action to recover arrears of rent of a furnished house & damages for dilapidations, deft. denied his liability for the rent, & while admitting liability for dilapidations if there were any, denied that there were any. The judge at chambers having ordered all the questions in the action to be tried by an official referee:—*Held*: there was jurisdiction to make the order.—*KNIGHT v. COALES* (1887), 19 Q. B. D. 296; 56 L. J. Q. B. 480; 35 W. R. 679; 3 T. L. R. 659, C. A.

*Annotations*:—*Distd. Case v. Willis* (1892), 8 T. L. R. 610. *Apld. Hurlbutt v. Barnett*, [1893] 1 Q. B. 77.

**1743.** — **Assessment by landlord's agent—Authority of agent.]**—*AITKEN v. PLOWDEN* (1888), 4 T. L. R. 197.

**1744.** — **Damage by burglary—Specific covenants by occupant.]**—The tenant of a furnished house covenanted "to deliver up at the expiration of the tenancy possession of the house, furniture, & effects in as good state & order as the same were at the date of the agreement, reasonable wear & tear . . . being allowed for, & damage by fire, storm, & tempest excepted." By a second covenant the tenant covenanted "to make good . . . all damage to the premises & to make good . . . or replace all . . . effects . . . lost, damaged, or destroyed by deft., his family, his servants, or others during the tenancy." During the tenancy the premises were broken into by burglars & damage was done:—*Held*: the tenant was in any event liable for the damage, as the first covenant imposed an absolute obligation on the tenant for anything not within the exceptions; & the second covenant did not limit the generality of the first, but merely amplified the obligation. *Semble*: however, a covenant such as the second is not to be construed by the *eiusdem generis* rule, & damage done by burglars would be included under it.—*PHILLIMORE v. LANE* (1925), 133 L. T. 268; 41 T. L. R. 469; 69 Sol. Jo. 542.

**1745.** **Warranty of fitness to occupy lodgings—Infectious disease.]**—On the engaging of furnished lodging there is no implied warranty that the incoming tenant is a fit & proper person to occupy the lodgings & is not suffering from any infectious or contagious disease.—*HUMPHREYS v. MILLER*, [1917] 2 K. B. 122; 86 L. J. K. B. 1111; 116 L. T. 668; 33 T. L. R. 115, C. A.

*Annotation*:—*Consd. Collins v. Hopkins*, [1923] 2 K. B. 617.

## SECT. 8.—SERVANTS.

### SUB-SECT. 1.—WHETHER TENANCY CREATED.

**1746.** **General rule—Nature of occupancy.]**—An agent or servant who is allowed to occupy premises belonging to his principal for the more convenient performance of his duties acquires no

goods.—*McINERNEY v. O'NEILL* (1862), 1 Q. S. C. R. 84.—*AUS.*

**n.** — **]**—A boarding house keeper has a lien over goods brought into the boarding house by a boarder

for board & lodging supplied to such boarder.—*MARSH v. ANDREWS* (1914), T. P. D. 290.—*S. AF.*

**1739 i.** **Dilapidations to contents of house.]**—*NORTH WESTERN HOTEL, LTD.*

*v. ROLFES, NEBEL & Co.*, (1902), T. S. 334.—*S. AF.*

**o.** — **Onus of proof.]**—*HAYES v. McNALLY* (1910), T. P. D. 226.—*S. AF.*

Sect. 8.—Servants: Sub-sects. 1 & 2.]

estate therein, although he be also allowed to use the premises for carrying on therein an independent business of his own.—*WHITE v. BAYLEY* (1861), 10 C. B. N. S. 227; 30 L. J. Ch. 253; 7 Jur. N. S. 948; 142 E. R. 438.

**1747. Stipulation on hire for use of rooms—In sole occupation of servant.]**—Though a servant stipulates upon hire for the use of certain rooms, in the premises of his master, for himself & family, the premises may be described as the master's dwelling-house, although the servant is the only person who inhabits them, for he shall be considered as living there as servant, not as holding as tenant.—*R. v. STOCK* (1810), Russ. & Ry. 185; 2 Taunt. 339; 2 Leach, 1015; 168 E. R. 751.

*Annotation.*—*Reid*, *Bertie v. Beaumont* (1812), 16 East, 33.

**1748. Occupation permitted as remuneration for services.]**—A servant put into the occupation of a cottage, with less wages on that account, does not occupy it as a tenant, but the master may properly declare on it as his own occupation in an action on the case for a disturbance of a right of way over deft.'s close to such cottage; & it matters not that the cottage was divided into two parts, one of which only was in the occupation of such servant, the other being occupied by a tenant paying rent.—*BERTIE v. BEAUMONT* (1812), 16 East, 33; 104 E. R. 1001.

*Annotations.*—*Reid*, *R. v. Hall* (1822), 1 L. J. O. S. K. B. 20. *Mentd.* *Ricketts v. Salway* (1819), 1 Chit. 104.

**1749.**—*DOE d. HUGHES v. DERRY*, No. 1077, *ante*.

**1750.**—*HUGHES v. CHATHAM OVERSEERS*, *BURTON'S CASE*, No. 1757, *post*.

**1751.**—*Where a servant occupies premises of his master, without paying rent, as part remuneration for his services, in order to ascertain whether the servant is a "substantial householder" within Poor Relief Act, 1601 (c. 2), s. 1, so as to be eligible to the office of overseer of the poor, the question is whether the occupation is subservient & necessary to the service; if it is, the occupation is that of the master; if it is not, the occupation is that of a tenant, & the servant is a "householder."*—*R. v. SPURRELL* (1865), L. R. 1 Q. B. 72; 35 L. J. M. C. 74; 13 L. T. 364; 30 J. P. 196; 12 Jur. N. S. 208; 14 W. R. 81.

*Annotation.*—*Reid*, *Madrasa Anjuman Islamiya v. Johannesburg Municipal Council*, [1922] 1 A. C. 500.

**1752.**—*A workman, who was employed as a steel tester, was permitted by his employers to occupy a cottage adjoining their offices on the terms of a written memorandum by which he agreed to be responsible for the cleaning of the offices & other duties, in return for which he could live in the cottage, rent & rates free, with coal & light provided. The cleaning & other duties were performed by his daughters. The workman was killed while sleeping in the cottage by the escape of gas from a stove in the basement of the offices into his bedroom. On an application for compensation by his dependants it was held that death had been caused by an accident arising out of & in the course of the employment, the memorandum constituting a contract of service by which the workman was obliged to sleep in the cottage, & compensation was awarded:—Held: the written memorandum was merely a tenancy agreement embodying a contract for services, & there was no evidence to support the award of the county ct. judge.*—*WRAY v. TAYLOR BROTHERS & CO., LTD.* (1913), 109 L. T. 120; 6 B. W. C. C. 529, C. A.

**1753. Acquisition of premises by master—Previously in occupation of servant as tenant.]**—

A pauper employed as a labourer by the Board of Ordnance, having previously occupied a house at an annual rent of £7, which was then purchased by the Board, still continued to reside in part of the premises, at a weekly rent of 2s., which was deducted out of his wages, & during such last occupation he also occupied a shop, the shop & house together being of the annual value of £10, & upon his dismissal from his employment he gave up possession of the house as required:—*Held: his last occupation of the house was not as tenant, but as servant, & no settlement was thereby gained.*—*R. v. CHESHUNT (INHABITANTS)* (1918), 1 B. & Ald. 473; 106 E. R. 174.

*Annotations.*—*Distd.* *R. v. Lakenheath* (1823), 1 B. & C. 531; *R. v. St. Mary, Newington* (1833), 5 B. & Ald. 540; *R. v. Wall Lynn* (1838), 2 J. P. 440. *Consd.* *Hughes v. Chatham Overseers* (1843), 1 Lut. Reg. Cas. 51. *Reid*, *R. v. St. Pancras, Middlesex* (1823), 3 Dow. & Ry. K. B. 343; *Hunt v. Colson* (1833), 3 Moo. & S. 790; *R. v. Iken* (1834), 2 Ad. & El. 147.

**1754. Occupation in course of employment—**

**Payment of rent.]**—If a servant lives in a house of his master's at a yearly rent, the house cannot be described as the master's house though it is on the premises where the master's business is carried on, & although the servant has it because of his service:—*Held: the servant stood in the character of tenant, & the master might have distrained upon him for his rent, & could not arbitrarily have removed him.*—*R. v. JARVIS & WALKER* (1824), 1 Mood. C. C. 7; *sub nom.* *JERVIS & WALKER'S CASE*, 1 Lew. C. C. 28.

**1755. Premises usually appropriated to servant—Stipulation as to notice.]**—A pauper in 1817 was engaged to take care of stock. He was to receive 12s. a week, & to have the keep of one cow, four sheep, & two pigs on the lands of his master, & also to occupy, rent free, a house upon the premises, which had been built for & always occupied by the overlooker of the stock. He was to go into the house at Michaelmas, & when he commenced taking charge of the stock it was stipulated that he should not be obliged to leave the house without notice to quit at Michaelmas. He tended the stock, & occupied the house for nine years under this agreement. Sessions found that the pauper occupied as a servant, but stated a case for the opinion of the ct. The ct. considering that the finding was not necessarily wrong, refused to disturb it.—*R. v. SNAPE (INHABITANTS)* (1837), 6 Ad. & El. 278; 1 Nev. & P. K. B. 429; Nev. & P. M. C. 142; Will. Woll. & Dav. 42; 6 L. J. M. C. 33; 1 J. P. 71; 1 Jur. 39; 112 E. R. 106.

**1756.**—*By an agreement, not under seal, made between deft., described as a common brewer, of the one part, & pltf. of the other part, reciting that deft. was in possession of a messuage & premises wherein the sale of beer had been for some time past carried on by A. on deft.'s account, & that pltf. was desirous of carrying on such trade & business for deft., to which he had agreed, it was witnessed, that deft. agreed, for consideration therein stated, that pltf. should enter upon the said premises & carry on therein such trade or business for deft., in the place & stead & in the same manner & with & on the same privileges & terms as the said A. had theretofore done, until the agreement should be determined by the notice thereafter mentioned; & pltf. thereby agreed, during all the time he should carry on the said trade on the said premises for deft., that all beer sold by him on the said premises should be had by him from deft., & that pltf. should not part with the said trade or occupation of the said premises to any person without the licence of deft.; & that whenever either party should be*

desirous of putting an end to the agreement, *pltf.* should, on receiving from *deft.* such notice, quit the said trade, & deliver up possession of the said premises, & should be at liberty to leave the said trade & quit the occupation of the said premises on giving one month's notice to *deft.* :—*Held* : this did not create the relation of landlord & tenant between the parties, but the occupation of *pltf.* was that of servant to *deft.*—*MAYHEW v. SUTTLE* (1854), 4 E. & B. 347; 3 C. L. R. 59; 24 L. J. Q. B. 54; 24 L. T. O. S. 159; 19 J. P. 38; 1 Jur. N. S. 303; 3 W. R. 108; 119 E. R. 137, Ex. Ch.

*Annotation*.—*Reid*. *Queen's Club Gardens Estates v. Bignoll*, [1924] 1 K. B. 117.

**1757. Occupation necessary for better performance of service.**—Where a house is occupied by a servant of the government, the Crown paying the taxes & allowing the rent to the occupier as part of remuneration of his salary, & the house so occupied is not used for the better performance of the duties of the service :—*Held* : the relation of landlord & tenant exists, & the occupier will be entitled to vote.

A master may pay a servant, by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; & if he do so, the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration (*TINDAL, C.J.*).—*HUGHES v. CHATHAM OVERSEERS, BURTON'S CASE* (1843), 5 Man. & G. 54, 77; Bar. & Arn. 61; Cox & Atk. 14; 1 Lut. Reg. Cas. 51; Pig. & R. 35; 7 Scott, N. R. 581; 13 L. J. C. P. 44; 2 L. T. O. S. 149, 189; 8 J. P. 89; 7 Jur. 1136; 134 E. R. 479, 488.

*Annotations*.—*Apld.* *Hughes v. Chatham Overseers, Brook's Case* (1843), 5 Man. & G. 80; *Hughes v. Chatham Overseers, Parker's Case* (1843), 5 Man. & G. 80; *Hughes v. Chatham Overseers, Smith's Case* (1843), 5 Man. & G. 81. *Distd.* *Dobson v. Jones* (1844), Bar. & Arn. 243. *Consd.* *Clark v. St. Mary, Bury St. Edmunds Overseers* (1856), 1 C. B. N. S. 23; Fox & Dalby (1874), L. R. 10 C. P. 285. *Apld.* *Smith v. Seghill Overseers* (1875), L. R. 10 Q. B. 422; *Dover v. Prosser*, [1904] 1 K. B. 84. *Reid.* *Heath v. Haynes* (1857), K. & G. 99; *Heartley v. Banks* (1859), K. & G. 219; *Bridgwater v. Durant* (1861), 28 J. P. 6; *Marsh v. Estcourt* (1889), 24 Q. B. D. 147. *Mentd.* *Cook v. Luckett* (1846), 2 C. B. 168.

**1758.**—*J.*—A., the surgeon of Greenwich Hospital, occupied, as such, a house at the infirmary in the hospital, which was appropriated to the surgeon. Repairs were done by the comrs. of the hospital. The surgeons to the hospital, when not provided with a residence within the hospital, were allowed a weekly sum as lodging money. By the regulations of the comrs. of the hospital, no officer of the hospital was allowed to make any exchange of apartments :—*Held* : A. did not occupy the house "as tenant," inasmuch as he was required to occupy the same with a view to the more efficient performance of his duties as surgeon.—*DOBSON v. JONES* (1844), 5 Man. & G. 112; Bar. & Arn. 243; Cox & Atk. 25; 1 Lut. Reg. Cas. 105; Pig. & R. 65; 8 Scott, N. R. 80; 13 L. J. C. P. 126; 2 L. T. O. S. 149; 3 L. T. O. S. 77; 8 Jur. 451; 134 E. R. 502.

*Annotations*.—*Consd.* *Clark v. St. Mary, Bury St. Edmunds Overseers* (1856), 1 C. B. N. S. 23. *Apld.* *Fox & Dalby* (1874), L. R. 10 C. P. 285. *Distd.* *Smith v. Seghill Overseers* (1875), L. R. 10 Q. B. 422. *Reid.* *Heartley v. Banks* (1859), K. & G. 219; *Bridgwater v. Durant* (1861), 11 C. B. N. S. 7; *Cook v. Humber* (1862), 11 C. B. N. S. 33; *Powell v. Boraston* (1865), 34 L. J. C. P. 73; *Sutton's Hospital in Charterhouse v. Elliott*, [1922] 2 K. B. 1.

**1759.**—*Servant permitted to carry on independent business on premises.*—*WHITE v. BAXLEY*, No. 1746, *ante*.

**1760.**—*J.*—*SMITH v. SEGHELL OVERSEERS*, No. 1761, *post*.

**1761. Occupation under compulsion—Forfeiture of rent allowance on refusal to occupy.**—The residence must be ancillary & necessary to the performance of the servant's duties; & unless he is required for that purpose to reside in the house, & not merely as an arbitrary regulation on the part of the master, I do not think he is prevented from occupying as a tenant. Then it appears that *appls.* & other workmen are only entitled to occupy the houses during the time of their service at the colliery; the occupation terminates at the time the service terminates. Still, *appls.* are tenants, though not tenants for any fixed time. They occupy as tenants at will as long as they reside in the houses by the arrangement between themselves & their masters. Then it appears that if there was no house for a married workman, he had an allowance for house rent, but if there was a house empty, & the workman would not come into it, he had no allowance. An inference might possibly be drawn from this, that, as he was bound to reside if a house was offered him, upon pain of forfeiting his allowance, he resided in it upon compulsion, & therefore his occupation was that of a servant; but I cannot assent to this, & in my opinion, those workmen who did reside in the houses resided in the character of tenants (*MELLOR, J.*).—*SMITH v. SEGHELL OVERSEERS* (1875), L. R. 10 Q. B. 422; 44 L. J. M. C. 114; 32 L. T. 859; 40 J. P. 228; 23 W. R. 745, D. C.

*Annotations*.—*Apld.* *Dover v. Prosser*, [1904] 1 K. B. 84. *Mentd.* *Barton v. Birmingham Town Clerk* (1878), 2 Hop. & Colt. 393; *A. G. v. Croydon Corp.* (1889), 42 Ch. D. 178.

**1762. Occupation during continuance of service.**—*SMITH v. SEGHELL OVERSEERS*, No. 1761, *ante*.

**1763.**—*By permission of master.*—Claimants were labourers residing in cottages on the farms of their employers. They were permitted but not required to live in the cottages on the terms that they were to give up possession when their employment ceased, & were either charged a reduced rent or had the rent deducted from their wages. The rates were paid by the employers, & the names of the claimants appeared in the rate book as occupiers :—*Held* : the facts showed an occupation by claimants not by virtue of service but as householders.—*MARSH v. ESTCOURT* (1889), 24 Q. B. D. 147; 59 L. J. Q. B. 100; 54 J. P. 204; 38 W. R. 495; Fox & S. Reg. 157, D. C.

*Annotations*.—*Apld.* *Dover v. Prosser*, [1904] 1 K. B. 84. *Mentd.* *Unwin v. McMullen*, [1891] 1 Q. B. 694.

*See, also, ELECTIONS*, Vol. XX., pp. 23–26.

#### SUB-SECT. 2.—EFFECT OF DISMISSAL.

**1764. Termination of occupation—Notice to quit.**—*DOE v. HUGHES v. DERRY*, No. 1077, *ante*.

**1765.**—*Injunction to restrain re-entry.*—The committee of a voluntary association, one of whose objects it was to disseminate a class of publications called New Church Works, at a general meeting resolved that the person to be advertised for as the librarian & storekeeper should have

#### PART VI. SECT. 8, SUB-SECT. 1.

**1762i. Occupation during continuance of service.**—Where an official person occupies a house merely in virtue of

his office, when he ceases to hold the office his right to the possession of the house expires & he is not entitled to notice to quit.—*Bislow (Lessee) v. Norton* (1848), 2 Thom. 323.—*CAN.*

#### PART VI. SECT. 8, SUB-SECT. 2.

**1764i. Termination of occupation—Notice to quit.**—*STIDWORTHY v. PEACOCK* (1908), E. D. C. 130.—*S. AF.*

*Sect. 8.—Servants: Sub-sect. 2.]*

rent & premises tax free, £33 per cent. on books sold out of stock, "he making such arrangements with booksellers, agents of the society, as the committee might from time to time determine, & that he should be allowed to carry on a retail business in other New Church Works & general literature for his own benefit." Deft., W., was afterwards appointed manager & storekeeper at £75 a year "with six months' notice of separation on either side." This appointment was renewed from year to year. The committee purchased a house & converted the lower portion into a shop, allowing W. to occupy the lower rooms for his residence. After some years W. commenced advertising & exposing for sale in the shop a class of books which was objected to by the society, & the committee requested W. to abstain from selling same, but W. refused. The committee thereupon, on Nov. 8, gave W. notice of dismissal, & demanded possession. W. retained possession by force, & alleged that he was duly appointed legal tenant of the premises for a term of seven years by virtue of resolutions passed at a general meeting of the society, held on Nov. 13. Pltfs., the committee, alleged that the meeting of Nov. 13 was illegally convened:—*Held*: apart from any question of the legality of the meeting of Nov. 13, the situation of W. at law under the original engagement was that of tenant at will of the committee, with a right to six months' notice of dismissal. Injunction granted restraining W., until further order from acting as agent or manager of the society, or from selling any of their books, etc., except under the order & with the permission of pltfs. or from disturbing their possession, or without prejudice to his right to recover damages by reason of the injunction; pltfs. undertaking to allow W. two months' occupation of the apartments, with reasonable access to the rest of the house to remove his stock & property.—*SPURGIN v. WHITE* (1860), 2 Giff. 473; 3 L. T.

609; 7 Jur. N. S. 15; 9 W. R. 266; 66 E. R. 198.

*Annotation*:—*Apld. Collison v. Warren*, [1901] 1 Ch. 812.

1766. ———.]—The order appealed from amounts in effect to this, that pltf. is restrained until judgment in the action from interfering with the possession of the hotel by the trustee. The question really is, how does pltf. happen to be in the hotel? In what capacity & on what grounds does he claim to be there? He says he is the manager, the irremovable manager, of the business of the hotel. He founds this claim upon the construction of the power given by the deed to the trustee to engage his services as manager of the business, the power being coupled with the provision that he & his wife & family shall during his engagement be entitled to reside & board on the premises, & pltf. claims to be entitled to remain in possession of the rooms in the basement of the hotel in which he & his wife & family have been living. It is plain that he is not claiming to be there either as owner of the hotel or as trustee for the person who has a charge upon it. That being so, I think there is no foundation for pltf.'s claim to retain possession of the rooms. He has been summarily dismissed from his position of manager by the trustee, with the approval of the committee of inspection. . . . Upon pltf.'s dismissal his right during his engagement as manager to occupy rooms in the hotel was, in my opinion, terminated, & although the operation of the injunction has been suspended first by the . . . judge for a fortnight, & afterwards by the order of this ct. over to-day, I cannot see that this affects the question whether the order ought or ought not to have been made. . . . In my opinion the judge was quite right in granting the injunction, & the appeal ought to be dismissed (*RIGBY, L.J.*). —*COLLISON v. WARREN*, [1901] 1 Ch. 812; 70 L. J. Ch. 382; 84 L. T. 482; 17 T. L. R. 362; 45 Sol. Jo. 377, C. A.

*See, also*, Nos. 1746, 1756, *ante*.

END OF VOL. XXX.

(VOL. XXXI. CONCLUDES LANDLORD AND TENANT.)





## JURIES.

## Part VII.—Juries of Issue and Assessment.

81. *Add. Annotation* :—**Mentd.** *Price v. Hilditch*, [1930] 1 Ch. 500.
99. *Add. Annotations* :—**Generally, Mentd.** *R. v. Harris*, [1927] 2 K. B. 587; *R. v. Noble* (1928), 20 Cr. App. Rep. 191.
292. *Add. Annotations* :—**Mentd.** *R. v. Chesshire, Lucas & Bottom* (1927), 20 Cr. App. Rep. 47; *Statham v. Statham* (1928), 45 T. L. R. 127.
- 292a. ——— **Necessity for request or consent of defence.**—Counsel for the prosecution should not ask for the jury to be dismissed from ct., for the purpose of a discussion taking place, when the defence objects to the withdrawal of the jury. The jury should be dismissed only at the request of, or with the consent of, the defence.—*R. v. ANDERSON* (1929), 112 L. T. 580; 21 Cr. App. Rep. 178, C. C. A.
- 295a. **Death of judge.**—*Semble* : a judge has no jurisdiction to continue the hearing of a case, in which witnesses have been called in ct. in the course of a trial before the jury & another judge.—*COLESHILL v. MANCHESTER CORPN.*, [1928] 1 K. B. 776; 97 L. J. K. B. 229; 138 L. T. 537; 92 J. P. 37; 44 T. L. R. 258; 26 L. G. R. 124, C. A.
- 295b. **Communications to judge—Right of counsel to inspect.**—*HOBBS v. TINLING, HOBBS v. NOTTINGHAM JOURNAL*, No. 304a, *post*.
- 301a. ———.—Where a jury, before hearing all the evidence for the defence, finds a verdict for pltf., it is in the discretion of the judge to decide whether the jury should be discharged or whether the case should be continued before the same jury.—*DE FREVILLE v. DILL* (1927), 43 T. L. R. 431; 71 Sol. Jo. 430, C. A.
- Annotation* :—*Reid, Hobbs v. Tinling, Hobbs v. Nottingham Journal*, [1929] 2 K. B. 1.
303. *Add. Annotation* :—**Mentd.** *De Freville v. Dill* (1927), 43 T. L. R. 431.
- 304a. ——— **Whether ground for new trial.**—In an action for libel pltf. set out in his statement of claim the alleged libel, & in a separate

paragraph alleged an innuendo which practically repeated, but somewhat extended, the statements in the alleged libel. Defts. did not plead justification or fair comment, but paid 20s. into ct. in respect of the alleged libel as sufficient damages; they made no payment into ct. in respect of the innuendo; & they gave notice under R. S. C. Ord. 36, r. 37, of their intention to give in evidence certain matters in mitigation of damages. At the trial pltf. gave evidence that save for one lapse he was a man of unblemished reputation. Thereupon he was cross-examined as to specific incidents not mentioned in the libel or in the particulars served under R. S. C. Ord. 36, r. 37, it being suggested that he was a man of bad reputation. This line of cross-examination was objected to, but was allowed. Before the conclusion of the cross-examination the jury intervened with an intimation that they desired to find for the defts., which they then did without any summing up. On appeal:—*Held* : (1) the cross-examination was admissible as cross-examination to credit, but if the incidents were denied by pltf. no further evidence could be called to rebut pltf.'s denials, & the jury should have been told that while they were not bound to accept pltf.'s denials, those denials, though unaccepted, afforded no evidence that the incidents had taken place; (2) the cross-examination was not admissible to mitigate damages, & the jury ought to have been directed to this effect; (3) the jury should have been told that their intervention was premature, & they must hear the pltf.'s case to the end & be directed as to the issues they had to try; & (4) the trial having been in those respects unsatisfactory, there must be a new trial.

(5) Communications from the jury to the judge should be shown to the parties' counsel (*per SCRUTTON, L. J.*).

While the better practice is for communica-

## PART I.

sa. *Order granting*—"Common" inadvertently inserted—*Amendment of order.*—*Held* : the order should be amended by striking out the word "common".—*BRADSHAW v. B. C. RAPID TRANSIT*, [1927] 1 D. L. R. 599; 38 B. C. R. 64.—CAN.

## PART VII. SECT. 2.

72 iii. ———.—Accused, except in cases of trial for high treason or misprision of treason, has no right to inspect the jury panel.—*R. v. BAUM* (1927), 27 S. R. N. S. W. 401; 44 N. S. W. W. N. 136.—AUS.

sb. *Original panel inadequate*—*Power of judge to add to.*—Def. was arrested, indicted & tried & convicted for harbouring a quantity of dutiable goods, to wit, spirituous liquors unlawfully imported into Canada, of the value of over \$200, whereon the duties lawfully payable had not been paid, in violation of Customs Act, Dominion Acts, 1907, c. 11. On the trial a number of jurors, previously sum-

moned, were absent, & others were excused from serving & a new panel was summoned. The original panel was not discharged, but the names on both panels were thrown into one box, & the jury, impanelled for deft.'s trial, drawn from the names as so combined.—*Held* : the effect of the legislation Acts of 1919, c. 7, s. 41, was to give the trial judge authority to retain the panel summoned, & to increase the number by additions thereto, & the objection to the composition of the jury drawn for deft.'s trial failed.—*R. v. SHELLMAN*, [1928] 1 D. L. R. 657; *sub nom. R. v. SCHELLMAN*, 59 N. S. R. 535.—CAN.

## PART VII. SECT. 5, SUB-SECT. 3.—C. (b) i.

183 i. *Revised*, 34 S. C. R. 228.

## PART VII. SECT. 5, SUB-SECT. 4.

sa. *Several actions tried together.*—Five actions were brought by different ptfs. against two defts. & were by consent tried together before a judge

& jury:—*Held* : the consent to try the actions together did not give a right to more than four peremptory challenges on each side.—*GAY CO., LTD. v. TRICK*, [1927] 1 D. L. R. 1091; 60 O. L. R. 8.—CAN.

## PART VII. SECT. 6, SUB-SECT. 1.

o i. ———.—*Panel improperly summoned.*—Pltf. in an action in a Division Ct. required a jury, pursuant to s. 124 of Division Cts. Act. The clerk of the ct. summoned a jury, but not in the manner prescribed by the Act. Def. objected & the judge disposed of the difficulty by calling a jury from the body of the ct. The action was tried by the jury thus formed & judgment was entered for pltf. upon the jury's verdict.—*Held* : the judge had no power to deprive either party of the right to have a trial by a jury qualified & summoned according to the strict requirements of the Act.—*FOLEY v. SANGSTER*, [1929] 3 D. L. R. 279; 64 O. L. R. 23.—CAN.

- 571 Ill. ———.]—Where a jury has given a general answer to a question and has been sent back to give a more definite answer and does answer more definitely, the last answer is its real answer and the one which must govern.—*BARLOW v. CANADIAN PACIFIC RY.*, [1926] 2 D. L. R. 956; [1926] 2 W. W. R. 11; 31 Can. Ry. Cas. 414; 35 Man. L. R. 517.—*CAN.*



